IN CONGRESS, JULY 4, 1776.

The unanimous Declaration of the thirteen united States of America.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. ——— We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. ——— He has refused his Assent to Laws, the most wholesome and necessary for the public good. ——— He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. ——— He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only. ——— He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures. ——— He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. ——— He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within. ——— He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands. ——— He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. ——— He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries. ——— He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance. ——— He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. ——— He has affected to render the Military independent of and superior to the Civil power. ——— He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: — For Quartering large bodies of armed troops among us: — For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States: — For cutting off our Trade with all parts of the world: — For imposing Taxes on us without our Consent: — For depriving us in many cases, of the benefits of Trial by Jury: — For transporting us beyond Seas to be tried for pretended offences: — For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies: ——— For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments: — For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever. — He has abdicated Government here, by declaring us out of his Protection and waging War against us. ——— He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people. ——— He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation. ——— He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands. — He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions. In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people. Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends. —

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. ——— And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

John Hancock

Button Gwinnett
Lyman Hall
Geo Walton.

Wm Hooper
Joseph Hewes,
John Penn

Edward Rutledge
Thos Heyward Junr.
Thomas Lynch Junr.
Arthur Middleton

Samuel Chase
Wm Paca
Thos Stone
Charles Carroll of Carrollton.

George Wythe
Richard Henry Lee
Th Jefferson
Benj. Harrison
Thos Nelson Jr.
Francis Lightfoot Lee
Carter Braxton

Robt Morris
Benjamin Rush
Benj. Franklin
John Morton
Geo Clymer
Jas. Smith
Geo. Taylor
James Wilson
Geo. Ross

Caesar Rodney
Geo Read
Tho M:Kean

Wm Floyd
Phil. Livingston
Fras. Lewis
Lewis Morris

Richd Stockton
Jno Witherspoon
Fras Hopkinson
John Hart
Abra Clark

Josiah Bartlett
Wm Whipple
Saml Adams
John Adams
Robt Treat Paine
Elbridge Gerry
Step. Hopkins
William Ellery
Roger Sherman
Sam. Huntington
Wm Williams
Oliver Wolcott
Matthew Thornton

To all to whom

these Presents shall come, we the under signed Delegates of the States affixed to our Names send greeting. Whereas the Delegates of the United States of America in Congress assembled on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventy seven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia in the Words following, viz. "Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Article I. The stile of this confederacy shall be "The United States of America."

Article II. Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

Article V. For the more convenient management of the general interests of the united states, delegates shall be annually appointed in such manner as the Legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No state shall be represented in Congress by less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united States, in Congress assembled, each State shall have one vote.

Freedom of Speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

Article VI. No State without the Consent of the united States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign State; nor shall the united states in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled shall determine otherwise.

Article VII. When land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

Article VIII. All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.

Article IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without shewing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to

congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states — fixing the standard of weights and measures throughout the united states — regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated — establishing and regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expences of the said office — appointing all officers of the land forces, in the service of the united states, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states — making rules for the government and regulation of the said land and naval forces, and directing their operations.

The united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expences — to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted; — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states, and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled. But if the united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and

equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

The congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states, so that no period of adjournment be for a longer duration than the space of six Months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

Article X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

Article XIII. Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them.

And that the articles thereof shall be inviolably observed by the States we respectively represent, and that the union shall be perpetual. In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the state of Pennsylvania the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy eight, and in the third year of the independence of America.

On the parts behalf of the State of Delaware

Tho: M:Kean
John Dickinson May 5th 1779
Nicholas Van Dyke

On the part and behalf of the State of Maryland

John Hanson
Daniel Carroll

On the Part and behalf of the State of Virginia

Richard Henry Lee
John Banister
Thomas Adams
Jno. Harvie
Francis Lightfoot Lee

On the part and Behalf of the State of North Carolina

John Penn July 21st 1778
Corns. Harnett
Jno. Williams

On the part & behalf of the State of South Carolina

Henry Laurens
William Henry Drayton
Jno. Mathews
Richd. Hutson
Thos. Heyward Junr.

On the part & behalf of the State of Georgia

Jno. Walton 24th July 1778
Edwd. Telfair
Edn. Langworthy

Josiah Bartlett
John Wentworth Junr August 8th 1778

On the Part & Behalf of the State of New Hampshire

John Hancock

On the part and behalf of

Samuel Adams
Elbridge Gerry
Francis Dana
James Lovell
Samuel Holten

The State of Massachusetts Bay

William Ellery
Henry Marchant
John Collins

On the part and behalf of the State of Rhode Island and Providence Plantations

Roger Sherman
Samuel Huntington
Oliver Wolcott
Titus Hosmer
Andrew Adams

On the part and behalf of the State of Connecticut

Jas Duane
Wm Floyd
Phil. Livingston

On the part and behalf of the State of New York

Jno. Witherspoon
Nath. Scudder

On the Part and in Behalf of the State of New Jersey Nov. 26. 1778.

Robt Morris
Daniel Roberdeau
Jona. Bayard Smith
William Clingan
Joseph Reed 22d July 1778

On the part and behalf of The State of Pennsylvania

Milestone Documents

Complete List of Documents

Treaty of Paris (1783)

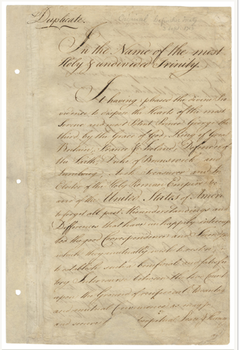
This treaty, signed on September 3, 1783, between the American colonies and Great Britain, ended the American Revolution and formally recognized the United States as an independent nation.

The American War for Independence (1775-1783) was actually a world conflict, involving not only the United States and Great Britain, but also France, Spain, and the Netherlands. The peace process brought a nascent United States into the arena of international diplomacy, playing against the largest and most established powers on earth.

The three American negotiators – John Adams, Benjamin Franklin, and John Jay – proved themselves ready for the world stage, achieving many of the objectives sought by the new United States. Two crucial provisions of the treaty were British recognition of U.S. independence and the delineation of boundaries that would allow for American western expansion.

The treaty is named for the city in which it was negotiated and signed. The last page bears the signatures of David Hartley, who represented Great Britain, and the three American negotiators, who signed their names in alphabetical order.

Multiple treaty documents, however, can be considered as originals. In this case, the United States and British representatives signed at least three originals, two of which are in the holdings of the National Archives. On one of the signed originals the signatures and wax seals are arranged horizontally; on the other they are arranged vertically. In addition, handwritten certified copies were made for the use of Congress. Some online transcriptions of the treaty omit Delaware from the list of former colonies, but the original text does list Delaware.



Treaty of Paris; 9/3/1783; Perfected Treaties, 1778 - 1945; General Records of the United States Government, Record Group 11; National Archives Building, Washington, DC.

View All Pages in National Archives Catalog

View Transcript

Teach with this document.

This document is available on DocsTeach, the online tool for teaching with documents from the National Archives. Find teaching activities that incorporate this document, or create your own online activity.

Previous Document | Next Document

Transcript

The Definitive Treaty of Peace 1783

In the Name of the most Holy & undivided Trinity.

It having pleased the Divine Providence to dispose the Hearts of the most Serene and most Potent Prince George the Third, by the Grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, Duke of Brunswick and Lunebourg, Arch- Treasurer and Prince Elector of the Holy Roman Empire etc.. and of the United States of America, to forget all past Misunderstandings and Differences that have unhappily interrupted the good Correspondence and Friendship which they mutually wish to restore; and to establish such a beneficial and satisfactory Intercourse between the two countries upon the ground of reciprocal Advantages and mutual Convenience as may promote and secure to both perpetual Peace and Harmony; and having for this desirable End already laid the Foundation of Peace & Reconciliation by the Provisional Articles signed at Paris on the 30th of November 1782, by the Commissioners empowered on each Part, which Articles were agreed to be inserted in and constitute the Treaty of Peace proposed to be concluded between the Crown of Great Britain and the said United States, but which Treaty was not to be concluded until Terms of Peace should be agreed upon between Great Britain & France, and his Britannic Majesty should be ready to conclude such Treaty accordingly: and the treaty between Great Britain & France having since been concluded, his Britannic Majesty & the United States of America, in Order to carry into full Effect the Provisional Articles above mentioned, according to the Tenor thereof, have constituted & appointed, that is to say his Britannic Majesty on his Part, David Hartley, Esqr., Member of the Parliament of Great Britain, and the said United States on their Part, - stop point - John Adams, Esqr., late a Commissioner of the United States of America at the Court of Versailles, late Delegate in Congress from the State of Massachusetts, and Chief Justice of the said State, and Minister Plenipotentiary of the said United States to their High Mightinesses the States General of the United Netherlands; - stop point - Benjamin Franklin, Esqr., late Delegate in Congress from the State of Pennsylvania, President of the Convention of the said State, and Minister Plenipotentiary from the United States of America at the Court of Versailles; John Jay, Esqr., late President of Congress and Chief Justice of the state of New York, and Minister Plenipotentiary from the said United States at the Court of Madrid; to be Plenipotentiaries for the concluding and signing the Present Definitive Treaty; who after having reciprocally communicated their respective full Powers have agreed upon and confirmed the following Articles.

Article 1st:
His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and Independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof.

Article 2d:
And that all Disputes which might arise in future on the subject of the Boundaries of the said United States may be prevented, it is hereby agreed and declared, that the following are and shall be their Boundaries, viz.; from the Northwest Angle of Nova Scotia, viz., that Angle which is formed by a Line drawn due North from the Source of St. Croix River to the Highlands; along the said Highlands which divide those Rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost Head of Connecticut River; Thence down along the middle of that River to the forty-fifth Degree of North Latitude; From thence by a Line due West on said Latitude until it strikes the River Iroquois or Cataraquy; Thence along the middle of said River into Lake Ontario; through the Middle of said Lake until it strikes the Communication by Water between that Lake & Lake Erie; Thence along the middle of said Communication into Lake Erie, through the middle of said Lake until it arrives at the Water Communication between that lake & Lake Huron; Thence along the middle of said Water Communication into the Lake Huron, thence through the middle of said Lake to the Water Communication between that Lake and Lake Superior; thence through Lake Superior Northward of the Isles Royal & Phelipeaux to the Long Lake; Thence through the middle of said Long Lake and the Water Communication between it & the Lake of the Woods, to the said Lake of the Woods; Thence through the said Lake to the most Northwestern Point thereof, and from thence on a due West Course to the river Mississippi; Thence by a Line to be drawn along the Middle of the said river Mississippi until it shall intersect the Northernmost Part of the thirty-first Degree of North Latitude, South, by a Line to be drawn due East from the Determination of the Line last mentioned in the Latitude of thirty-one Degrees of the Equator to the middle of the River Apalachicola or Catahouche; Thence along the middle thereof to its junction with the Flint River; Thence straight to the Head of Saint Mary's River, and thence down along the middle of Saint Mary's River to the Atlantic Ocean. East, by a Line to be drawn along the Middle of the river Saint Croix, from its Mouth in the Bay of Fundy to its Source, and from its Source directly North to the aforesaid Highlands, which divide the Rivers that fall into the Atlantic Ocean from those which fall into the river Saint Lawrence; comprehending all Islands within twenty Leagues of any Part of the Shores of the United States, and lying between Lines to be drawn due East from the Points where the aforesaid Boundaries between Nova Scotia on the one Part and East Florida on the other shall, respectively, touch the Bay of Fundy and the Atlantic Ocean, excepting such Islands as now are or heretofore have been within the limits of the said Province of Nova Scotia.

Article 3d:
It is agreed that the People of the United States shall continue to enjoy unmolested the Right to take Fish of every kind on the Grand Bank and on all the other Banks of Newfoundland, also in the Gulf of Saint Lawrence and at all other Places in the Sea, where the Inhabitants of both Countries used at any time heretofore to fish. And also that the Inhabitants of the United States shall have Liberty to take Fish of every Kind on such Part of the Coast of Newfoundland as British Fishermen shall use, (but not to dry or cure the same on that Island) And also on the Coasts, Bays & Creeks of all other of his Brittanic Majesty's Dominions in America; and that the American Fishermen shall have Liberty to dry and cure Fish in any of the unsettled Bays, Harbors, and Creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled, but so soon as the same or either of them shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Settlement without a previous Agreement for that purpose with the Inhabitants, Proprietors, or Possessors of the Ground.

Article 4th:
It is agreed that Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted.

Article 5th:
It is agreed that Congress shall earnestly recommend it to the Legislatures of the respective States to provide for the Restitution of all Estates, Rights, and Properties, which have been confiscated belonging to real British Subjects; and also of the Estates, Rights, and Properties of Persons resident in Districts in the Possession on his Majesty's Arms and who have not borne Arms against the said United States. And that Persons of any other Description shall have free Liberty to go to any Part or Parts of any of the thirteen United States and therein to remain twelve Months unmolested in their Endeavors to obtain the Restitution of such of their Estates – Rights & Properties as may have been confiscated. And that Congress shall also earnestly recommend to the several States a Reconsideration and Revision of all Acts or Laws regarding the Premises, so as to render the said Laws or Acts perfectly consistent not only with Justice and Equity but with that Spirit of Conciliation which on the Return of the Blessings of Peace should universally prevail. And that Congress shall also earnestly recommend to the several States that the Estates, Rights, and Properties of such last mentioned Persons shall be restored to them, they refunding to any Persons who may be now in Possession the Bona fide Price (where any has been given) which such Persons may have paid on purchasing any of the said Lands, Rights, or Properties since the Confiscation.

And it is agreed that all Persons who have any Interest in confiscated Lands, either by Debts, Marriage Settlements, or otherwise, shall meet with no lawful Impediment in the Prosecution of their just Rights.

Article 6th:
That there shall be no future Confiscations made nor any Prosecutions commenced against any Person or Persons for, or by Reason of the Part, which he or they may have taken in the present War, and that no Person shall on that Account suffer any future Loss or Damage, either in his Person, Liberty, or Property; and that those who may be in Confinement on such Charges at the Time of the Ratification of the Treaty in America shall be immediately set at Liberty, and the Prosecutions so commenced be discontinued.

Article 7th:
There shall be a firm and perpetual Peace between his Britanic Majesty and the said States, and between the Subjects of the one and the Citizens of the other, wherefore all Hostilities both by Sea and Land shall from henceforth cease: All prisoners on both Sides shall be set at Liberty, and his Britanic Majesty shall with all convenient speed, and without causing any Destruction, or carrying away any Negroes or other Property of the American inhabitants, withdraw all his Armies, Garrisons & Fleets from the said United States, and from every Post, Place and Harbour within the same; leaving in all Fortifications, the American Artillery that may be therein: And shall also Order & cause all Archives, Records, Deeds & Papers belonging to any of the said States, or their Citizens, which in the Course of the War may have fallen into the hands of his Officers, to be forthwith restored and delivered to the proper States and Persons to whom they belong.

Article 8th:
The Navigation of the river Mississippi, from its source to the Ocean, shall forever remain free and open to the Subjects of Great Britain and the Citizens of the United States.

Article 9th:
In case it should so happen that any Place or Territory belonging to great Britain or to the United States should have been conquered by the Arms of either from the other before the Arrival of the said Provisional Articles in America, it is agreed that the same shall be restored without Difficulty and without requiring any Compensation.

Article 10th:
The solemn Ratifications of the present Treaty expedited in good & due Form shall be exchanged between the contracting Parties in the Space of Six Months or sooner if possible to be computed from the Day of the Signature of the present Treaty. In witness whereof we the undersigned their Ministers Plenipotentiary have in their Name and in Virtue of our Full Powers, signed with our Hands the present Definitive Treaty, and caused the Seals of our Arms to be affixed thereto.

Done at Paris, this third day of September in the year of our Lord, one thousand seven hundred and eighty-three.

D HARTLEY (SEAL)
JOHN ADAMS (SEAL)
B FRANKLIN (SEAL)
JOHN JAY (SEAL

This page was last reviewed on May 10, 2022.
Contact us with questions or comments.

An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio.

BE IT ORDAINED by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district; subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grand-child, to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parents share; and there shall in no case be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. ——— And until the governor and judges shall adopt laws as herein after mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be, (being of full age) and attested by three witnesses; —— and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincent's, and the neighbouring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, That there shall be appointed from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked, he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office; it shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department; and transmit authentic copies of such acts and proceedings, every six months, to the secretary of Congress: There shall also be appointed a court to consist of three judges, any two of whom to form a court, who shall have a common law jurisdiction, and reside in the district, and have each therein a freehold estate in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behaviour.

The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original states, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress, from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same, below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same: After the general assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof---and he shall proceed from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly; provided that for every five hundred free male inhabitants there shall be one representative, and so on progressively with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five, after which the number and proportion of representatives shall be regulated by the legislature; provided that no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years and be a resident in the district, or unless he shall have resided in the district three years, and in either case shall likewise hold in his own right, in fee simple, two hundred acres of land within the same:---Provided also, that a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district; or the like freehold and two years residence in the district shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected, shall serve for the term of two years, and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress, any three of whom to be a quorum, and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and, when met, they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of re-

preſentatives, ſhall have authority to make laws in all caſes for the good government of the diſtrict, not repugnant to the principles and articles in this ordinance eſtabliſhed and declared. And all bills having paſſed by a majority in the houſe, and by a majority in the council, ſhall be referred to the governor for his aſſent; but no bill or legiſlative act whatever, ſhall be of any force without his aſſent. The governor ſhall have power to convene, prorogue and diſſolve the general aſſembly, when in his opinion it ſhall be expedient.

The governor, judges, legiſlative council, ſecretary, and ſuch other officers as Congreſs ſhall appoint in the diſtrict, ſhall take an oath or affirmation of fidelity, and of office, the governor before the preſident of Congreſs, and all other officers before the governor. As ſoon as a legiſlature ſhall be formed in the diſtrict, the council and houſe, aſſembled in one room, ſhall have authority by joint ballot to elect a delegate to Congreſs, who ſhall have a ſeat in Congreſs, with a right of debating, but not of voting, during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the baſis whereon theſe republics, their laws and conſtitutions are erected; to fix and eſtabliſh thoſe principles as the baſis of all laws, conſtitutions and governments, which forever hereafter ſhall be formed in the ſaid territory;---to provide alſo for the eſtabliſhment of ſtates, and permanent government therein, and for their admiſſion to a ſhare in the federal councils on an equal footing with the original ſtates, at as early periods as may be conſiſtent with the general intereſt:

It is hereby ordained and declared by the authority aforeſaid, That the following articles ſhall be conſidered as articles of compact between the original ſtates and the people and ſtates in the ſaid territory, and forever remain unalterable, unleſs by common conſent, to wit:

Article the Firſt. No perſon, demeaning himſelf in a peaceable and orderly manner, ſhall ever be moleſted on account of his mode of worſhip or religious ſentiments in the ſaid territory.

Article the Second. The inhabitants of the ſaid territory ſhall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate repreſentation of the people in the legiſlature, and of judicial proceedings according to the courſe of the common law; all perſons ſhall be bailable unleſs for capital offences, where the proof ſhall be evident, or the preſumption great; all fines ſhall be moderate, and no cruel or unuſual puniſhments ſhall be inflicted; no man ſhall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and ſhould the public exigencies make it neceſſary for the common preſervation to take any perſon's property, or to demand his particular ſervices, full compenſation ſhall be made for the ſame; — and in the juſt preſervation of rights and property it is underſtood and declared, that no law ought ever to be made, or have force in the ſaid territory, that ſhall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previouſly formed.

Article the Third. Religion, morality and knowledge, being neceſſary to good government and the happineſs of mankind, ſchools and the means of education ſhall forever be encouraged. The utmoſt good faith ſhall always be obſerved towards the Indians; their lands and property ſhall never be taken from them without their conſent; and in their property, rights and liberty, they never ſhall be invaded or diſturbed, unleſs in juſt and lawful wars authoriſed by Congreſs; but laws founded in juſtice and humanity ſhall from time to time be made, for preventing wrongs being done to them, and for preſerving peace and friendſhip with them.

Article the Fourth. The ſaid territory, and the ſtates which may be formed therein, ſhall forever remain a part of this confederacy of the United States of America, ſubject to the articles of confederation, and to ſuch alterations therein as ſhall be conſtitutionally made; and to all the acts and ordinances of the United ſtates in Congreſs aſſembled, conformable thereto. The inhabitants and ſettlers in the ſaid territory, ſhall be ſubject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expences of government, to be apportioned on them by Congreſs, according to the ſame common rule and meaſure by which apportionments thereof ſhall be made on the other ſtates; and the taxes for paying their proportion, ſhall be laid and levied by the authority and direction of the legiſlatures of the diſtrict or diſtricts or new ſtates, as in the original ſtates, within the time agreed upon by the United States in Congreſs aſſembled. The legiſlatures of thoſe diſtricts, or new ſtates, ſhall never interfere with the primary diſpoſal of the ſoil by the United States in Congreſs aſſembled, nor with any regulations Congreſs may find neceſſary for ſecuring the title in ſuch ſoil to the bona fide purchaſers. No tax ſhall be impoſed on lands the property of the United States; and in no caſe ſhall non-reſident proprietors be taxed higher than reſidents. The navigable waters leading into the Miſſiſippi and St. Lawrence, and the carrying places between the ſame ſhall be common highways, and forever free, as well to the inhabitants of the ſaid territory, as to the citizens of the United States, and thoſe of any other ſtates that may be admitted into the confederacy, without any tax, impoſt or duty therefor.

Article the Fifth. There ſhall be formed in the ſaid territory, not leſs than three nor more than five ſtates; and the boundaries of the ſtates, as ſoon as Virginia ſhall alter her act of ceſſion and conſent to the ſame, ſhall become fixed and eſtabliſhed as follows, to wit: The weſtern ſtate in the ſaid territory, ſhall be bounded by the Miſſiſippi, the Ohio and Wabaſh rivers; a direct line drawn from the Wabaſh and Poſt Vincent's due north to the territorial line between the United States and Canada, and by the ſaid territorial line to the lake of the Woods and Miſſiſippi. The middle ſtate ſhall be bounded by the ſaid direct line, the Wabaſh from Poſt Vincent's to the Ohio; by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the ſaid territorial line, and by the ſaid territorial line. The eaſtern ſtate ſhall be bounded by the laſt mentioned direct line, the Ohio, Pennſylvania, and the ſaid territorial line: Provided however, and it is further underſtood and declared, that the boundaries of theſe three ſtates, ſhall be ſubject ſo far to be altered, that if Congreſs ſhall hereafter find it expedient, they ſhall have authority to form one or two ſtates in that part of the ſaid territory which lies north of an eaſt and weſt line drawn through the ſouthern bend or extreme of lake Michigan: and whenever any of the ſaid ſtates ſhall have ſixty thouſand free inhabitants therein, ſuch ſtate ſhall be admitted by its delegates into the Congreſs of the United ſtates, on an equal footing with the original ſtates in all reſpects whatever; and ſhall be at liberty to form a permanent conſtitution and ſtate government: Provided the conſtitution and government ſo to be formed, ſhall be republican, and in conformity to the principles contained in theſe articles; and ſo far as it can be conſiſtent with the general intereſt of the confederacy, ſuch admiſſion ſhall be allowed at an earlier period, and when there may be a leſs number of free inhabitants in the ſtate than ſixty thouſand.

Article the Sixth. There ſhall be neither ſlavery nor involuntary ſervitude in the ſaid territory, otherwiſe than in puniſhment of crimes whereof the party ſhall have been duly convicted: Provided always, that any perſon eſcaping into the ſame, from whom labor or ſervice is lawfully claimed in any one of the original ſtates, ſuch fugitive may be lawfully reclaimed and conveyed to the perſon claiming his or her labor or ſervice as aforeſaid.

Be it ordained by the authority aforeſaid, That the reſolutions of the 23d of April, 1784, relative to the ſubject of this ordinance, be, and the ſame are hereby repealed and declared null and void.

DONE by the UNITED STATES in CONGRESS aſſembled, the 13th day of July, in the year of our Lord 1787, and of their ſovereignty and independence the 12th.

Cha Thomſon ſecy

We the People

of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the

United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a Question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences 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, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock Yards, and other needful Buildings;—— And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

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.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of

the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:— "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section. 1. 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more States;— between a State and Citizens of another State;— between Citizens of different States,— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the

Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our Names,

Attest William Jackson Secretary

Go: Washington — Presidt
and Deputy from Virginia

Delaware
Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland
James M'Henry
Dan: of St Thos. Jenifer
Dan: Carroll

Virginia
John Blair —
James Madison Jr.

North Carolina
Wm. Blount
Richd. Dobbs Spaight.
Hu Williamson

South Carolina
J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler.

Georgia
William Few
Abr Baldwin

New Hampshire
John Langdon
Nicholas Gilman

Massachusetts
Nathaniel Gorham
Rufus King

Connecticut
Wm. Saml. Johnson
Roger Sherman

New York
Alexander Hamilton

New Jersey
Wil: Livingston
David Brearley.
Wm. Paterson.
Jona: Dayton

Pensylvania
B Franklin
Thomas Mifflin
Robt Morris
Geo Clymer
Thos. FitzSimons
Jared Ingersoll
James Wilson.
Gouv Morris

Congress of the United States,

begun and held at the City of New York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the 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, will best ensure the beneficent ends of its institution

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States; all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

ARTICLES in addition to, and amendment of the Constitution of the United States of America, proposed by Congress and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Article the first. ... After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Article the second. ... No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

Article the third. ... 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.

Article the fourth. ... A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Article the fifth. ... No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Article the sixth. ... The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

Article the seventh. ... No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article the eighth. ... 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 defence.

Article the ninth. ... In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article the tenth. ... Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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

Article the twelfth. ... 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.

ATTEST,

Frederick Augustus Muhlenberg Speaker of the House of Representatives.

John Adams Vice President of the United States, and President of the Senate.

John Beckley Clerk of the House of Representatives.

Sam.A.Otis Secretary of the Senate.

WARE v. HYLTON , 3 U.S. 199 (1796)

United States Supreme Court

WARE v. HYLTON(1796)

Decided: February 01, 1796

Error from the Circuit Court for the District of Virginia. The action was brought by William Jones, (but as he died, pendente lite, his Administrator was duly substituted as Plaintiff in the cause) surviving partner of Farrel and Jones, subjects of the king of Great Britain, against Daniel Hylton & Co. and Francis Eppes, citizens of Virginia, on a bond, for the penal sum of 2976 11s. 6d. sterling, dated the 7th July, 1774.

The Defendants pleaded, 1st, Payment; and, also, by leave of the court, the following additional pleas in bar of the action.

2nd. That the Plaintiff ought not to have and maintain his action, aforesaid, against them, for three thousand one hundred and eleven and one ninth dollars, equal to nine hundred and thirty three pounds fourteen shillings, part of the debt in the declaration mentioned, because they say, that, on the fourth day of July, in the year one thousand seven hundred and seventy six, they, the said Defendants, became citizens of the state of Virginia, and have ever since remained citizens thereof, and residents therein; and, that the Plaintiff, on the said fourth day of July, in the year 1776, and the said Joseph Farrel were, and from the time of their nativity ever had been, and always since have been, and the Plaintiff still is a British subject, owing, yielding and paying allegiance to the King of Great Britain; which said King of Great Britain, and all his subjects, as well the Plaintiff as others, were, on the said fourth day of July, in the year 1776, and so continued until the third of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America: and, that being so enemies, and at open war as aforesaid, the legislature of the state of Virginia did, at their session begun and held in the city of Williamsburgh, on Monday the twentieth day of October, in the year 1777, pass an act, entitled 'an act for sequestering British property, enabling those indebted [3 U.S. 199, 200] to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties,' whereby it was enacted, 'that it may and shall be lawful for any citizen of this Commonwealth, owing money to a subject of Great Britain to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan office, taking thereout a certificate for the same, in the name of the creditor, with an endorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the Governor and council, whose receipt shall discharge him from so much of the said debt.' And the Defendants say, that the said Daniel L. Hylton and Co. did, on the 26th day of April, in the year 1780, in the county of Henrico, and in the state of Virginia, while the said recited act continued in full force, in pursuance thereof, pay into the loan office of this Commonwealth, on account of the debt in the declaration mentioned, the sum of 3111-1-9 dollars, equal to 933:14, and did take out a certificate for the same, in the name of Farell and Jones, in the declaration mentioned, as creditors, with an endorsement under the hand of the commissioner of the said office, expressing the name of the payer, which certificate they, the Defendants, then delivered to the Governor and Council, who gave a receipt therefor, in conformity to the directions of the said act, in the words and figures following, to wit: 'Received into the Councils' office, a certificate bearing date the twenty sixth day of April, 1780, under the hand of the treasurer, that Daniel L. Hylton and Co. have paid to him thirty one hundred eleven and one ninth dollars, to be applied to the credit of their accounts with Farrell and Jones, British subjects. Given under my hand, at Richmond, this 30th May, 1780.'

T. JEFFERSON.

Whereby the Defendants, by virtue of the said act of Assembly, are discharged from so much of the debt in the declaration mentioned, as the said receipt specifies and amounts to, and this they are ready to verify. Wherefore, they pray the judgment of the court, whether the said Plaintiff ought to have or maintain his action, aforesaid, against them for the 933: 14, part of the debt in the declaration mentioned.

3rd. That the Plaintiff ought not to have or maintain his action, aforesaid, against them, because they say that, on the 4th day of July, in the year 1776, the said Defendants became citizens of the state of Virginia, and have ever since remained citizens thereof, and residents therein, and that the said Plaintiff, and the said Joseph Farrell, on the said fourth day of July, in the year 1776, and from the time of their nativity, had ever been, and always since have been, British subjects, [3 U.S. 199, 201] and the Plaintiff still is a British subject, yielding and paying allegiance to the King of Great Britain, which said King of Great Britain,

and all his subjects, as well the Plaintiff and the said Joseph Farell, as others, were on the said 4th day of July, 1776, and so continued till the 3rd day of September, in the year 1783, enemies of, and at open war with, the state of Virginia, and the United States of America; and that, being so enemies and at open war, as aforesaid, the legislature of the state of Virginia did, at their session commenced and held in the city of Williamsburg, on the third day of May, in the year 1779, pass an act entitled 'An act concerning escheats and forfeitures from British subjects,' whereby it was, among other things enacted, 'That all the property, real and personal, within this Commonwealth, belonging at this time to any British subject, or which did belong to any British subject at the time when such escheat or forfeiture may have taken place, shall be deemed to be vested in the Commonwealth; the lands, slaves, and other real estate, by way of escheat, and the personal estate by forfeiture.' And the legislature of the state of Virginia did, in their session begun and held in the town of Richmond, on Monday the sixth day of May, in the year 1782, pass an act, entitled 'An act to repeal so much of a former act, as suspends the issuing of executions upon certain judgments until December, 1783,' whereby it is enacted, that no demand whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court in this commonwealth, although the same may be transferred to a citizen of this state, or to any other person capable of maintaining such an action, unless the assignment hath been, or may be, made for a valuable consideration, bona fide, paid before the first day May 1777, which said acts are unrepealed, and still in force. And the Defendants, in fact, say, that the debt in the declaration mentioned, was personal property, within this commonwealth, belonging to a British subject, at the time of the passing of the said act, entitled 'An act concerning escheats and forfeitures from British subjects;' and the Defendants, in fact, also say, that the debt in the declaration mentioned, is a demand originally due to a subject of the King of Great Britain, not transferred to any person whatsoever. And these things they are ready to verify: Wherefore they pray the judgment of the court, whether the said Plaintiff ought to have, or maintain his action aforesaid, against them.

4th. That the Plaintiff, his action aforesaid, against them, ought not to have or maintain, because they say that a definitive treaty of peace between the United States of America and his Britannic Majesty, was done at Paris, on the third day of September, in the year 1783, and that, by a part of the seventh [3 U.S. 199, 202] article of the said treaty, it was expressly agreed, on the part of his Britannic Majesty, with the United States, among other things, 'That his said Britannic Majesty should, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets, from the said United States, and from every port, place and harbour within the same,' which may more fully appear, reference being had to the said treaty: And the said Defendants aver, that on the said 3rd day of September, 1783, and from their birth to this day, they have been citizens of these United States, and of the State of Virginia, and that the Plaintiff has ever been a British subject, and that the Plaintiff ought not to maintain an action, because his Britannic Majesty hath wilfully broken and violated the said treaty in this, that his Britannic Majesty hath, from the day of the said treaty and ever since, continued to carry off the negroes in his possession, the property of the American inhabitants of the United States, and hath, and still doth refuse to deliver them, or permit the owners of the said negroes to take them. And the Defendants aver, that his Britannic Majesty hath refused, and still doth refuse to withdraw his armies and garrisons from every port and harbour within the United States, which his said Britannic Majesty was bound to do by the said treaty: and the Defendants aver, that from the day of the treaty his Britannic Majesty, by force and violence, and with his army, retains possession of the forts Detroit and Niagara, and a large territory adjoining the said forts, and within the bounds and limits of the United States of America, and the Defendants say, that in further violation of the said treaty of peace, concluded as aforesaid, certain nations, or tribes of Indians, known by the names of Shawanese, Tawas, Twightces, Powtawatemies, Quiapoees, Wiandots, Mingoes, Piankaskaws and Naiadonepes, and others, being at open, public and known wars with the inhabitants of the United States, and living within the limits thereof, and for the purpose of aiding the said Indians in such war and hostility, at certain posts, forts and garrisons, held and kept by the troops and garrisons of his Britannic Majesty, to wit, at Detroit, Michelimachinac and Niagara, within the limits of the said United States, on the 4th day of September, 1783, and at divers times after the said 4th day of September, 1783, up to the institution of this suit, by orders and directions of his Britannic Majesty, and his officers commanding his said troops and armies, at the said garrisons of Detroit, Michelimachinac and Niagara, and at other forts and places held by the said troops and armies within the limits of the United States, are supplied and furnished with arms, ammunition and weapons of war, to wit, with guns and gunpowder, lead [3 U.S. 199, 203] and leaden bullets, tomahawks and scalping-knives, for the purpose of enabling them to prosecute the war against the citizens of these United States, and also giving and paying to the said Indians money, goods, wares and merchandize, for booty and plunder taken in such war, and for persons, citizens of these United States, made prisoners by the said Indians, in such their warfare against the United States, and so the King of Great Britain is an enemy to these United States: And this they are ready to verify. Wherefore they pray judgment of the court, whether the Plaintiff, his action aforesaid, against them, ought to have or maintain.

5th. That the debt in the declaration mentioned, was contracted before the 4th day of July, in the year 1776, to wit, on the seventh day of July, in the year 1774, and that when the said debt was contracted, and from thence to the said fourth day of July, 1776, and on that day, and until this day the said Plaintiff was, and is a subject to the King of Great Britain, residing in Virginia, until the said fourth day of July, in the year 1776, on which day the people of North America, among whom were these defendants, who had theretofore been the subjects of the King of Great Britain, dissolved the till then subsisting government, whereby the right of the Plaintiff to the debt in the declaration mentioned, was totally annulled. And this they are ready to verify: Wherefore they pray the judgment of the court, whether the Plaintiff ought to have, or maintain his action aforesaid, against them.

The Plaintiff replied, 1st. Non Solverunt to the plea of payment; on which issue was joined; and to the 2nd. plea in bar he replied,

2nd. That he, by reason of any thing in the said plea alleged, ought not to be barred from having or maintaining his said action against the said Defendants, because protesting, that that plea, and the matters therein contained, are not sufficient in law to bar the said Plaintiff from having or maintaining his said action in this behalf, against the said Defendants, to which the said Plaintiff hath no reason, nor is he bound by the law of the land to answer; yet, for replication in this behalf, he, the said Plaintiff, faith, that after the debt in the said declaration mentioned was contracted, and after the said 4th day of July, 1776, in the

said plea of the said Defendants mentioned, and also after the said twentieth day of October, 1777, and the passing the act of General Assembly, in the said plea also mentioned, and also after the day in which the said receipt in the plea stated, is said to have been granted, to wit, on the third day of September, in the year of our Lord 1783, it was by the definitive Treaty of Peace between the United States of America and his Britannic Majesty, made and done in the [3 U.S. 199, 204] City of Paris, that is to say, in the commonwealth, now District of Virginia, and now within the jurisdiction of this honourable court, stipulated and agreed, among other things, 'that the creditors of either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts, theretofore contracted;' and the said Plaintiff in fact faith, that he, on the said third day of September, in the year 1783, and for a long time before (as well as the said Joseph Farrell, in his lifetime were) then was, and ever since hath been and still is, a subject of his Britannic Majesty, and a creditor within the intent and meaning of the 4th article of the Definitive Treaty; and that the debt in the declaration mentioned, was contracted before the said third day of September, 1783, that is to say, in the county and commonwealth aforesaid, now the District of Virginia, and now within the jurisdiction of this honourable court; and there was and still is owing and unpaid. And the said Plaintiff, for further replication, faith, that after contracting the debt in the declaration mentioned by the said Defendants, and also after the fourth day of July, in the year of our Lord 1776, and after the said twentieth day of October, in the year of our Lord 1777, and also after the said third day of September, in the year of our Lord 1783, that is to say, on the day of 1787, in the then commonwealth, now the district of Virginia, and now within the jurisdiction of this honourable court, it was by the Constitution of the United States of America, among other things, expressly declared, that treaties which were then made, or should thereafter be made, under the authority of the United States, should be the supreme law of the land, any thing in the said constitution, or of the laws of any state to the contrary notwithstanding; and the said Plaintiff doth, in fact, aver, that the said Constitution of the United States, was made and accepted, subsequent to and after the ratification of the said definitive treaty of peace between the said United States of America and his Britannic Majesty, whose subject the said Plaintiff then was, and still is, and after the said fourth day of July, in the year 1776, and also after the said twentieth day of October, in the year 1777: Wherefore without that the debt in the declaration mentioned, was bona fide, contracted before the making of the said Definitive Treaty of Peace, and before the making of the said Constitution of the United States, that he, the said Plaintiff, is entitled to demand, have, and recover of the said Defendants, the aforesaid debt in the declaration mentioned without that the Governor and Council did give a receipt for a certificate of the payment into the loan office of the sum of 1311 1-9 dollars, in the name of Farrell and Jones, [3 U.S. 199, 205] and in conformity to the direction of the act of General Assembly, entitled 'An act for sequestering British property, enabling those indebted to British subjects, to pay of such debts, and directing the proceedings in suits where such subjects are parties;' whilst the said act was in force, as in the said plea of the said Defendants is alledged, and this he is ready to verify. Wherefore the said Plaintiff, as before, prays judgment of the court, and his debt aforesaid, and damages for detention of the debt to be adjudged to him.

To the 3rd, 4th and 5th pleas in bar, the Plaintiff demurred generally.

The Defendants to the Plaintiff's second replication, rejoined, that the said Plaintiff, for any thing in the said replication contained, ought not to have or maintain his said action against them, because they, by way of rejoinder, in this behalf, say, that in the same Definitive Treaty of Peace between the United States of America and his Britannic Majesty, by the said plaintiff in his replication mentioned, and which is now to the court shown, it was among other things stipulated and contracted as follows: 'There shall be a firm and perpetual peace between his Britannic Majesty and the said United States, and between the subjects of the one and the citizens of the other; wherefore, all hostilities both by sea and land, shall from henceforth cease, all prisoners on both sides shall be set at liberty, and his Britannic Majesty shall, with all convenient speed, and without causing any destruction or carrying away any negroes, or other property of the American inhabitants, withdraw all his armies, garrisons, and fleets, from the said United States, and from every port, place, and harbour within the same:' And the Defendants, in fact, say, that his said Britannic Majesty hath not performed those things, which, by the said Treaty of Peace, he was bound to perform, but hath altogether failed to do so, and hath broken the said Treaty in this: that on the fourth day of September, in the year 1783, and on the third day of June, 1790, and at divers times between the said fourth day of September 1783, and the said third day of June, in the year 1790, his Britannic Majesty at Detroit, and other parts within the boundaries of the United States, to wit, within the commonwealth of Virginia, and the jurisdiction of this honorable court, in open violation of the said treaty, and the articles thereof, excited, persuaded, and stirred up the Shawanese, and divers other tribes of Indians, to make war upon the said United States of America, and the commonwealth of Virginia; and gave them, the said Indians, aid in the prosecution of the said war, and furnished them with arms and ammunition, for the purpose of enabling them to prosecute the same. And his said Britannic [3 U.S. 199, 206] Majesty hath not, with all convenient speed, and without causing any destruction or carrying away any negroes, or other property of the American inhabitants, withdrawn all his armies, garrisons and fleets, from the said United States, and from every port and place within the same; but hath carried away five thousand negroes, the property of American inhabitants, on the fourth day of September, in the year 1783, from New York, to wit, in the commonwealth of Virginia, and within the jurisdiction of the court; and hath refused to withdraw with all convenient speed, his armies and garrisons from the United States, and from every post and place within the same; but hath, with force and violence, and in open violation of the said Treaty of Peace, on the said third day of September, in the year 1783, and since, maintained his armies and garrisons in the forts of Niagara and Detroit, which are posts and places within the United States, and still doth maintain his armies and garrisons within the said forts; and the Defendants further say, that the debt in the declaration mentioned, or so much thereof, as is equal to the sum of 933 14. was not a bona fide debt due and owing to the Plaintiff, on the said third day of September, 1783, because the Defendant had, on the day of 1780, in Virginia as aforesaid, paid in part thereof, the sum of 311 1-9 dollars, and afterwards obtained a certificate therefor, according to the act of the General Assembly, entitled 'An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits, where such subjects are parties,' which payment was made while the said act continued in full force, without that the said Treaty of Peace, and the

Constitution of the United States, entitle the said Plaintiff to maintain his said action, against the said Defendants, for so much of the said debt in the declaration mentioned, as is equal to 933 14. and this they are ready to verify: Wherefore they pray the judgment of the court, whether the Plaintiff ought to have or maintain his action aforesaid, against them, for so much of the debt in the declaration mentioned, as is equal to the said sum of 933 14.

The Defendants joined issue on the demurrer to the 3rd, 4th, and 5th pleas in bar: And the Plaintiff having demurred to the Defendants rejoinder to the second replication, issue was thereupon likewise joined.

On the demurrer to the Defendant's rejoinder to the Plaintiff's replication to the second plea, judgment was given by the Circuit Court, for the Defendants, and that as to so much of the debt in the declaration mentioned, as is in the said second plea set forth, the Plaintiff take nothing by his bill: On which judgment, the present writ of error was brought; but on [3 U.S. 199, 207] demurrer to the 3rd, 4th, and 5th pleas, judgment was given for the Plaintiff; a Venire was awarded to try the issue in fact on the first plea of payment; and on the trial a verdict and judgment were given for the Plaintiff for 596 dollars, with interest at 5 per cent. from the 7th July, 1782, and costs.

On the return of the record, the error assigned was, that judgment had been given for the Defendants, instead of being given for the Plaintiff, upon his demurrer to their rejoinder to the replication to the second plea. In nullo est erratum was pleaded, and thereupon issue was joined.

The general question was whether by paying a debt due before the war, from an American citizen to British subjects, into the loan office of Virginia, in pursuance of the law of that state, the debtor was discharged from his creditor? And the argument took the following general course. *

E. Tilghman, for the Plaintiff in error.

It is conceded that a debt was due from the Defendants to the Plaintiff, at the commencement of the revolutionary war; and it has been decided, in the case of Georgia versus Brailsford, ant. p. 1. that although the state had a power to suspend the payment of such a debt, during the continuance of hostilities, yet that the creditor's right to recover it, revived as an incident and consequence of the peace. There is, indeed, no controverting the general right of a belligerent power to confiscate the property of its enemy, in ordinary cases; though the modern policy of nations abstains from the exercise of that right, in respect to debts. Vatt. B. 3. s. 77. p. 484. But the relative situation of Great Britain and her colonies was of a peculiar nature, widely different from the situation of the Grecian, or Roman colonies; and, therefore, requiring a new and appropriate rule of action. At the time of the revolution, the creditor and debtor were members of the same society; subjects of the same empire. Had they belonged, originally, to distinct, independent states, both would have anticipated, in the case of a war. an exercise of the power of confiscation; but the event of a civil contest could not be reasonably contemplated, nor provided for. We find, therefore, upon the law of positive authority, as well as upon a principle of natural justice, that even the declaration of independence was deemed to have no obligatory operation upon any inhabitant of the United States, who did not choose, voluntarily to remain in the country, or to take an [3 U.S. 199, 208] oath of allegiance, to some member of the confederation. 1 Dall. Rep. 53. On the declaration of independence, the American debtor might choose his political party, but he could not dissolve his obligation to his British creditor; and if he had no power to dissolve it himself, it follows that he could not communicate such a power, to the society of which he became a member. Vatt. Pr. Dis. s. 5. 11. Besides, there are, certainly, a variety of cases, to which the rigorous power of confiscation cannot, and ought not to extend. Suppose a contract is formed in a neutral country, between subjects of two belligerent powers, the debt thus incurred could hardly be the object of confiscation. An action, it has been adjudged, may be maintained on a ransom bill, even during the continuance of the war. Doug. 19. And. in general, it may be stated, that capitulations, made in time of war, though they embrace the security of debts, as well as other property, must be held sacred. Vatt. B. 3. s. 263. 264. p. 612. 613.

But supposing Virginia had the right of confiscation in the present instance, two grounds for judicial enquiry will still remain to be explored: 1st, Whether an act of the Legislature of that State has been passed, and so acted upon, as ever to have created an impediment to the Plaintiff's recovering the debt in controversy? And 2nd. Whether such impediment, if it ever existed, has been lawfully removed?

1st. It does not appear, from the enacting clauses of the law of Virginia, which has been pleaded, that the State had any intention to confiscate the British debts paid into her treasury; and the preamble (which, though it cannot controul, may be advantageously employed to expound, the enacting clauses) is manifestly inconsistent with such an intention. The money, when paid by the debtor into the treasury, was, simply, to remain there, subject to the directions of the Legislature; and as the debtor was not bound so to pay it, the provisions of the act could not amount to a confiscation; but were merely an invitation to pay, with an implied promise, that whoever accepted the terms of the invitation, should be indemnified by the State. Nor was the invitation indiscriminately given to all debtors, but only to those who were sued; from which the inference is irresistible, that whatever responsibility the state meant herself to assume, there was no intention to extinguish the responsibility of the Virginia debtor to the British creditor, The act of the Virginia Legislature, passed the 3rd of May 1779, is in pari materia, and throws light on the construction of the former act; for, there, when the Legislature meant to interpose a bar to the recovery, they have in express terms declared it. Several other acts have passed on the subject, to which it is merely necessary to refer: The act of the 1st of [3 U.S. 199, 209] May, 1780, repeals the act of the 20th of October 1777, so far as regards the authority to pay debts into the treasury. The acts of the 6th of May 1782, and 20th of October 1783, revive the authority of making such payments in relation to British debts; and prevents the recovery by British creditors. The act of the 3rd of January 1788, fixes the amount for which the State will be liable on account of payments into the treasury; to wit, for the value of the money at the time it was so paid, with interest.

2nd. But if any impediment ever existed to the recovery of the debt, it is removed by the operation of the treaty between the United States and Great Britain, Congress having a power to repeal all the acts of the several States, in order to obtain peace; and the treaty made for that purpose being the supreme law of the land. The fourth article declares that creditors on either side shall meet with no lawful impediment to the recovery of debts heretofore contracted; and unless this provision applies to cases like the present, it will be useless and nugatory. An interpretation, which would render a clause in the treaty of no effect, ought not to be admitted. Vatt. B. 2. s. 283. The fifth article expressly stipulates, that Congress shall recommend the restoration of some parts of confiscated property, and a composition as to other parts; but that 'all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights.' Both parties to the treaty seemed to think that there had been no confiscation of debtsa; and debts were the great object which the British commissioners wished to secure. Whatever tends to produce equality in national compacts ought to be favoured; Vatt. B. 2. s. 301. and as the British government had thrown no impediment in the way of recovering debts, the American should be presumed to have acted on the same liberal principle, if any doubt arises upon the construction of the public acts. When a statute is repealed, mesne acts are valid; but it is not so, when a subsequent act declares a former one to be void. Jenk. 233. pl. 6. Had the treaty meant to obviate only a part of the impediments, the meaning would have been expressed in qualified terms. But as it could not be supposed, that, after the peace, laws would be passed creating impediments to the recovery of British debts; the treaty cannot be construed merely to intend to prevent the passing future laws, but to annihilate the operation of such as were previously enacted. There is no such clause in the treaties, which England

a Iredell, Justice. --The state of North Carolina did actually pass a confiscation law. [3 U.S. 199, 210] made at the same period with France, Spain, and Holland, and for this obvious reason, that those countries had passed no law to impede the recovery of British debts. A change of circumstances, a recognition, ex post facto, will often impose an obligation, which may not, originally, be binding on the party: The debt contracted by an infant, is obligatory on him, if he promises to pay it when of age. The assumption of a certificated bankrupt, to satisfy a debt, which the certificate would, otherwise, have discharged, affords a new cause of action. And the bare acknowledgment of a debt, barred by the statute of limitations, is sufficient to maintain an action against the debtor. So, in the present case, the treaty, operating as a national compact, is a promise to remove every pre-existing bar to the recovery of British debts; and, whatever may have been the previous state of things, this is a paramount engagement, entered into by a competent authority, upon an adequate consideration.

Marshall, (of Virginia) for the Defendant in error.

The case resolves itself into two general propositions: 1st, That the act of Assembly of Virginia, is a bar to the recovery of the debt, independent of the treaty. 2nd, That the treaty does not remove the bar.

I. That the act of Assembly of Virginia is a bar to the recovery of the debt, introduces two subjects for consideration: 1st. Whether the Legislature had power to extinguish the debt? 2nd. Whether the Legislature had exercised that power?

1st. It has been conceded, that independent nations have, in general, the right of confiscation; and that Virginia, at the time of passing her law, was an independent nation. But, it is contended, that from the peculiar circumstances of the war, the citizens of each of the contending nations, having been members of the same government, the general right of confiscation did not apply, and ought not to be exercised. It is not, however, necessary for the Defendant in error to show a parallel case in history; since, it is incumbent on those, who wish to impair the sovereignty of Virginia, to establish on principle, or precedent, the justice of their exception. That State being engaged in a war, necessarily possessed the powers of war; and confiscation is one of those powers, weakening the party against whom it is employed, and strengthening the party that employs it. War, indeed, is a state of force; and no tribunal can decide between the belligerent powers. But did not Virginia hazard as much by the war, as if she had never been a member of the British empire? Did she not hazard more, from the very circumstance of its being a civil war? It will be allowed, that nations have equal powers; and that America, in her own tribunals at least, must from the 4th of July 1776, [3 U.S. 199, 211] considered as independent a nation as Great Britain: then, what would have been the situation of American property, had Great Britain been triumphant in the conflict? Sequestration, confiscation and proscription would have followed in the train of that event; and why should the confiscation of British property be deemed less just in the event of the American triumph? The rights of war clearly exist between members of the same Empire, engaged in a civil war. Vatt. B. 3. s. 292. 295. But, suppose a suit had been brought during the war by a British subject against an American citizen, it could not have been supported; and if there was a power to suspend the recovery, there must have been a power to extinguish the debt: they are, indeed, portions of the same power, emanating from the same source. The legislative authority of any country, can only be restrained by its own municipal constitution: This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution. It is not necessary to enquire, how the judicial authority should act, if the Legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject, in all respects, to the disposition and controul of civil institutions. There is no weight in the argument, founded on what is supposed to be the understanding of the parties at the place and time of contracting debts; for, the right of confiscation does not arise from the understanding of individuals, in private transactions, but from the nature and operation of government. Nor does it follow, that because an individual has not the power of extinguishing his debts, the community, to which he belongs, may not, upon principles of public policy, prevent his creditors from recovering them. It must be repeated, that the law of property, in its origin and operation, is the offspring of the social state; not the incident of a state of nature. But the revolution did not reduce the inhabitants of America to a state of nature; and, if it did, the Plaintiff's claim would be at an end. Other objections to the doctrine are started: It is said, that a debt, which arises from a contract, formed between the subjects of two belligerent powers, in a neutral country, cannot be confiscated; but the society has a right to apply to its own use, the property of its enemy, wherever the right of property accrued, and wherever the property itself can be found. Suppose a debt had been contracted between two Americans, and one of them had joined England, would not the

right of confiscation extend to such a debt? As to the case of the ransom bill, if the right of confiscation does not extend to it, (which is, by no means, admitted) it must be on account of the peculiar nature of the contract, implying a waver of the rights of [3 U.S. 199, 212] war. And the validity of capitulations depends on the same principle. But, let it be supposed, that a government should infringe the provisions of a capitulation, by imprisoning soldiers, who had stipulated for a free return to their home, could an action of trespass be maintained against the gaoler? No: the act of the government, though disgraceful, would be obligatory on the judiciary department.

2nd, But it is now to be considered, whether, if the Legislature of Virginia had the power of confiscation, they have exercised it? The third section of the act of Assembly discharges the debtor; and, on the plain import of the term, it may be asked, if he is discharged, how can he remain charged? The expression is, he shall be discharged from the debt; and yet, it is contended, he shall remain liable to the debt. Suppose the law had said, that the debtor should be discharged from the commonwealth, but not from his creditor, would not the Legislature have betrayed the extremest folly in such a proposition? and what man in his senses would have paid a farthing into the treasury, under such a law? Yet, in violation of the expressions of the act, this is the construction which is now attempted. It is, likewise, contended, that the act of Assembly does not amount to a confiscation of the debts paid into the treasury; and that the Legislature had no power, as between creditors and debtors, to make a substitution, or commutation, in the mode of payment. But what is a confiscation? The substance, and not the form, is to be regarded. The state had a right either to make the confiscation absolute, or to modify it as she pleased. If she had ordered the debtor to pay the money into the treasury, to be applied to public uses; would it not have been, in the eye of reason, a perfect confiscation? She has thought proper, however, only to authorise the payment, to exonerate the debtor from his creditor, and to retain the money in the treasury, subject to her own discretion, as to its future appropriation. As far as the arrangement has been made, it is confiscatory in its nature, and must be binding on the parties; though in the exercise of her discretion, the state might choose to restore the whole, or any part, of the money to the original creditor. Nor is it sufficient to say, that the payment was voluntary, in order to defeat the confiscation. A law is an expression of the public will; which, when expressed, is not the less obligatory, because it imposes no penalty. Banks, Canal Companies, and numerous associations of a similar description, are formed on the principle of voluntary subscription. The nation is desirous that such institutions should exist; individuals are invited to subscribe on the terms of the law; and, when they have subscribed, they are entitled to all the benefits, and are subject to all the inconveniences of the association, although [3 U.S. 199, 213] no penalties are imposed. So, when the government of Virginia wished to possess itself of the debts previously owing to British subjects, the debtors were invited to make the payment into the treasury; and, having done so, there is no reason, or justice, in contending that the law is not obligatory on all the world, in relation to the benefit, which it promised as an inducement to the payment. If, subsequent to the act of 1777, a law had been passed confiscating British debts, for the use of the state, with orders that the Attorney General should sue all British debtors, could he have sued the Defendants in error, as British debtors, after this payment of the debt into the treasury? Common sense and common honesty revolt at the idea; and, yet, if the British creditor retained any right or interest in the debt, the state would be entitled, on principles of law, to recover the amount.

II. Having thus, then, established, that at the time of entering into the Treaty of 1783, the Defendant owed nothing to the Plaintiff; it is next to be enquired, whether that treaty revived the debt in favour of the Plaintiff, and removed the bar to a recovery, which the law of Virginia had interposed? The words of the fourth article of the Treaty are, 'that creditors on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted.' Now, it may be asked, who are creditors? There cannot be a creditor where there is not a debt; and British debts were extinguished by the act of confiscation. The articles, therefore, must be construed with reference to those creditors, who had bona fide debts, subsisting, in legal force, at the time of making the Treaty; and the word recovery can have no effect to create a debt, where none previously existed. Without discussing the power of Congress to take away a vested right by treaty, the fair and rational construction of the instrument itself, is sufficient for the Defendant's cause. The words ought, surely, to be very plain, that shall work so evident a hardship, as to compel a man to pay a debt, which he had before extinguished. The treaty, itself, does not point out any particular description of persons, who were to be deemed debtors; and it must be expounded in relation to the existing state of things. It is not true, that the fourth article can have no meaning, unless it applies to cases like the present. For instance; there was a law of Virginia, which prohibited the recovery of British debts, that had not been paid into the treasury: these were bona fide subsisting debts; and the prohibition was a legal impediment to the recovery, which the treaty was intended to remove. So, likewise, in several other states, laws had been passed authorising a discharge of British debts in paper money, or by a tender of property [3 U.S. 199, 214] at a valuation, and the treaty was calculated to guard against such impediments to the recovery of the sterling value of those debts. It appears, therefore, that at the time of making the treaty, the state of things was such, that Virginia had exercised her sovereign right of confiscation, and had actually received the money from the British debtors. If debts thus paid were within the scope of the fourth article, those who framed the article knew of the payment; and upon every principle of equity and law, it ought to be presumed, that the recovery, which they contemplated, was intended against the receiving state, not against the paying debtor. Virginia possessing the right of compelling a payment for her own use, the payment to her, upon her requisition, ought to be considered as a payment to the attorney, or agent, of the British creditor. Nor is such a substitution a novelty in legal proceedings: a foreign attachment is founded on the same principle. Suppose judgment had been obtained against the Defendants in error, as Garnishee in a foreign attachment brought against the Plaintiff in error, and the money had been paid, accordingly, to the Plaintiff in the attachment; but it afterwards appeared that the Plaintiff in the attachment had, in fact, no cause of action, having been paid his debt before he commenced the suit: If the treaty had been made in such a state of things, which would be the debtor contemplated by the fourth article, the Defendants in error, who had complied with a legal judgment against them, or the Plaintiff in the attachment, who had received the money? This act of Virginia must have been known to the American and British commissioners; and, therefore, cannot be repealed without plain and explicit expressions directed to that object. Besides, the public faith ought to be preserved. The public faith was plighted by the act of Virginia; and, as a revival of the debt in question, would be a shameful violation of the faith of the state to her own citizens, the treaty should receive any possible interpretation to avoid so dishonorable and so pernicious a consequence. It is evident, that the power

of the government, to take away a vested right, was questionable in the minds of the American commissioners, since they would not exercise that power in restoring confiscated real estate; and confiscated debts, or other personal estate must come within the same rule. If Congress had the power of divesting a vested right, it must have arisen from the necessity of the case; and if the necessity had existed, the American commissioners, explicitly avowing it, would have justified their acquiescence to the nation. But the commissioners could have no motive to form a treaty such as the opposite construction supposes; for, if the stipulation was indispensable to the attainment of peace, the object was national, and so should be the [3 U.S. 199, 215] payment of the equivalent: the commissioners, in such case, would have agreed, at once, that the public should pay the British debts; since the public must, on every principle of equity, be answerable to the Virginia debtor, who is now said to be the victim. The case cited from Jenkins, does not apply; as there is no article of the treaty, that declares the law of Virginia void. See Old Law of Evidence 196.

Campbell, of Virginia, on the same side.

The questions to be discussed are these: 1st. Did the act of Assembly of Virginia discharge the debtor? 2nd. Did any subsequent act, or law, of the government, re-charge him?

I. The right of confiscation, in a time of war, is incontrovertibly established; Vatt. b. 3. c. 5. s. 77. and nothing but the conventional, or customary, law of nations, can restrain the exercise of that general right. But the conventional, or customary, law of nations is only obligatory on those nations by whom it is adopted. Vatt. Pret. Dise s. 24. 25. 17. Vatt. b. 3. c. 28. s. 287. 292. Even in the English courts, indeed, the confiscation law of Georgia has been adjudged to be valid. If, therefore, the right of confiscation might be exercised by an individual state, nothing can more emphatically prove its exercise, than the language of the act of Virginia. The act is a discharge in express terms, saying, that 'the receipt of the proper officer shall Discharge the payer from so much of his debt, as is paid into the treasury;' whereas a confiscation of the debt, would only work a discharge by legal inference. To restrict the meaning of the discharge to a discharge from the state, is absurd; for, the state never had a charge against the debtor; or, if the state had a right to charge him, another consequence, equally fatal to the Plaintiff's cause, would ensue, that the right of the British creditor to charge him was extinguished; since the debtor clearly could not be responsible to both.

II. In considering, whether any thing has been done by the Government, to revive the charge, in favor of the British creditor, it is to be premised, that the state of things, at the time of making the treaty, is to be held legitimate; and whatever tends to change that state, is odious in the eye of the law. Vatt. B. 4. c. 2. s. 21. Ibid. B. 2. c. 17. s. 305 As, therefore, by the law of nations, a payment under a confiscation discharges a debtor, though if there had been no payment, the debt would have revived at the peace; Byrk. c. 8. p. 177. de reb. bell. nothing short of an express and explicit declaration of the treaty should be allowed so to alter the state of things, as to revive a debt, that had been lawfully extinguished. If then the treaty had been intended to alter the state of things, reason, equity, and law, concur in supposing, that it would have been by a provision, [3 U.S. 199, 216] calling on Virginia, who had received the money, to refund it in satisfaction of the claim of the British creditor. Adverting to the words of the fourth article of the treaty, and thence deducing a fair, legal, and consistent meaning, the claim of the Plaintiff cannot be supported. It may not be improper to apply the word Creditors to British subjects; but, it is contended, that the Virginia act interposes a lawful impediment, (not an impediment in fact, such as payment to the creditor himself) to the recovery of the debt, which impediment the treaty intended to remove. The answer, however, is conclusive, that this was not a debt at the time of making the treaty; and, therefore, the expression, whatever may be its general import, cannot be applied to the case. It is urged, likewise, that the words debts heretofore contracted, are peculiarly descriptive of debts of the present class: but the words heretofore contracted, cannot alter the nature and import of the word debt; and those words were necessary to be inserted; because they ascertained the debts, which were, at all events, to be paid in sterling money; debts contracted afterwards being left to the lex loci, and liable to the tender laws, which the different states had made, or might think proper to make. If, indeed the opposite construction prevails, then all debts, previously contracted, in whatever manner they may have been extinguished, are revived by the treaty. But, surely, obscure words ought not to be construed so as to alter the existing state of things between the two nations, and involve thousands of individual citizens in ruin. It is not now contended, that debts do not revive by the peace; though the Commissioners, who formed the treaty, might entertain doubts on the subject; and, therefore, provided specially for the case. Grotius B. 3. c. 9. s. 9. says, (though his commentator dissents) that debts are not, of course, revived by a peace; and there are many instances of Conventions between nations, stipulating for the revival. Bynk. de reb. bell. c. 8. p. 177. The treaty extends to British, as well as to American, debtors; and as Britain had passed no act of confiscation, the article was meant solely as a convention, that debts not paid to the public, should be recoverable of the original creditor. To illucidate the subject, it is necessary to inquire into the power of the Commissioners; for, it is not to be presumed, that they were ignorant of their power, or that they meant to exceed it; and if one construction will produce an effect, to which they were competent, while the other construction will amount to a mere usurpation, the former ought certainly to be adopted. Thus, Congress never was considered as a legislative body, except in relation to those subjects expressly assigned to the Federal jurisdiction; and could at no time, nor in any manner, repeal the laws of the several states, or sacrifice the rights of individuals. The power of abrogating, [3 U.S. 199, 217] is as eminent as the power of making laws; Vatt. B. 1. c.3.s.34.47. and even the powers of war and peace may be limited by the fundamental law of the Society. Vatt. B. 4. c. 2.s.10. The fundamental law of the Union, was declared in the articles of confederation; and those articles, as well as the written constitutions of the several states, must have been known to the commissioners on both sides, as the boundaries of the authority of the American government itself, and of course of all authority derived from that government. But the right of sacrificing individuals, even on the ground of public necessity, belongs only to that power in a state, which is vested with the eminent domain, a domain inseparable from empire. Vatt. B. 4. s. 12. Ibid. B. 1. c. 20. s. 244. 245. On the revolution, the eminent domain was vested in the people of America, in their respective State Legislatures; and it could not be divested and transferred, without an express grant by the same authority. The debates that arose in the British Parliament on the subject of the treaty, show, likewise, that the British Commissioners were sensible, that the power of the American Commissioners did not extend to the repeal of any State law. On the faith of the

Virginia law, many citizens collected their estates from other hands, and paid them into the treasury; and, therefore, even if the treaty requires a payment of those debts, the responsibility ought only to attach upon the State. If the Virginia law had made a direct and unqualified confiscation, there would be no doubt of its validity; but it discharges the debtor as much as if it had been a confiscation, and being discharged, it can be no reason to revive the debt, that the discharge was procured by a voluntary payment. Upon the whole, the act of Assembly amounts, substantially, to a confiscation; which means nothing more, than a bringing into the public Treasury the confiscated property; and the State may, if she pleases, restore it in that case, as well as in the case of a discretion expressly reserved, or in the case of a forfeiture for treason, or felony.

Wilcocks, for the Plaintiff in error.

It is necessary, 1st, to ascertain the meaning of the acts of the Legislature of Virginia; and 2nd, the operation of the treaty of peace, in relation to those acts.

I. That the Legislature of Virginia did not mean to confiscate debts, is evident from the declaration contained in the preamble, that such a confiscation is not agreeable to the custom of nations; and where the enacting clause is doubtful, the preamble will furnish a key to the construction. After providing, therefore, for the sequestration of real estate, the law proceeds merely to permit the payment of British debts into the public Treasury. There is nothing compulsory on the debtor; all [3 U.S. 199, 218] debtors are not enjoined to pay; and no debtor is restrained from remitting to his British creditor. Even, indeed, if a bare sequestration had been intended, there never could be terms more defective. The Legislature only says, if a debtor chuses to pay his debt into the Treasury, he shall be indemnified; and, in a subsequent act, when the State declares the amount for which she will be responsible, (the value of the money paid with interest) she does not determine, whether the payment by the American debtors, was a discharge from the British creditors. To pay the British creditor in that way, would be manifestly unjust; but if the American debtor is reimbursed the value of what he paid, with interest, he has no right to complain.

II. In examining the effect of the treaty, if it is conceded, that the Virginia act extinguished the debt, it may be assumed, that the commissioners had power to enter into the treaty. That instrument, therefore, is the supreme law of the land: and, upon the whole, it is highly favourable to America. Treaties ought to be construed liberally; but it would be illiberal to construe this treaty, so as to prevent the recovery of bona fide debts. The British Commissioners gave up a great deal; but they were particularly anxious on two points, the property of the loyalists, and the security of the British debts. It is objected, that the treaty does not make any express mention of the repeal of State laws: but the laws interfering with the object of the fourth article were so numerous, that, probably, the commissioners did not know them all; and it was safest to resort to general expressions. The words 'heretofore contracted,' mean debts contracted before the revolution; and include not only existing debts, at the time of forming the treaty, but all debts contracted before that memorable epoch, though extinguished by the acts of State Legislatures, without the consent, or co-operation, of the British creditors. The words that 'creditors shall meet with no lawful impediment in the recovery of all such debts,' mean, that when the creditors apply to a court of justice, no law shall be pleaded in bar to a judgment for their debts. What else, indeed, could reasonably be the object of the British Minister, who was bound to protect the commercial interests of his nation, and who insisted on the insertion of the fourth article? Could he mean to relinquish all debts paid into the public treasury of the different States? Then, if all had been so paid, the article was nugatory. But the impediments referred to, must have been the existing impediments, and not impediments to be afterwards created; and the enforcement of the former would be, on general principles, as unjust to the British creditor, as the introduction of the latter. Besides, if the former description of impediments was not contemplated, British creditors were in a worse predicament, [3 U.S. 199, 219] than loyalists, owners of confiscated real estate, in whose favor, it was stipulated, that a Congressional recommendation should be made.

Lewis, for the Plaintiff in error.

The individuals of different nations enter into contracts with each other, upon a presumption, that, in case of a war, debts will not be confiscated. The presumption is founded upon the uniform practice of the monarchies of Europe; and the national character of the American Republic is interested that a more rigorous policy should not be introduced. Congress, indeed, never attempted the seizure of debts; and very few of the States have passed confiscating laws. It is now, then, to be enquired, 1st, Had the Legislature of Virginia a competent authority to extinguish the debt? 2nd, If the Legislature had such an authority, has it been exercised? And 3rdly, if the authority was lawfully exercised, what is the effect of the treaty of peace.

1st. If the power to confiscate debts existed, it existed in the United States, and not in the individual states. It has been admitted, that Congress possessed the power of war and peace; and that the right of confiscation emanates from that source. All America was concerned in the war, and it seems naturally to follow, that all America (not the constituent parts, respectively) was entitled to the emoluments of confiscation. It is true, that when a civil war breaks out, each party is entitled to the rights of war, as between independent nations; and, it is not denied, that Virginia was vested, at the revolution, with all the eminent domain attached to empire, which was not delegated to Congress, as the head of the confederation. Such was the peculiar state of things, that although Virginia might, in any future war, have acted as she pleased, in the war then subsisting she had no election; all the powers of war and peace were vested in Congress, not in the legislatures of the several states. When it is said, that even the British courts recognize the validity of a state confiscation; it should be remembered, that the case alluded to, arose from a law of treason, and the forfeiture for treason, properly belonged to the state of Georgia. 1 H. Bl. 148.9. So, when it is said, that the act of Virginia was passed, prior to the completion of the articles of confederation, it is sufficient to answer, that the same objection has already been over-ruled in Doane & Penhallow.* It is absurd to suppose, that Congress and Virginia could, at the same time, possess the powers of war and peace. The war was waged against all America, as one nation, or community; and the peace was concluded on the same principles. Before the revolution, the power of confiscation was vested in the King, not in the Parliament. When the revolution commenced, conventions, committees of safety, and other popular associations, [3 U.S. 199, 220] were formed, even while the legislatures of the several states were in session. The people assumed themselves, in the first

instance, the powers of war and peace, but quickly and wisely vested them in Congress. At what period, then, could the state legislatures assert that they possessed those powers? All the property of the enemy, likewise, of whatever kind, was booty of war, and belonged to the Union. The authorities say, that one belligerent power may confiscate debts due from its subjects, to the subjects of the other belligerent power; but it is no where said, that a member of any belligerent power, a constituent part of the nation, possesses such authority. The eminent domain of Virginia must, therefore, be confined to internal affairs; and it is not sufficient to object, that the property of the debt in question, was within the limits of her territory, and, therefore, was subject to her laws. The inference would be false, even if the premises were true: but the premises are unfounded; for a debt is always due where the creditor resides, except in the case of an obligation, which is due, where the instrument is kept. 1 Roll. Abr. 908. pl. 1. 4. Ibid. 909. pl. 1. 7. Salk. 37. 4 Burn. Ecc. L. 157.

2nd & 3rd. On the second and third points, there can be but little added to the arguments already advanced. If laws change according to the manners of times, as reason and authority inculcate (1. L. Raym. 882.) the act of Virginia should be so expounded as to conform to the modern law of nations, which is adverse to the confiscation of debts. The right of sequestration may exist (and that is all the case in the Old Law of Evidence, p. can prove) but Bynkershook says expressly, that a debt not exacted, revives upon the peace; and, in the present instance, the payment was surely voluntary, without force of any kind.

The Court, after great consideration, delivered their opinions, seriatim, as follow:

Chase, Justice.

The Defendants in error, on the day of July, 1774, passed their penal bond to Farrell and Jones, for the payment of 2,976 11 6, of good British money; but the condition of the bond, or the time of payment, does not appear on the record.

On the 20th of October, 1777, the legislature of the commonwealth of Virginia, passed a law to sequester British property. In the third section of the law, it was enacted, 'that it should be lawful for any citizen of Virginia, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he should think fit, into the loan office, taking thereout a certificate for the same, in the name of the creditor, with an indorsement, under the hand of the commissioner of the said office, expressing the name of the payer; and [3 U.S. 199, 221] shall deliver such certificate to the governor and the council, whose receipt shall discharge him from so much of the debt. And the governor and the council shall, in like manner, lay before the General Assembly, once in every year, an account of these certificates, specifying the names of the persons by, and for whom they were paid; and shall see to the safe keeping of the same; subject to the future directions of the legislature: provided, that the governor and the council may make such allowance, as they shall think reasonable, out of the INTEREST of the money so paid into the loan office, to the wives and children, residing in the state, of such creditor.

On the 26th of April, 1780, the Defendants in error, paid into the loan office of Virginia, part of their debt, to wit, 3,111 1-9 dollars, equal to 933 14 0 Virginia currency; and obtained a certificate from the commissioners of the loan office, and a receipt from the governor and the council of Virginia, agreeably to the above, in part recited law.

The Defendants in error being sued, on the above bond, in the Circuit Court of Virginia, pleaded the above law, and the payment above stated, in bar of so much of the Plaintiff's debt. The plaintiff, to avoid this bar, replied the fourth article of the Definitive Treaty of Peace, between Great Britain and the United States, of the 3rd of September, 1783. To this replication there was a general demurrer and joinder. The Circuit Court allowed the demurrer, and the plaintiff brought the present writ of error.

The case is of very great importance, not only from the property that depends on the decision, but because the effect and operation of the treaty are necessarily involved. I wished to decline sitting in the cause, as I had been council, some years ago, in a suit in Maryland, in favour of American debtors; and I consulted with my brethren, who unanimously advised me not to withdraw from the bench. I have endeavored to divest myself of all former prejudices, and to form an opinion with impartiality. I have diligently attended to the arguments of the learned council, who debated the several questions, that were made in the cause, with great legal abilities, ingenuity and skill. I have given the subject, since the argument, my deliberate investigation, and shall, (as briefly as the case will permit,) deliver the result of it with great diffidence, and the highest respect for those, who entertain a different opinion. I solicit, and I hope I shall meet with, a candid allowance for the many imperfections, which may be discovered in observations hastily drawn up, in the intervals of attendance in court, and the consideration of other very important cases.

The first point raised by the council for the Plaintiff in error was, 'that the legislature of Virginia had no right to make [3 U.S. 199, 222] the law, of the 20th October, 1777, above in part recited. If this objection is established, the judgment of the Circuit Court must be reversed; because it destroys the Defendants plea in bar, and leaves him without defence to the Plaintiff's action.

This objection was maintained on different grounds by the Plaintiff's council. One of them (Mr. Tilghman) contended, that the legislature of Virginia had no right to confiscate any British property, because Virginia was part of the dismembered empire of Great Britain, and the Plaintiff and Defendants were, all of them, members of the British nation, when the debt was contracted, and therefore, that the laws of independent nations do not apply to the case; and, if applicable, that the legislature of Virginia was not justified by the modern law and practice of European nations, in confiscating private debts. In support of this opinion, he cited Vattel Lib. 3. c. 5. s.77, who expresses himself thus: 'The sovereign has naturally the same right over what his subjects may be indebted to

enemies. Therefore, he may confiscate debts of this nature, if the term of payment happen in the time of war. But at present, in regard to the advantage and safety of Commerce, all the sovereigns of Europe have departed from this rigour; and, as this custom has been generally received, he, who should act contrary to it, would injure the public faith; for strangers trusted his subjects, only from a firm persuasion, that the general custom would be observed.'

The other council for the Plaintiff in error (Mr. Lewis) denied any power in the Virginia legislature, to confiscate any British property, because all such power belonged exclusively to Congress; and he contended, that if Virginia had a power of confiscation, yet, it did not extend to the confiscation of debts by the modern law and practice of nations.

I would premise that this objection against the right of the Virginia legislature to confiscate British property, (and especially debts) is made on the part of British subjects, and after the treaty of peace, and not by the government of the United States. I would also remark, that the law of Virginia was made after the declaration of independence by Virginia, and also by Congress; and several years before the Confederation of the United States, which, although agreed to by Congress on the 15th of November, 1777, and assented to by ten states, in 1778, was only finally completed and ratified on the 1st of March, 1781.

I am of opinion that the exclusive right of confiscating, during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the Legislature of that commonwealth. I shall hereafter consider whether the law of the 20th of October 1777, operated to confiscate or extinguish [3 U.S. 199, 223] British debts, contracted before the war. It is worthy of remembrance, that Delegates and Representatives were elected, by the people of the several counties and corporations of Virginia, to meet in general convention, for the purpose of framing a NEW government, by the authority of the people only; and that the said Convention met on the 6th of May, and continued in session until the 5th of July 1776; and, in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power, that could be rightfully exercised within its limits; they had therefore an unquestionable right to grant it to whom they pleased, and under what restrictions or limitations they thought proper. The people of Virginia, by their Constitution or fundamental law, granted and delegated all their Supreme civil power to a Legislature, and Executive, and a Judiciary; The first to make; the second to execute; and the last to declare or expound, the laws of the Commonwealth. This abolition of the Old Government, and this establishment of a new one was the highest act of power, that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of Independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes, which impelled the separation; and was proper to give notice of the event to the nations of Europe. I hold it as unquestionable, that the Legislature of Virginia established as I have stated by the authority of the people, was for ever thereafter invested with the supreme and sovereign power of the state, and with authority to make any Laws in their discretion, to affect the lives, liberties, and property of all the citizens of that Commonwealth, with this exception only, that such laws should not be repugnant to the Constitution, or fundamental law, which could be subject only to the control of the body of the nation, in cases not to be defined, and which will always provide for themselves. The legislative power of every nation can only be restrained by its own constitution: and it is the duty of its courts of justice not to question the validity of any law made in pursuance of the constitution. There is no question but the act of the Virginia Legislature (of the 20th of October 1777) was within the authority granted to them by the people of that country; and this being admitted, it is a necessary result, that the law is obligatory on the courts of Virginia, and, in my opinion, on the courts of the United States. If Virginia as a sovereign State, violated the ancient or modern [3 U.S. 199, 224] law of nations, in making the law of the 20th of October 1777, she was answerable in her political capacity to the British nation, whose subjects have been injured in consequence of that law. Suppose a general right to confiscate British property, is admitted to be in Congress, and Congress had confiscated all British property within the United States, including private debts: would it be permitted to contend in any court of the United States, that Congress had no power to confiscate such debts, by the modern law of nations? If the right is conceded to be in Congress, it necessarily follows, that she is the judge of the exercise of the right, as to the extent, mode, and manner. The same reasoning is strictly applicable to Virginia, is considered a sovereign nation; provided she had not delegated such power to Congress, before the making of the law of October 1777, which I will hereafter consider.

In June 1776, the Convention of Virginia formally declared, that Virginia was a free, sovereign, and independent state; and on the 4th of July, 1776, following, the United States, in Congress assembled, declared the Thirteen United Colonies free and independent states; and that as such, they had full power to levy war, conclude peace, etc. I consider this as a declaration, not that the United Colonies jointly, in a collective capacity, were independent states, etc. but that each of them was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth.

Before these solemn acts of separation from the Crown of Great Britain, the war between Great Britain and the United Colonies, jointly, and separately, was a civil war; but instantly, on that great and ever memorable event, the war changed its nature, and became a PUBLIC war between independent governments; and immediately thereupon ALL the rights of public war (and all the other rights of an independent nation) attached to the government of Virginia; and all the former political connection between Great Britain and Virginia, and also between their respective subjects, were totally dissolved; and not only the two nations, but all the subjects of each, were in a state of war; precisely as in the present war between Great Britain and France. Vatt. Lib. 3. c.18,s.292. to 295. lib.3.c. 5.s.70.72 and 73.

From the 4th of July, 1776, the American States were de facto, as well as de jure, in the possession and actual exercise of all the rights of independent governments. On the 6th of February, 1778, the King of France entered into a treaty of alliance with the United States; and on the 8th of Oct. 1782, a treaty of Amity and Commerce was concluded between the United States and the States General of the United Provinces. I have ever [3 U.S. 199, 225] considered it as

the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of Congress, on the 4th of July, 1776; and that no other period can be fixed on for its commencement; and that all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments.

That Virginia was part of the dismembered British empire, can, in my judgment, make no difference in the case. No such distinction is taken by Vattell (or any other writer) but Vattell, when considering the rights of war between two parties absolutely independent, and no longer acknowledging a common superior (precisely the case in question) thus expresses himself, Lib. 3.c. 18 s.295. 'In such case, the state is dissolved, and the war between the two parties, in every respect, is the same with that of a public war between two different nations.' And Vattell denies, that subjects can acquire property in things taken during a CIVIL war.

That the creditor and debtor were members of the same empire, when the debt was contracted, cannot (in my opinion) distinguish the case, for the same reasons. A most arbitrary claim was made by the parliament of Great Britain, to make laws to bind the people of America, in all cases whatsoever, and the King of Great Britain, with the approbation of parliament, employed, not only the national forces, but hired foreign mercenaries to compel submission to this absurd claim of omnipotent power. The resistance against this claim was just, and independence became necessary; and the people of the United States announced to the people of Great Britain, 'that they would hold them, as the rest of mankind, enemies in war, in peace, friends.' On the declaration of independence, it was in the option of any subject of Great Britain, to join their brethren in America, or to remain subjects of Great Britain. Those who joined us were entitled to all the benefits of our freedom and independence; but those who elected to continue subjects of Great Britain, exposed themselves to any loss, that might arise therefrom. By their adhering to the enemies of the United States, they voluntarily became parties to the injustice and oppression of the British government; and they also contributed to carry on the war, and to enslave their former fellow citizens. As members of the British government, from their own choice, they became personally answerable for the conduct of that government, of which they remained a part; and their property, wherever found (on land or water) became liable to confiscation. On this ground, Congress on the 24th of July, 1776, confiscated any British property taken on the seas. See 2 Ruth. Inst. lib. 2.c.9.s.13.p.531.559. Vatt. [3 U.S. 199, 226] lib.2.c.7.s.81.& c. 18.s.344.lib.3. c,5.s.74.& c. 9. s. 161 & 193.

The British creditor, by the conduct of his sovereign, became an enemy to the commonwealth of Virginia; and thereby his debt was forfeitable to that government, as a compensation for the damages of an unjust war.

It appears to me, that every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all moveable property of its enemy, (of any kind or nature whatsoever) wherever found, whether within its territory, or not. Bynkershoek Q. 1. P. de rebus bellicis. Lib. 1. c. 7. p. 175. thus delivers his opinion. 'Cum ea sit belli conditiout hostes sint, omni jure, spoliati proscriptique, rationis est, quascunque res hostium, apud hostes inventas, Dominum mutare, et Fisco cedere.' 'Since it is a condition of war, that enemies, by every right, may be plundered, and seized upon, it is reasonable that whatever effects of the enemy are found with us who are his enemy, should change their master, and be confiscated, or go into the treasury.' S. P. Lee on Capt. c. 8.p. 111. S. P.2. Burn. p.209.s.12.p.219. s.2.p.221s.11. Bynkershoek the same book, and chapter, page 177. thus expresses himself: 'Quod dixi de actionibus recte publicandis ita demum obtinet. Si quod subditi nostri hostibus nostris debent, princeps a subditis juis, revera exegerit: Si exegerit recte solutum est, si non exegerit, pace facta, reviviscit jus pristinum creditoris; quia occupatio, quae bello fit, magis in facto, quam in potestate juris consistit. Nomina igitur, non exacta, tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hoec inter gentes fere convenit ut nominibus bello publicatis, pace deinde facta, exasta censeantur periisse, et maneant extincta; non autem exacta reviviscant, et restituantur veris creditoribus.'

> 'What I have said of things in action being rightfully confiscated, holds thus: If the prince truly exacts from his subjects, what they owed to the enemy; if he shall have exacted it, it is rightfully paid, if he shall not have exacted it, peace being made, the former right of the creditor revives; because the seizure, which is made during war, consists more in fact than in right. Debts, therefore, not exacted, seem as it were to be forgotten in time of war, but upon peace, by a kind of postliminy, return to their former proprietor. Accordingly, it is for the most part agreed among nations, that things in action, being confiscated in war, the peace being made, those which were paid are deemed to have perished, and remain extinct; but those not paid revive, and are restored to their true creditors. Vatt. lib. 4. s.22. S. P. Lee on Capt. c.8.p 118.' [3 U.S. 199, 227] That this is the law of nations, as held in Great Britain, appears from Sir Thomas Parker's Rep. p. 267 (II William 3rd) in which it was determined, that choses in action belonging to an alien enemy are forfeitable to the crown of Great Britain; but there must be a commission and inquisition to entitle the crown; and if peace is concluded before inquisition taken, it discharges the cause of forfeiture.

The right to confiscate the property of enemies, during war, is derived from a state of war, and is called the rights of war. This right originates from self-preservation, and is adopted as one of the means to weaken an enemy, and to strengthen ourselves. Justice, also, is another pillar on which it may rest; to wit, a right to reimburse the expence of an unjust war. Vatt. lib.3.c.8.s.138, & c.9.s.161.

But it is said, if Virginia had a right to confiscate British property, yet by the modern law, and practice of European nations, she was not justified in confiscating debts due from her citizens to subjects of Great Britain; that is, private debts. Vattell is the only author relied on (or that can be found) to maintain the distinction between confiscating private debts, and other property of an enemy. He admits the right to confiscate such debts, if the term of payment happen in the time of war; but this limitation on the right is no where else to be found. His opinion alone will not be sufficient to restrict the right to that case only. It does not appear in the present case, whether the time of payment happened before, or during the war. If this restriction is just, the Plaintiff ought to have shown the

fact. Vattell adds, 'at present, in regard to the advantages and safety of commerce, all the sovereigns of Europe have departed from this rigour; and this custom has been generally received, and he who should act contrary to it (the custom) would injure the public faith.' From these expressions it may be fairly inferred, that, by the rigour of the law of nations, private debts to enemies might be confiscated, as well as any other of their property; but that a general custom had prevailed in Europe to the contrary; founded on commercial reasons. The law of nations may be considered of three kinds, to wit, general, conventional, or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on express consent, and is not universal, and only binds those nations that have assented to it. The third is founded on TACIT consent; and is only obligatory on those nations, who have adopted it. The relaxation or departure from the strict rights of war to confiscate private debts, by the commercial nations of Europe, was not binding on the state of Virginia, because founded on custom only; and she was at liberty to reject, or adopt the custom, as she pleased. [3 U.S. 199, 228] The conduct of nations at war, is generally governed and limited by their exigencies and necessities. Great Britain could not claim from the United States, or any of them, any relaxation of the general law of nations, during the late war, because she did not consider it, as a civil war, and much less as a public war, but she gave it the odious name of rebellion; and she refused to the citizens of the United States the strict rights of ordinary war.

It cannot be forgotten, that the Parliament of Great Britain, by statute (16 Geo.3.c.5. in 1776) declared, that the vessels and cargoes belonging to the people of Virginia, and the twelve other colonies, found and taken on the high seas, should be liable to seizure and confiscation, as the property of open enemies; and, that the mariners and crews should be taken and considered as having voluntarily entered into the service of the King of Great Britain; and that the killing and destroying the persons and property of the Americans, before the passing this act, was just and lawful: And it is well known that, in consequence of this statute, very considerable property of the citizens of Virginia was seized on the high seas, and confiscated; and that other considerable property, found within that Commonwealth, was seized and applied to the use of the British army, or navy. Vattel lib. 3.c.12. sec. 191. says, and reason confirms his opinion, 'That whatever is lawful for one nation to do, in time of war, is lawful for the other.' The law of nations is part of the municipal law of Great Britain, and by her laws all moveable property of enemies, found within the kingdom, is considered as forfeited to the crown, as the head of the nation; but if no inquisition is taken to ascertain the owners to be alien enemies, before peace takes place, the cause of forfeiture is discharged, by the peace ipso facto. Sir Thomas Parker's Rep. pa.267. This doctrine agrees with Bynk. lib. 1.c.7. pa. 177. and Lee on Capt. ch.8.p. 118. that debts not confiscated and paid, revive on peace. Lee says, 'Debts, therefore, which are not taken hold of, seem, as it were, suspended and forgotten in time of war; but by a peace return to their former proprietor by a kind of postliminy.' Mr. Lee, who wrote since Vattel, differs from him in opinion, that private debts are not confiscable, pag. 114. He thus delivers himself: 'By the law of nations, Rights and Credits are not less in our power than other goods; why, therefore, should we regard the rights of war in regard to one, and not as to the other? And when nothing occurs, which gives room for a proper distinction, the general law of nations ought to prevail.' He gives many examples of confiscating debts, and concludes, (p. 119) 'All which prove, that not only actions, but all [3 U.S. 199, 229] other things whatsoever, are forfeited in time of war, and are often exacted.'

Great Britain does not consider herself bound to depart from the rigor of the general law of nations, because the commercial powers of Europe wish to adopt a more liberal practice. It may be recollected, that it is an established principle of the law of nations, 'that the goods of a friend are free in an enemy's vessel; and an enemy's goods lawful prize in the vessel of a friend.' This may be called the general law of nations. In 1780 the Empress of Russia proposed a relaxation of this rigor of the laws of nations, 'That all the effects belonging to the subjects of the belligerent powers shall be free on board neutral vessels, except only contraband articles.' This proposal was acceded to by the neutral powers of Sweden, Denmark, the States General of the United Provinces, Prussia and Portugal; France and Spain, two of the powers at war, did not oppose the principle, and Great Britain only declined to adopt it, and she still adheres to the rigorous principle of the law of nations. Can this conduct of Great Britain be objected to her as an uncivilized and barbarous practice? The confiscating private debts by Virginia has been branded with those terms of reproach, and very improperly in my opinion.

It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations, yet if in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her Courts of Justice; and, in my opinion, on all the Courts of the United States. If Virginia by such conduct violated the law of nations, she was answerable to Great Britain, and such injury could only be redressed in the treaty of peace. Before the establishment of the national government, British debts could only be sued for in the state court. This, alone, proves that the several states possessed a power over debts. If the crown of Great Britain had, according to the mode of proceeding in that country, confiscated, or forfeited American debts, would it have been permitted in any of the courts of Westminister Hall, to have denied the right of the crown, and that its power was restrained by the modern law of nations? Would it not have been answered, that the British nation was to justify her own conduct; but that her courts were to obey her laws.

It appears to me, that there is another and conclusive ground, which effectually precluded any objection, since the peace, on the part of Great Britain, as a nation, or on the part of any of her subjects, against the right of Virginia to confiscate British debts, or any other British property, during the war; even on the admission that such confiscation was in violation of the ancient or modern law of nations. [3 U.S. 199, 230] If the Legislature of Virginia confiscated or extinguished the debt in question, by the law of the 20th of October 1777, as the Defendants in error contend, this confiscation or extinguishment, took place in 1777, fagrante Bello; and the definitive treaty of peace was ratified in 1783. What effects flow from a treaty of peace, even if the confiscation, or extinguishment of the debt was contrary to the law of nations, and the stipulation in the 4th article of the treaty does not provide for the recovery of the debt in question?

I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violencies, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaty, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice. If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the treaty of peace, it is thereby so far considered lawful, as never afterwards to be revived, or to be a subject of complaint.

Vattel lib. 4. sect. 21. p. 121. says, 'The state of things at the instant of the treaty, is held to be legitimate, and any change to be made in it requires an express specification in the treaty; consequently, all things not mentioned in the treaty, are to remain as they were at the conclusion of it. All the damages caused during the war are likewise buried in oblivion; and no plea is allowable for those, the reparation of which is not mentioned in the treaty: They are looked on as if they had never happened.' The same principle applies to injuries done by one nation to another, on occasion of, and during the war. See Grotius lib. 3. c. 8. sect. 4.

The Baron De Wolfuis, 1222, says, 'De quibus nihil dictum ca manent quo sunt loco.' Things of which nothing is said remain in the state in which they are.

It is the opinion of the celebrated and judicious Doctor Rutherforth, that a nation in a just war may seize upon any moveable goods of an enemy, (and he makes no distinction as to private debts) but that whilst the war continues, the nation has, of right, nothing but the custody of the goods taken; and [3 U.S. 199, 231] if the nation has granted to private captors (as privateers) the property of goods taken by them, and on peace, restitution is agreed on, that the nation is obliged to make restitution, and not the private captors; and if on peace no restitution is stipulated, that the full property of moveable goods, taken from the enemy during the war, passes, by tacit consent, to the nation that takes them. This I collect as the substance of his opinion in lib. 2. c. 9, from p. 558 to 573.

I shall conclude my observations on the right of Virginia to confiscate any British property, by remarking, that the validity of such a law would not be questioned in the Court of Chancery of Great Britain; and I confess the doctrine seemed strange to me in an American Court of Justice. In the case of Wright and Nutt, Lord Chancellor Thurlow declared, that he considered an act of the State of Georgia, passed in 1782, for the confiscation of the real and personal estate of Sir James Wright, and also his debts, as a law of an independent country; and concluded with the following observation, that the law of every country, must be equally regarded in the Courts of Justice of Great Britain, whether the law was a barbarous or civilized institution, or wise or foolish. H. Black. Rep. p. 149. In the case of Folliot against Ogden, Lord Loughborough, Chief Justice of the Court of Common Pleas, in delivering the judgment of the court, declared 'that the act of the State of New York, passed in 1779, for attainting, forfeiting, and confiscating the real and personal estate of Folliott, the Plaintiff, was certainly of as full validity, as the act of any independent State. H. Black. Rep. p. 135. On a writ of error Lord Kenyon, Chief Justice of the Court of King's Bench, and Judge Grose, delivered direct contrary sentiments; but Judges Asburst and Buller were silent. 3 Term Rep. p. 726.

From these observations, and the authority of Bynkersboek, Lee, Burlamaque, and Rutherforth, I conclude, that Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory; unless she had before delegated that power to Congress, which Mr. Lewis contended she had done. The proof of the allegation that Virginia had transferred this authority to Congress, lies on those who make it; because if she had parted with such power it must be conceded, that she once rightfully possessed it.

It has been enquired what powers Congress possessed from the first meeting, in September 1774, until the ratification of the articles of confederation, on the 1st of March, 1781? It appears to me, that the powers of Congress, during that whole period, were derived from the people they represented, expressly given, through the medium of their State Conventions, or State Legislatures; or that after they were exercised they were [3 U.S. 199, 232] impliedly ratified by the acquiescence and obedience of the people. After the confederacy was compleated, the powers of Congress rested on the authority of the State Legislatures, and the implied ratifications of the people; and was a government over governments. The powers of Congress originated from necessity, and arose out of, and were only limited by, events or, in other words, they were revolutionary in their very nature. Their extent depended on the exigencies and necessities of public affairs. It was absolutely and indispensably necessary that Congress should possess the power of conducting the war against Great Britain, and therefore if not expressly given by all, (as it was by some of the States) I do not hesitate to say, that Congress did rightfully possess such power. The authority to make war, of necessity implies the power to make peace; or the war must be perpetual. I entertain this general idea, that the several States retained all internal sovereignty; and that Congress properly possessed the great rights of external sovereignty: Among others, the right to make treaties of commerce and alliance; as with France on the 6th of February 1778. In deciding on the powers of Congress, and of the several States, before the confederation, I see but one safe rule, namely, that all the powers actually exercised by Congress, before that period were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express, or implied grant; and that all the powers exercised by the State Conventions or State Legislatures were also rightfully exercised, on the same presumption of authority from the people. That Congress did not possess all the powers of war is self-evident from this consideration alone, that she never attempted to lay any kind of tax on the people of the United States, but relied altogether on the State Legislatures to impose taxes, to raise money to carry on the war, and to sink the emissions of all the paper money issued by Congress. It was expressly provided, in the 8th article of the confederation, that 'all charges of war (and all other expenses for the common defence and general welfare) and allowed by Congress, shall be defrayed out of a common Treasury, to be supplied by the several States in proportion to the value of the land in each State; and the taxes for paying the said proportion, shall be levied by the Legislatures of the several States.' In every free country the power of laying taxes is considered a legislative power over the property and persons of the citizens; and this power the people of the United States, granted to their State Legislatures, and they

neither could, nor did transfer it to Congress; but on the contrary they expressly stipulated that it should remain with them. It is an incontrovertible fact that Congress never attempted to confiscate [3 U.S. 199, 233] any kind of British property within the United States (except what their army, or vessels of war captured) and thence I conclude that Congress did not conceive the power was vested in them. Some of the states did exercise this power, and thence I infer, they possessed it. On the 23rd of March, 3rd of April, and 24th of July, 1776, Congress confiscated British property, taken on the high seas.*

The second point made by the council for the Plaintiff in error was, 'if the legislature of Virginia had a right to confiscate British debts, yet she did not exercise that right by the act of the 20th October, 1777.' If this objection is well founded, the Plaintiff in error must have judgment for the money covered by the plea of that law, and the payment under it. The preamble recites, that the public faith, and the law and the usage of nations require, that debts incurred, during the connexion with Great Britain, should not be confiscated. No language can possibly be stronger to express the opinion of the legislature of Virginia, that British debts ought not to be confiscated, and if the words or effect and operation, of the enacting clause, are ambiguous or doubtful, such construction should be made as not to extend the provisions in the enacting clause, beyond the intention of the legislature, so clearly expressed in the preamble; but if the words in the enacting clause, in their nature, import, and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction. It is not an uncommon case for a legislature, in a preamble, to declare their intention to provide for certain cases, or to punish certain offences, and in enacting clauses to include other cases, and other offences. But I believe very few instances can be found in which the legislature declared that a thing ought not to be done, and afterwards did the very thing they reprobated. There can be no doubt that strong words in the enacting part of a law may extend it beyond the preamble. If the preamble is contradicted by the enacting clause, as to the intention of the legislature, it must prevail, on the principle that the legislature changed their intention.

I am of opinion, that the law of the 20th of October, 1777, and the payment in virtue thereof, amounts either to a confiscation, or extinguishment, of so much of the debt as was paid into the loan office of Virginia. 1st. The law makes it lawful for a citizen of Virginia indebted to a subject of Great Britain [3 U.S. 199, 234] to pay the whole, or any part, of his debt, into the loan office of that commonwealth. 2nd. It directs the debtor to take a certificate of his payment, and to deliver it to the governor and the council; and it declares that the receipt of the governor and the council for the certificate shall discharge him (the debtor) from so much of the debt as he paid into the loan office. 3rd. It enacts that the certificate shall be subject to the future direction of the legislature. And 4th, it provides, that the governor and council may make such allowance, as they shall think reasonable, out of the interest of the money paid, to the wives and children, residing within the state, of such creditor. The payment by the debtor into the loan office is made a lawful act. The public receive the money, and they discharge the debtor, and they make the certificate (which is the evidence of the payment) subject to their direction; and they benevolently appropriate part of the money paid, to wit, the interest of the debt, to such of the family of the creditor as may live within the state. All these acts are plainly a legislative interposition between the creditor and debtor; annihilates the right of the creditor; and is an exercise of the right of ownership over the money; for the giving part to the family of the creditor, under the restriction of being residents of the state, or to a stranger, can make no difference. The government of Virginia had precisely the same right to dispose of the whole, as of part of the debt. Whether all these acts amount to a confiscation of the debt, or not, may be disputed according to the different ideas entertained of the proper meaning of the word confiscation. I am inclined to think that all these acts, collectively considered, are substantially a confiscation of the debt. The verb confiscate is derived from the latin, con with, and Fiscus a basket, or hamper, in which the Emperor's treasure was formerly kept. The meaning of the word to confiscate is to transfer property from private to public use; or to forfeit property to the prince, or state. In the language of Mr. Lee, (page 118) the debt was taken hold of; and this he considers as confiscation. But if strictly speaking, the debt was not confiscated, yet it certainly was extinguished as between the creditor and debtor; the debt was legally paid, and of consequence extinguished. The state interfered and received the debt, and discharged the debtor from his creditor; and not from the state, as suggested. The debtor owed nothing to the state of Virginia, but she had a right to take the debt or not at her pleasure. To say that the discharge was from the state, and not from the debtor, implies that the debtor was under some obligation or duty to pay the state, what he owed his British creditor. If the debtor was to remain charged to his creditor, notwithstanding his payment; not one farthing would have been [3 U.S. 199, 235] paid into the loan office. Such a construction, therefore, is too violent and not to be admitted. If Virginia had confiscated British debts, and received the debt in question, and said nothing more, the debtor would have been discharged by the operation of the law. In the present case, there is an express discharge on payment, certificate, and receipt. It appears to me that the plea, by the Defendant, of the act of Assembly, and the payment agreeably to its provisions, which is admitted, is a bar to the plaintiff's action, for so much of his debt as he paid into the loan office; unless the plea is avoided, or destroyed, by the Plaintiff's replication of the fourth article of the Definitive Treaty of Peace, between Great Britain and the United States, on the 3rd of September, 1783. The question then may be stated thus: Whether the 4th article of the said treaty nullifies the law of Virginia, passed on the 20th of October, 1777; destroys the payment made under it; and revives the debt, and gives a right of recovery thereof, against the original debtor? It was doubted by one of the counsel for the Defendants in error (Mr. Marshall) whether Congress had a power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts. Another of the Defendant's council (Mr. Campbell) expressly, and with great zeal, denied that Congress possessed such power. But a few remarks will be necessary to shew the inadmissibility of this objection to the power of Congress. 1st. The legislatures of all the states, have often exercised the power of taking the property of its citizens for the use of the public, but they uniformly compensated the proprietors. The principle to maintain this right is for the public good, and to that the interest of individuals must yield. The instances are many; and among them are lands taken for forts, magazines, or arsenals; or for public roads, or canals; or to erect towns. 2nd. The legislatures of all the states have often exercised the power of divesting rights vested; and even of impairing, and, in some instances, of almost annihilating the obligation of contracts, as by tender laws, which made an offer to pay, and a refusal to receive, paper money, for a specie debt, an extinguishment, to the amount tendered. 3rd. If the Legislature of Virginia could, by a law, annul any former law; I apprehend that the effect would be to destroy all rights acquired under the law so nullified. 4th. If the Legislature of Virginia could not by ordinary acts of legislation, do these things, yet possessing the supreme sovereign power of the

state, she certainly could do them, by a treaty of peace; if she had not parted with the power or making [3 U.S. 199, 236] such treaty. If Virginia had such power before she delegated it to Congress, it follows, that afterwards that body possessed it. Whether Virginia parted with the power of making treaties of peace, will be seen by a perusal of the ninth article of the Confederation (ratified by all the states, on the 1st of March, 1781,) in which it was declared, 'that the United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace, or war, except in the two cases mentioned in the 6th article; and of entering into treaties and alliances, with a proviso, when made, respecting commerce.' This grant has no restriction, nor is there any limitation on the power in any part of the confederation. A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must of necessity imply a power, to decide the terms on which they shall be made. A war between two nations can only be concluded by treaty.

Surely, the sacrificing public, or private, property, to obtain peace cannot be the cases in which a treaty would be void. Vatt. lib. 2 c. 12.s. 160. 161. p. 173. lib. 6. c.2. s. 2. It seems to me that treaties made by Congress, according to the Confederation, were superior to the laws of the states; because the Confederation made them obligatory on all the states. They were so declared by Congress on the 13th of April, 1787; were so admitted by the legislatures and executives of most of the states; and were so decided by the judiciary of the general government, and by the judiciaries of some of the state governments.

If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th article of the Constitution, which provides 'That all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution, or laws, of any State to the contrary notwithstanding.' There can be no limitation on the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the State Constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way. If the Constitution of a State (which is the fundamental law of the State, and paramount to its Legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act [3 U.S. 199, 237] of the State Legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide. If a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the National Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded.

Four things are apparent on a view of this 6th article of the National Constitution. 1st. That it is Retrospective, and is to be considered in the same light as if the Constitution had been established before the making of the treaty of 1783. 2nd. That the Constitution, or laws, of any of the States so far as either of them shall be found contrary to that treaty are by force of the said article, prostrated before the treaty. 3rd. That consequently the treaty of 1783 has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over the Constitution, which was its creator. 4thly. That it is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to that treaty (or any other) made under the authority of the United States, null and void. National or Federal Judges are bound by duty and oath to the same conduct.*

The argument, that Congress had not power to make the fourth article of the treaty of peace, if its intent and operation was to annul the laws of any of the States, and to destroy vested rights (which the Plaintiff's Council contended to be the object and effect of the fourth article) was unnecessary, but on the supposition that this court possess a power to decide, whether this article of the treaty is within the authority delegated to that body, by the articles of confederation. Whether this court constitutionally possess such a power is not necessary now to determine, because I am fully satisfied that Congress were invested with the authority to make the stipulation in the fourth article. If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed. One further remark will shew how very circumspect the court ought to be before they would decide against the right of Congress to make the stipulation objected to. If Congress had no [3 U.S. 199, 238] power (under the confederation) to make the fourth article of the treaty, and for want of power that article is void, would it not be in the option of the crown of Great Britain to say, whether the other articles, in the same treaty, shall be obligatory on the British nation?

I will now proceed to the consideration of the treaty of 1783. It is evident on a perusal of it what were the great and principal objects in view by both parties. There were four on the part of the United States, to wit. 1st. An acknowledgment of their independence, by the crown of Great Britain. 2nd. A settlement of their western bounds. 3rd. The right of fishery: and 4thly. The free navigation of the Mississippi. There were three on the part of Great Britain, to wit, 1st. A recovery by British Merchants, of the value in sterling money, of debts contracted, by the citizens of America, before the treaty. 2nd. Restitution of the confiscated property of real British subjects, and of persons residents in districts in possession of the British forces, and who had not borne arms against the United States; and a conditional restoration of the confiscated property of all other persons: and 3rdly. A prohibition of all future confiscations, and prosecutions. The following facts were of the most public notoriety, at the time when the treaty was made, and therefore must have been very well known to the gentlemen who assented to it. 1st. That British debts, to a great amount, had been paid into some of the State Treasuries, or loan offices, in paper money of very little value, either under laws confiscating debts, or under laws authorising payment of such debts in paper money, and discharging the debtors. 2nd. That tender laws had existed in all the states; and that by some of those laws, a tender and a refusal to accept, by principal or factor, was declared an extinguishment of the debt. From the knowledge that such laws had existed there was good reason to fear that similar laws, with the same or less consequences, might be again made, (and the fact really happened) and prudence required to guard the British creditor against them. 3rd. That in some of the

States property, of any kind, might be paid, at an appraisement, in discharge of any execution. 4th. That laws were in force in some of the States, at the time of the treaty, which prevented suits by British creditors. 5th. That laws were in force in other of the States, at the time of the treaty, to prevent suits by any person for a limited time. All these laws created legal impediments, of one kind or another, to the recovery of many British debts, contracted before the war; and in many cases compelled the receipt of property instead of gold and silver.

To secure the recovery of British debts, it was by the latter part of the 5th article, agreed as follows, 'That all persons [3 U.S. 199, 239] who have any interest in confiscated lands, by DEBTS, should meet with no lawful impediment in the prosecution of their just rights.' This provision clearly relates to debts secured by mortgages on lands in see simple, which were afterwards confiscated; or to debts on judgments, which were a lien on lands, which also were afterwards confiscated, and where such debts on mortgages, or judgments, had been paid into the State Treasuries, and the debtors discharged. This stipulation was absolutely necessary if such debts were intended to be paid. The pledge, or security by lien, had been confiscated and sold. British subjects being aliens, could neither recover the possession of lands by ejectment, nor foreclose the equity of redemption; nor could they claim the money secured by a mortgage, or have the benefit of a lien from a judgment, if the debtor had paid his debt into the Treasury, and been discharged. If a British subject, in either of those cases, prosecuted his just right, it could only be in a court of justice, and if any of the above causes were set up as a lawful impediment, the courts were bound to decide, whether this article of the treaty nullified the laws confiscating the lands, and also the purchases made under them, or the laws authorizing payment of such debts to the State; or whether aliens were enabled, by this article, to hold lands mortgaged to them before the war. In all these cases, it seems to me, that the courts, in which the cases arose, were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it. One instance among many will illustrate my meaning. Suppose a mortgagor paid the mortgage money into the public Treasury, and afterwards sold the land, would not the British creditor, under this article, be entitled to a remedy against the mortgaged lands?

The fourth article of the treaty is in these words: 'It is agreed that creditor, on either side, shall meet with no lawful impediment to the recovery of the full value, in sterling money, of all bona fide debts, heretofore contracted.'

Before I consider this article of the treaty, I will adopt the following remarks, which I think applicable, and which may be found in Dr. Rutherforth and Vattel. (2 Ruth. 307 to 315. Vattel lib. 2. c. 17. sect, 263 and 271.) The intention of the framers of the treaty, must be collected from a view of the whole instrument, and from the words made use of by them to express their intention, or from probable or rational conjectures. If the words express the meaning of the parties plainly, distinctly, and perfectly, there ought to be no other means of interpretation; but if the words are obscure, or ambiguous, or imperfect, recourse must be had to other means of interpretation, and in these three cases, we must collect the meaning from the words, [3 U.S. 199, 240] or from probable or rational conjectures, or from both. When we collect the intention from the words only, as they lie in the writing before us, it is a literal interpretation; and indeed if the words, and the construction of a writing, are clear and precise, we can scarce call it interpretation to collect the intention of the writer from thence. The principal rule to be observed in literal interpretation, is to follow that sense, in respect both of the words, and the construction, which is agreeable to common use.

If the recovery of the present debt is not within the clear and manifest intention and letter of the fourth article of the treaty, and if it was not intended by it to annul the law of Virginia, mentioned in the plea, and to destroy the payment under it, and to revive the right of the creditor against his original debtor; and if the treaty cannot effect all these things, I think the court ought to determine in favour of the Defendants in error. Under this impression, it is altogether unnecessary to notice the several rules laid down by the Council for the Defendants in error, for the construction of the treaty.

I will examine the fourth article of the treaty in its several parts; and endeavour to affix the plain and natural meaning of each part.

To take the fourth article in order as it stands.

1st. 'It is agreed,' that is, it is expressly contracted; and it appears from what follows, that certain things shall not take place. This stipulation is direct. The distinction is self-evident, between a thing that shall not happen, and an agreement that a third power shall prevent a certain thing being done. The first is obligatory on the parties contracting. The latter will depend on the will of another; and although the parties contracting, had power to lay him under a moral obligation for compliance, yet there is a very great difference in the two cases. This diversity appears in the treaty.

2nd. 'That creditors on either side,' without doubt meaning British and American creditors.

3rd. 'Shall meet with no lawful impediment,' that is, with no obstacle (or bar) arising from the common law, or acts of Parliament, or acts of Congress, or acts of any of the States, then in existence, or thereafter to be made, that would, in any manner, operate to prevent the recovery of such debts, as the treaty contemplated. A lawful impediment to prevent a recovery of a debt can only be matter of law pleaded in bar to the action. If the word lawful had been omitted, the impediment would not be confined to matter of law. The prohibition that no lawful impediment shall be interposed, is the same as that all lawful impediments shall be removed. The meaning cannot be satisfied by the removal of one impediment, and leaving another; and a [3 U.S. 199, 241] fortiori by taking away the less and leaving the greater. These words have both a retrospective and future aspect.

4th. 'To the recovery,' that is, to the right of action, judgment, and execution, and receipt of the money, without impediments in courts of justice, which could only be by plea, (as in the present case) or by proceedings, after judgment, to compel receipt of paper money, or property, instead of sterling money. The word recovery is very comprehensive, and operates, in the present case, to give remedy from the commencement of suit, to the receipt of the money.

5th. 'In the full value in sterling money,' that is, British creditors shall not be obliged to receive paper money, or property at a valuation, or any thing else but the full value of their debts, according to the exchange with Great Britain. This provision is clearly restricted to British debts, contracted before the treaty, and cannot relate to debts contracted afterwards, which would be dischargeable according to contract, and the laws of the State where entered into. This provision has also a future aspect in this particular, namely, that no lawful impediment, no law of any of the States made after the treaty, shall oblige British creditors to receive their debts, contracted before the treaty, in paper money, or property at appraisement, or in any thing but the value in sterling money. The obvious intent of these words was to prevent the operation of past and future tender laws; or past and future laws, authorizing the discharge of executions for such debts by property at a valuation.

6th. 'Of all bona fide debts,' that is, debts of every species, kind, or nature, whether by mortgage, if a covenant therein for payment; or by judgments, specialties, or simple contracts. But the debts contemplated were to be bona fide debts, that is, bona fide contracted before the peace, and contracted with good faith, or honestly, and without covin, and not kept on foot fraudulently. Bona fide is a legal technical expression; and the law of Great Britain and this country has annexed a certain idea to it. It is a term used in statutes in England, and in acts of Assembly of all the States, and signifies a thing done really, with a good faith, without fraud, or deceit, or collusion, or trust. The words bona fide are restrictive, for a debt may be for a valuable consideration, and yet not bona fide. A debt must be bona fide at the time of its commencement, or it never can become so afterwards. The words bona fide, were not prefixed to describe the nature of the debt at the date of the treaty, but the nature of the debt at the time it was contracted. Debts created before the war, were almost the only debts in the contemplation of the treaty; although debts contracted during the war were covered by the general provision, taking in debts from the most distant period of time, [3 U.S. 199, 242] to the date of the treaty. The recovery, where no lawful impediments were to be interposed, was to have two qualifications: 1st. The debts were to be bona fide contracted; and, 2nd, they were to be contracted before the peace.

7th. 'Heretofore contracted,' that is, entered into at any period of time before the date of the treaty; without regard to the length or distance of time. These words are descriptive of the particular debts that might be recovered; and relate back to the time such debts were contracted. The time of the contract was plainly to designate the particular debts that might be recovered. A debt entered into during the war, would not have been recoverable, unless under this description of a debt contracted at any time before the treaty.

If the words of the fourth article taken separately, truly bear the meaning I have given them, their sense collectively, cannot be mistaken, and must be the same.

The next enquiry is, whether the debt in question, is one of those, described in this article. It is very clear that the article contemplated no debts but those contracted before the treaty; and no debts but only those to the recovery whereof some lawful impediment might be interposed. The present debt was contracted before the war, and to the recovery of it a lawful impediment, to wit, a law of Virginia and payment under it, is pleaded in bar. There can be no doubt that the debt sued for, is within the description, if I have given a proper interpretation of the words. If the treaty had been silent as to debts, and the law of Virginia had not been made, I have already proved that debts would, on peace, have revived by the law of nations. This alone shows that the only impediment to the recovery of the debt in question, is the law of Virginia, and the payment under it; and the treaty relates to every kind of legal impediment.

But it is asked, did the fourth article intend to annul a law of the states? and destroy rights acquired under it?

I answer, that the fourth article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment; and would bar a recovery, if not destroyed by this article of the treaty. This stipulation could not intend only to repeal laws that created legal impediments, to the recovery of the debt (without respect to the mode of payment) because the mere repeal of a law would not destroy acts done, and rights acquired, under the law, during its existence and before the repeal. This right to repeal was only admitted by the council for the Defendants in error, because a repeal would not affect their case; but on the same ground that a treaty can repeal a law of the state, it can nullify it. I have already proved, that a treaty can totally annihilate [3 U.S. 199, 243] any part of the Constitution of any of the individual states, that is contrary to a treaty. It is admitted that the treaty intended and did annul some laws of the states, to wit, any laws, past or future, that authorised a tender of paper money to extinguish or discharge the debt, and any laws, past or future, that authorised the discharge of executions by paper money, or delivery of property at appraisement; because if the words sterling money have not this effect, it cannot be shewn that they have any other. If the treaty could nullify some laws, it will be difficult to maintain that it could not equally annul others.

It was argued, that the fourth article was necessary to revive debts which had not been paid, as it was doubtful, whether debts not paid would revive on peace by the law of nations. I answer, that the fourth article was not necessary on that account, because there was no doubt that debts not paid do revive by the law of nations; as appears from Bynkershock, Lee, and Sir Thomas Parker. And if necessary, this article would not have this effect, because it revives no debts, but only those to which some legal impediment might be interposed, and there could be no legal impediment, or bar, to the recovery, after peace, of debts not paid, during the war to the state.

It was contended, that the provision is, that CREDITORS shall recover, etc. and there was no creditor at the time of the treaty, because there was then no debtor, he having been legally discharged. The creditors described in the treaty, were not creditors generally, but only those with whom debts had been contracted, at some time before the treaty; and is a description of persons, and not of their rights. This adhering to the letter, is to destroy the plain meaning of the provision; because, if the treaty does not extend to debts paid into the state treasuries, or loan offices, it is very clear that nothing was done by the treaty as to those debts, not even so much as was stipulated for Royalists, and Refugees, to wit, a recommendation of restitution. Further, by this construction, nothing was done

for British creditors, because the law of nations secured a recovery of their debts, which had not been confiscated and paid to the states; and if the debts paid in paper money, of little value, into the state treasuries, or loan offices, were not to be paid to them, the article was of no kind of value to them, and they were deceived. The article relates either to debts not paid, or, to debts paid into the treasuries, or loan offices. It has no relation to the first, for the reasons above assigned; and if it does not include the latter it relates to nothing.

It was said that the treaty secured British creditors from payment in paper money. This is admitted, but it is by force [3 U.S. 199, 244] and operation of the words, 'in sterling money,' but then the words, 'heretofore contracted,' are to have no effect whatsoever; and it is those very words, and those only, that secure the recovery of the debts, paid to the states; because no lawful impediment is to be allowed to prevent the recovery of debts contracted at any time before the treaty.

But it was alledged, that the fourth article only stipulates, that there shall be no lawful impediment, etc. but that a law of the state was first necessary to annul the law creating such impediment; and that the state is under a moral obligation to pass such a law; but until it is done, the impediment remains.

I consider the fourth article in this light, that it is not a stipulation that certain acts shall be done, and that it was necessary for the legislatures of individual states, to do those acts; but that it is an express agreement, that certain things shall not be permitted the American courts of justice; and that it is a contract, on behalf of those courts, that they will not allow such acts to be pleaded in bar, to prevent a recovery of certain British debts. 'Creditors are to meet with no lawful impediment, etc.' As creditors can only sue for the recovery of their debts, in courts of justice; and it is only in courts of justice that a legal impediment can be set up by way of plea, in bar of their actions; it appears to me, that the courts are bound to overrule every such plea, if contrary to the treaty. A recovery of a debt can only be prevented by a plea in bar to the action. A recovery of a debt in sterling money, can only be prevented by a like plea in bar to the action, as tender and refusal, to operate as an extinguishment. After judgment, payment thereof in sterling money can only be prevented by some proceedings under some law, that authorises the debtor to discharge an execution in paper money, or in property, at a valuation. In all these, and similar cases, it appears to me, that the courts of the United States are bound, by the treaty, to interfere. No one can doubt that a treaty may stipulate, that certain acts shall be done by the Legislature; that other acts shall be done by the Executive; and others by the Judiciary. In the sixth article it is provided, that no future prosecutions shall be commenced against any person, for or by reason of the part he took in the war. Under this article the American courts of justice discharged the prosecutions, and the persons, on receipt of the treaty, and the proclamation of Congress. 1 Dall. Rep. 233.

If a law of the State to annul a former law was first necessary, it must be either on the ground that the treaty could not annul any law of a State; or that the words used in the treaty were not explicit or effectual for that purpose. Our Federal Constitution establishes the power of a treaty over the constitution [3 U.S. 199, 245] and laws of any of the States; and I have shown that the words of the fourth article were intended, and are sufficient to nullify the law of Virginia, and the payment under it. It was contended that Virginia is interested in this question, and ought to compensate the Defendants in error, if obliged to pay the Plaintiff under the treaty. If Virginia had a right to receive the money, which I hope I have clearly established, by what law is she obliged to return it? The treaty only speaks of the original debtor, and says nothing about a recovery from any of the States. It was said that the defendant ought to be fully indemnified, if the treaty compels him to pay his debt over again; as his rights have been sacrificed for the benefit of the public. That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the States, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the Constitution, which declares, 'that private property shall not be taken for public use without just compensation'. See Vattel. lib. 1. c. 20. s. 244. Although Virginia is not bound to make compensation to the debtors, yet it evident that they ought to be indemnified, and it is not to be supposed, that those whose duty it may be to make the compensation, will permit the rights of our citizens to be sacrificed to a public object, without the fullest indemnity. On the best investigation I have been able to give the fourth article of the treaty, I cannot conceive, that the wisdom of men could express their meaning in more accurate and intelligible words, or in words more proper and effectual to carry their intention into execution. 2 Am satisfied, that the words, in their natural import, and common use, give a recovery to the British creditor from his original debtor of the debt contracted before the treaty, notwithstanding the payment thereof into the public treasuries, or loan offices, under the authority of any State law; and, therefore, I am of opinion, that the judgment of the Circuit Court ought to be reversed, and that judgment ought to be given, on the demurrer, for the Plaintiff in error; with the costs in the Circuit Court, and the costs of the appeal.

Paterson, Justice. The present suit is instituted on a bond bearing date the 7th of July 1774, and executed by Daniel Lawrence Hylton & Co. and Francis Eppes, citizens of the State of Virginia, to Joseph Farrel and William Jones, subjects [3 U.S. 199, 246] of the king of Great Britain, for the payment of 2,976 11s. 6d. British, or sterling, money.

The Defendants, among other pleas, pleaded,

1st. Payment; on which issue is joined.

2nd. That 3111 1-9 dollars, equal to 933 14s. od. part of the debt mentioned in the declaration, were, on the 26th of April 1780, paid by them into the loan office of Virginia pursuant to an act of that State, passed the 20th of October 1777, entitled, 'An act for sequestering British property, enabling those indebted to British subjects to pay off such debts, and directing the proceedings in suits where such subjects are parties'. The material section of the act is recited in the plea.

To this plea the Plaintiffs reply, and set up the fourth article of the treaty, made the 3rd. of September 1783, between the United States and his Britannic Majesty, and the Constitution of the United States making treaties the supreme law of the land.

The rejoinder sets forth, that the debt in the declaration mentioned, or so much thereof as is equal to the sum of 933 14s. od. was not a bona fide debt due and owing to the Plaintiffs on the 3rd of September 1783, because the Defendants had, on the 26th of April 1780, paid, in part thereof, the sum of 3111 1-9 dollars into the loan office of Virginia, and obtained a certificate and receipt therefor pursuant to the directions of the said act; without that, that the said treaty of peace, and the Constitution of the United States entitle the Plaintiffs to maintain their action against the Defendants for so much of the said debt in the declaration mentioned as is equal to 933 14s.

To this rejoinder the Plaintiffs demur.

The defendants join in demurrer.

On this issue in law judgment was entered for the Defendants in the Circuit Court for the District of Virginia. A Writ of Error has been brought, and the general errors are assigned.

The question is, whether the judgment rendered in the Circuit Court be erroneous? I shall not pursue the range of discussion, which was taken by the Counsel on the part of the Plaintiffs in error. I do not deem it necessary to enter on the question, whether the Legislature of Virginia had authority to make an act, confiscating the debts due from its citizens to the subjects of the king of Great Britain, or whether the authority in such case was exclusively in Congress. I shall read and make a few observations on the act, which has been pleaded in bar, and then pass to the consideration of the fourth [3 U.S. 199, 247] article of the treaty. The first and third sections are the only parts of the act necessary to be considered.

1st. 'Whereas divers persons, subjects of Great Britain, had, during our connexion with that kingdom, acquired estates, real and personal, within this commonwealth, and had also become entitled to debts to a considerable amount, and some of them had commenced suits for the recovery of such debts before the present troubles had interrupted the administration of justice, which suits were at that time depending and undetermined, and such estates being acquired and debts incurred, under the sanction of the laws and of the connexion then subsisting, and it not being known that their sovereign hath as yet set the example of confiscating debts and estates under the like circumstances, the public faith, and the law and usages of nations require, that they should not be confiscated on our part, but the safety of the United States demands, and the same law and usages of nations will justify, that we should not strengthen the hands of our enemies during the continuance of the present war, by remitting to them the profits or proceeds of such estates, or the interest or principal of such debts.'

3rd. 'And be it further enacted, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan office, taking thereout a certificate for the same in the name of the creditor, with an endorsement under the hand of the commissioner of the said office expressing the name of the payer, and shall deliver such certificate to the Governor and Council, whose receipt shall discharge him from so much of the debt. And the Governor and Council shall in like manner lay before the General Assembly, once in every year, an account of these certificates, specifying the names of the persons by and for whom they were paid, and shall see to the safe- keeping of the same, subject to the future direction of the Legislature.'

The act does not confiscate debts due to British subjects. The preamble reprobates the doctrine as being inconsistent with public faith, and the law and usages of nations. The payments made into the loan office were voluntary and not compulsive; for it was in the option of the debtor to pay or not. The enacting clause will admit of a construction in full consistency with the preamble; for, although the certificates were to be subject to the future direction of the Legislature, yet it was under the express declaration, that there should be no confiscation, unless the King of Great Britain should set the example; if he should confiscate debts due to the citizens [3 U.S. 199, 248] of Virginia, then the Legislature of Virginia would confiscate debts due to British subjects. But the King of Great Britain did not confiscate debts on his part, and the Legislature of Virginia have not confiscated debts on their part. It is, however, said, that the payment being made under the act, the faith of Virginia is plighted. True-but to whom is it plighted- to the creditor or debtor-to the alien enemy, or to its own citizen, who made the voluntary payment? Or will it be shaped and varied according to the event-if one way, then to the creditor; if another, then to the debtor. Be these points as they may, the Legislature thought it expedient to declare to what amount Virginia should be bound for payments so made. The act for this purpose was passed on the 3rd of January, 1780; and is entitled 'An act concerning monies paid into the public loan office, in payment of British debts.'

> 'Section 1. Whereas by an act of the General Assembly, entitled 'An act for sequestering British property, enabling those indebted to British subjects, to pay off such debts, and directing the proceedings in suits where such subjects are parties;' it is among other things provided, that it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan office, taking thereout a certificate for the same, in the name of the creditor; with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer; and shall deliver such certificate to the governor and council, whose receipt shall discharge him from so much of the debt; and the Governor and Council shall, in like manner, lay before the General Assembly, once in every year, an account of these certificates, specifying the names of the persons, by and for whom they were paid, and shall see to the safe keeping of the same, subject to the future direction of the Legislature.

'Sect. 2. And whereas it belongs not to the Legislature to decide particular questions, of which the judiciary have cognizance, and it is therefore unfit for them to determine, whether the payments so made into the loan office, as aforesaid, be good or void between the creditor and debtor. But it is expedient to declare to what amount this commonwealth may be bound for the payments aforesaid. Be it enacted and declared, That this commonwealth shall, at no time nor in any event or contingency, be liable to any person or persons whatsoever, for any sum, on account of the payments aforesaid, other than the value thereof when reduced by the scale of depreciation, established by one other act of the General Assembly, entitled An act directing the mode of adjusting and settling the payment [3 U.S. 199, 249] of certain debts and contracts, and for other purposes, with interest thereon, at the rate of six per centum per annum; any law, usage, custom, or any adjudication or construction of the first recited act already made, or hereafter be made notwithstanding.'

On the part of the Defendants, it has been also urged, that it is immaterial whether the payment be voluntary or compulsive, because the payer, on complying with the directions of the act, shall be discharged from so much of the debt. Be it so. If the Legislature had authority to make the act, the Congress could, by treaty, repeal the act, and annul every thing done under it. This leads us to consider the treaty and its operation. Treaties must be construed in such manner, as to effectuate the intention of the parties. The intention is to be collected from the letter and spirit of the instrument, and may be illustrated and enforced by considerations deducible from the situation of the parties; and the reasonableness, justice, and nature of the thing, for which provision has been made. The fourth article of the treaty gives the text, and runs in the following words:

'It is agreed, that creditors on either side, shall meet with no legal impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.'

The phraseology made use of, leaves in my mind no room to hesitate as to the intention of the parties. The terms are unequivocal and universal in their signification, and obviously point to and comprehend all creditors, and all debtors, previously to the 3rd of September, 1783. In this article there appears to be a selection of expressions plain and extensive in their import, and admirably calculated to obviate doubts, to remove difficulties, to designate the objects, and ascertain the intention of the contending powers, and, in short, to meet and provide for all possible cases that could arise under the head or debts. The words 'creditors on either side,' embrace every description of creditors, and cannot be limited or narrowed down to such only, whose debtors had not paid into the loan office of Virginia. Creditors must have debtors; debtors is the correlative term. Who are these debtors? On the part of the Defendants in error, it has been contended, that Virginia is the substituted debtor, so far as respects debtors, who may have paid money into the loan office under its laws. But the idea, that the treaty may be satisfied by substituting the state of Virginia in the stead of the original debtor, is far fetched, and altogether inadmissible. The terms in which the article is expressed, clearly evince a contrary intention, and naturally and irresistably carry the mind back to the original debtor; for, as between the British creditor and the [3 U.S. 199, 250] state of Virginia, there was no express and pre-existing stipulation or debt. Besides, what lawful impediment was to be removed out of the way of the creditor, if Virginia was the substituted or self-created debtor? Did this clause make Virginia liable to a prosecution for the debt? Is Virginia now suable by such British creditor? No; he would in such case be totally remediless, unless the nation of which he is a subject, would interpose in his behalf. The words 'shall meet with no lawful impediment,' refer to legislative acts, and every thing done under them, so far as the creditor might be affected or obstructed in regard either to his remedy or right. All lawful impediments of whatever kind they might be, whether they related to personal disabilities, or confiscations, sequestrations, or payments into loan offices or treasuries, are removed. No act of any state legislature, and no payment made under such act into the public coffers, shall obstruct the creditor in his course of recovery against his debtor. The act itself is a lawful impediment, and therefore is repealed; the payment under the act is also a lawful impediment, and therefore is made void. The article is to be construed according to the subject matter or nature of the impediment; it repeals in the first instance, and nullifies in the second. Unless this be the construction, it is not true, that the creditor shall meet with no legal impediment to the recovery of his debt. Does not the plea in the present case contradict the treaty, and raise an impediment in the way of recovery, when the treaty declares there shall be none? Payments made in paper money into loan offices, and treasuries, were the principal impediments to be removed, and mischiefs to be redressed. The article makes provision accordingly. It stipulates, that the creditor shall recover the full value of his debt in sterling money; hereby securing and guarding him against all payments in paper money. Suppose the creditor should call on Virginia for payment-what would it be-the paper money paid into the loan office, or its value. Would this be a compliance with the article? In the one case, the money being cried down and dead, is no better than waste paper; and in the other, the payment, when reduced by the table of depreciation, would be inconsiderable, and in many cases not more than six-pence in the pound. Can this be called payment to the full value of the debt in sterling money? The subsequent expressions in the article, enforce the preceding observations, and mark the will and intention of the contracting parties, in the most clear and precise terms. The concluding words are, 'all bona fide debts heretofore contracted.' In the construction of contracts, words are to be taken in their natural and obvious meaning, unless some good reason be assigned, to show, [3 U.S. 199, 251] that they should be understood in a different sense. Now, if a person, in reading this article, should take the words in their common meaning, and as generally understood, could be mistake the intention of the parties? Their design unquestionably was, to restore the creditor and debtor to their original state, and place them precisely in the situation they would have stood, if no war had intervened, or act of the Legislature of Virginia had been passed. The impediments created by Legislative acts, and the payments made in pursuance of them, and all the evils growing out of them, were, so far as respected creditors, done away and cured. This is the only way in which all lawful impediments can be removed, and all debts, contracted before the date of the treaty, can be recovered to their full value, by the creditors against their debtors. It has, however, been urged, that this article must be restricted to debts existing and due at the time of making the treaty; that the debt in question was discharged, because it has been paid into the Loan Office, agreeably to law; and that the treaty ought not to be construed so as to renovate or revive it. To enforce this objection, the rule laid down by Vattel was relied on, 'that the state of things at the instant of the treaty, is to be held legitimate, and any change to be made in it requires an express specification in the treaty; consequently all things not mentioned in the treaty, are to remain as they were at the conclusion of it.' Vatt. B. 4. c. 2. s. 21. The first part of the objection has

been already answered; for it is within both the letter and spirit of the instrument, that the creditors should be reinstated, and, of course, that the debtors should be liable to pay. The act of Virginia, and the payment under it have, so far as the creditor is concerned, no operation, and are void. There is no difficulty in answering the objection arising from the passage in Vattel. The universality of the terms is equal to an express specification in the treaty, and indeed includes it. For it is fair and conclusive reasoning, that if any description of debtors or class of cases was intended to be excepted, it would have been specified in the instrument, and the words, 'that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money of all debts heretofore contracted,' would not have been made use of in the unqualified manner, in which they stand in the treaty. Another article in the treaty now under review, will serve by way of illustration.

'Article VII. There shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other, wherefore all hostilities both by sea and land shall then immediately cease: all prisoners on both sides shall be set at liberty, and his Britannic [3 U.S. 199, 252] Majesty shall, with all convenient speed, and without causing any destruction, or carrying away any negroes or other property of the American inhabitants, withdraw all his armies, garrisons and fleets from the said United States, and from every port, place and harbour within the same; leaving in all fortifications the American artillery that may be therein. And shall also order and cause all archives, records, deeds, and papers, belonging to any of the said States, or their citizens, which in the course of the war may have fallen into the hands of his officers, to be forthwith restored and delivered to the proper States and persons to whom they belong.' Would it be an objection on the part of his Britannic Majesty, that the state of things at the instant of the treaty is to be held legitimate, and any change to be made in it, requires an express specification? That the forts are not specified, and therefore not to be given up? The objection would be considered as futile and evasive. The answer would be, that there is no doubt, because the expressions are general, comprehend the forts, and are equal to an express specification. So in the present case, the universality of the terms are equal to a specification of every particular debt, or an enumeration of every creditor and debtor. It is the same thing as though they had been individually named. All the creditors on either side, without distinction, must have been contemplated by the parties in the fourth article. Almost every word, separately taken, is expressive of this idea, and when all the words are combined and taken together, they remove every particle of doubt. But if the class of British creditors, whose debtors have paid into the Loan Office of Virginia, are not comprehended in the fourth article, then they pass without redress, without notice, without so much as a recommendation in their favour. The thing is incredible. Why a distinction- why should the creditors, whose debtors paid into the Loan Office, be in a worse situation than the creditors, whose debtors did not thus pay? The traders, and others of this country, were largely indebted to the merchants of Great Britain. To provide for the payment of these debts, and give satisfaction to this class of subjects, must have been a matter of primary importance to the British ministry. This, doubtless, is at all times, and in all situations, an object of moment to a commercial country. The opulence, resources, and power of the British nation, may, in no small degree, be ascribed to its commerce; it is a nation of manufacturers and merchants. To protect their interests and provide for the payment of debts due to them, especially when those debts amounted to an immense sum, could not fail of arresting the attention, and calling forth the utmost exertions of the British cabinet. A measure of this kind, it is easy to perceive, would be pursued with unremitting [3 U.S. 199, 253] diligence and ardour; sacrifices would be made to ensure its success; and, perhaps, nothing short of extreme necessity would induce them to give it up. But, if the debts, which have been confiscated, or paid into loan offices, or treasuries, be not within the provision of the fourth article, then a numerous class of British merchants are passed over in silence, and not so much attended to as the loyalists, or Americans, who attached themselves to the cause of Britain during the war. Is it a supposable case, that the British negociators would have been more regardful of the interests of the loyalists than of their own merchants? That they would make a discrimination between merchants, when in a national and political view, and in the eye of justice, they were equally meritorious, and entitled to receive complete satisfaction for their debts? No line should be drawn between creditors unless it be found in the treaty. The treaty does not make it: the truth is, that none was intended; for, if intended, it would have been expressed. The indefinite and sweeping terms made use of by the parties, such as 'creditors on either side, no lawful impediment to the recovery of the full value in sterling money, of all debts heretofore contracted,' exclude the idea of any class of cases having been intended to be excepted, and explode the doctrine of constructive discrimination. The fourth article appears to me to come within the first general maxim of interpretation laid down by Vattel. 'It is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, when the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavour to elude it. If this dangerous method be once admitted, there will be no act which it will not render useless. Let the brightest light shine on all the parts of the piece, let it be expressed in terms the most clear and determinate; all this shall be of no use, if it be allowed to search for foreign reasons, in order to maintain what cannot be found in the sense it naturally presents.' Vatt. B. 2. ch. 17. s. 263.

To proceed, the construction on the part of the defendants excludes mutuality. The debts due from British subjects to American citizens were not confiscated, or sequestered or drawn into the public coffers. They were left untouched. Now, if all the British debtors be compelled to pay their American creditors, and a part only of the American debtors be compelled to pay their British creditors, there will not be that mutuality in the thing, which its nature and justice require. The rule in such case should work both ways: Whereas the other construction creates mutuality, and proceeds upon [3 U.S. 199, 254] indiscriminating principles. The former construction does violence to the letter and spirit of the instrument; the latter flows easily and naturally out of it.

It has been made a question, whether the confiscation of debts, which were contracted by individuals of the enemy in time of war, is authorised by the law of nations among civilized states? I shall not, however, controvert the position, that, by the rigour of the law of nations, debts of the description just mentioned, may be confiscated. This rule has by some been considered as a relict of barbarism; it is certainly a hard one, and cannot continue long among commercial nations; indeed, it ought not to have existed among any nations, and, perhaps, is generally exploded at the present day in Europe. Hear the language of Vattell

on this subject, B. 3. c. 5. s. 77. 'But at present, in regard to the advantage and safety of commerce, all the sovereigns of Europe have departed from this rigor. And as this custom has been generally received, he who should act contrary to it, would injure the public faith; for strangers trusted his subjects only from a firm persuasion, that the general custom would be observed. The state does not so much as touch the sums which it owes to the enemy. Every where, in case of war, funds credited to the public are exempt from confiscation, and seizure.' The Legislators of Virginia, who made the act, which has been pleaded in bar, lay down the doctrine relative to this point, in strong and unequivocal terms. For, they expressly declare, that the law and usages of nations require, that debts should not be confiscated. If the enemy should, in the first instance, direct a confiscation of debts, retaliation might in such case be a proper and justifiable measure. The truth is, that the confiscation of debts is at once unjust and impolitic; it destroys confidence, violates good faith, and injures the interests of commerce; it is also unproductive, and in most cases impracticable. Ingenious writers have endeavoured to defend the doctrine on the ground, that the confiscation of debts weakens the enemy and enriches ourselves. The first is not true, because remittances are seldom, if ever, made during a war, and the second generally proves unprofitable, when attempted to be carried into practice. The gain is, at most, temporary, and inconsiderable; whereas the injury is certain and incalculable, and the ignominy great and lasting. History furnishes a remarkable instance in support and illustration of the foregoing remarks. For, in the war that broke out between France and Spain in the year 1684, his Catholic Majesty endeavoured to seize the effects of the subjects of France in his kingdom; but the attempt proved [3 U.S. 199, 255] abortive, for not one Spanish agent or factor violated his trust, or betrayed his French principal or correspondent. If the payments, which have been made into the loan office, pursuant to the act of Virginia, should be scaled according to a subsequent act of that state, they would not, it is probable, amount to a very large sum. Other reasons in support of the doctrine have been assigned, namely, that the confiscation of debts operates as an indemnity for past losses, and a security against future injuries; but they do not appear to me to be more solid than those already mentioned. Confiscation of debts is considered a disreputable thing among civilized nations of the present day; and indeed nothing is more strongly evincive of this truth, than that it has gone into general dessuetude, and whenever put into practice, provision is made by the treaty, which terminates the war, for the mutual and complete restoration of contracts and payment of debts. I feel no hesitation in declaring, that it has always appeared to me to be incompatible with the principles of justice and policy, that contracts entered into by individuals of different nations, should be violated by their respective governments in consequence of national quarrels and hostilities. National differences should not affect private bargains. The confidence, both of an individual and national nature, on which the contracts were founded, ought to be preserved inviolate. Is not this the language of honesty and honor? Does not the sentiment correspond with the principles of justice, and the dictates of the moral sense? In short, is it not the result of right reason and natural equity? The relation, which the parties stood in to each other at the time of contracting these debts, ought not to pass without notice. The debts were contracted while the creditors and debtors were subjects of the same king, and children of the same family. They were made under the sanction of laws common to, and binding on, both. A revolution-war could not, like other wars, be foreseen or calculated upon. The thing was improbable. No one, at the time that the debts were contracted, had any idea of a severance or dismemberment of the empire, by which persons, who had been united under one system of civil polity, should be torn asunder, and become enemies for a time, and, perhaps, aliens forever. Contracts entered into in such a state of things ought to be sacredly regarded. Inviolability seems to be attached to them. Considering then the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted, we ought to take the expressions in this fourth article in their most extensive sense. We ought to admit of no comment, that will narrow and restrict their operation and [3 U.S. 199, 256] import. The construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign. For these reasons this clause in the treaty deserves the utmost latitude of exposition. The fourth article embraces all creditors, extends to all pre-existing debts, removes all lawful impediments, repeals the legislative act of Virginia, which has been pleaded in bar, and with regard to the creditor annuls every thing done under it. This article reinstates the parties; the creditor and debtor before the war, are creditor and debtor since; as they stood then, they stand now. To prevent mistakes, it is to be understood, that my argument embraces none but lawful impediments within the meaning of the treaty, such as legislative acts, and payments under them into loan offices and treasuries. An impediment created by law stands on different ground from an impediment created by the creditor. To conclude: I am of opinion, that the demurrer ought to have been sustained; and, of course, that the judgment rendered in the court below, is erroneous; and must be reversed.

Iredell, Justice*.

In delivering my opinion on this important case, I feel myself deeply affected by the awful situation in which I stand. The uncommon magnitude of the subject, its novelty, the high expectation it has excited, and the consequences with which a decision may be attended, have all impressed me with their fullest force. I have trembled left by an ill informed or precipitate opinion of mine, either the honour, the interest, or the safety of the United States should suffer or [3 U.S. 199, 257] be endangered on the one hand, or the just rights and proper security of any individual on the other. In endeavouring to form the opinion I shall now deliver, I am sure the great object of my heart has been to discover the true principles upon which a decision ought to be given, unbiassed by any other consideration than the most sacred regard to justice. Happy should I have thought myself, if I could as confidently have relied on a strength of abilities equal to the greatness of the occasion. The cause has been spoken to, at the bar, with a degree of ability equal to any occasion. However painfully I may at any time reflect on the inadequacy of my own talents, I shall as long as I live remember with pleasure and respect the arguments which I have heard on this case: they have discovered an ingenuity, a depth of investigation, and a power of reasoning fully equal to any thing I have ever witnessed, and some of them have been adorned with a splendor of eloquence surpassing what I have ever felt before. Fatigue has given way under its influence, and the heart has been warmed, while the understanding has been instructed. The action now before the court is an action of debt, brought by a British creditor against an American debtor, to recover upon a bond executed before the late war. To this action there are five pleas, substantially as follow. The 1st, a plea of payment, on which issue is joined, but not now before the court, and which is to be tried by a jury, in case judgment be given for the Plaintiff upon the legal questions arising on the other pleas, so as to entitle him to try the issue. The 2nd is a plea of a payment into the treasury of the State, of part of the debt, under an act of assembly of the

20th of October, 1777. The 3rd. plea is grounded on two acts of assembly: One of May 1779, under which it is alledged that the debt in question became forfeited to the State; the other of May 1782, which is relied on as a bar to the recovery. The former part of the plea I understand to be given up by the defendant's counsel, and certainly with great propriety, because debts are expressly excepted in the act it refers to. The 4th plea alledges a non-compliance with the treaty on the part of Great Britain, and, therefore, that the British creditor cannot now recover a benefit under the same treaty. It also alledges acts of hostility by Great Britain since the peace, as likewise forming a bar to the recovery of the Plaintiff, who is a British creditor. The 5th plea is, that this debt was absolutely annulled by the change of government. This also I understand to have [3 U.S. 199, 258] been given up in the course of the argument, and undoubtedly it is not tenable. The only pleas, therefore, for us to consider, are the second, part of the third, and the fourth. Every thing I have to say on that part of the 3rd, not relinquished, admitting the fullest operation of the act of 1782, as intending to affect British creditors themselves, as well as assignees, which does not appear to me to have formed any part of its object, will appear from my observations on the second plea; and, therefore, to prevent unnecessary repetition, I shall not consider it separately by itself. It seems proper to speak of the fourth plea first, because, if that can be maintained, it is altogether immaterial to consider either of the others. I am clearly of opinion, that the fourth plea is not maintainable. It is grounded on two allegations. 1st. The breach of the treaty by Great Britain, as alledged in the plea. 2nd. New acts of hostility on the part of that kingdom. 1. In regard to the first, I consider the law of nations to be decided as to the following position, viz: 'That if a treaty be broken by one of the contracting parties it becomes (in the expressive language of the law) not absolutely void, but voidable; and voidable, not at the option of any individual of the contracting country injured, however much he may be affected by it, but at the option of the sovereign power of that country, of which such individual is a member'. The authorities, I think, are full and decisive to that effect. Grotius, b. 2. c. 15. s. 15. ib. b. 3. c. 20. s. 35, 36, 37, 38. 2. Burl. p. 355. part 4. c. 14. in s. 8. Vattel, b. 4. c. 4. s. 54. The gentlemen for the defendant, taking hold of some particular expressions, without regarding the whole of these authorities, and considering the reason of them, have argued, that true, in the present instance (for example) Congress might have remitted the infraction, but not having done so, the Plaintiff is barred for the present, however he might be restored to the right, in case the infraction should hereafter be actually remitted. But to me it is very evident, that such a position is not maintainable, either by the authorities I have recited, or the reason of the thing. The words of Grotius are pointed and express to show, not that the treaty shall be reputed broken until a remission is actually pronounced by the injured party, but that it shall not be reputed as broken, until the injured party shall think proper actually to pronounce it broken; and it is remarkable that his [3 U.S. 199, 259] words to this effect, are calculated for the very purpose of removing any doubts which other more general expressions might occasion. His words are: 'When there is treachery on one side, it is certainly at the choice of the innocent party to let the peace subsist; as Scipio did formerly after many perfidious actions of the Carthagenians. Because no man, by doing contrary to his obligation, can thereby discharge himself from it. For though it is expressed, that by such a fact the peace shall be reputed as broken, yet this clause is to be understood only in favour of the innocent, if he thinks fit to make use of it.' Grotius. b. 3. c. 20. s. 38. The whole clause of Vattel is substantially to the same purpose; and, therefore, where in one part of the clause he says, 'the offended party may remit the infraction committed,' this must be understood, to make the whole consistent, a remission not arising from an express declaration, but from a tacit acquiescence in the breach. Otherwise, what becomes of the words? 'but if he chooses not to come to a rupture, the 'treaty remains valid and obligatory.' The treaty, therefore, must remain valid and obligatory, until the power, authorised to come to a rupture, does come to it. The same observations apply to Burlamaqui, who expresses himself more generally, but states substantially the same doctrine. His expression is, 'it is at the choice of the innocent 'party to let the peace subsist,' which certainly does not require a positive declaration that it shall subsist. This doctrine appears to me to be grounded on the highest reason. It is undoubtedly true, that each nation is considered as a moral person, and the welfare and interest of all the individuals of that nation, so far as they may be affected by its concerns with foreign nations, are in each country entrusted to some particular power authorised to negociate with them, or to speak the sense of the nation on any emergency. When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to the authority of his own, he may complain to that power in his own nation, which is entrusted with the sovereignty of it as to foreign negociations, and he will be entitled to all the redress which the nature of his case requires, and the situation of his own country will enable him to obtain. The people of the United States, in their present Constitution, have devolved on the President and Senate, the power of making treaties; and upon Congress, the power of declaring war. To one or other of these powers, in case of an infraction of a treaty that has been entered into with the United States, I apprehend application is to be made. [3 U.S. 199, 260] Upon such an application various important considerations would necessarily occur. 1. Whether the treaty was first violated on the part of the United States, or on that of the other contracting power? 2. Whether, if first violated by the latter, it was a violation in an important or an inconsiderable article; whether the violation was by design or accident, or owing to unforeseen obstacles; whether, in short, it was wholly or partially without excuse? 3. Whether, admitting it was either, it was a matter for which compensation could be made, or otherwise? 4. Whether the injury was of such a nature as to admit of negociation, or to require immediate satisfaction, peremptorily and without delay? 5. Whether, if the circumstances in all other cases justified it, it was adviseable, upon an extensive view and wise estimation of all the relative circumstances of the United States, to declare the treaty broken, and of course void: for though the party first breaking the treaty cannot make it absolutely void, but it is only voidable at the election of the injured party, yet when that election is made, by declaring the treaty void, I conceive it is totally so as to both parties, and that all rights enjoyed under the treaty are absolutely annulled, as if no stipulation had been made for them? These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a Court of Justice. Miserable and disgraceful indeed, would be the situation of the citizens of the United States, if they were obliged to comply with a treaty on their part, and had no means of redress for a non-compliance by the other contracting power. But they have, and the law of nations points out the remedy. The remedy depends on the discretion and sense of duty of their own government. This plea is therefore defective, so far as concerns the breach of the treaty, not because this court hath no cognizance of a breach of treaty, but because by the law of nations, we have no authority upon any information or concessions of any individuals, to consider or declare it broken; but our judgment must be grounded on the solemn declaration of Congress alone, (to whom, I conceive, the authority is entrusted) given for the very purpose of vacating the treaty on the principles I have stated. The paper transmitted by order of Congress, to the Executive of Virginia, on the subject of a violation complained of on

the part of the British, certainly cannot amount to so much, especially as there is another paper of theirs in the year 1787, transmitted to the different States, complaining of violations [3 U.S. 199, 261] on our part. They have pronounced no solemn decision, which committed the first infraction; much less have they declared that in consequence of the infraction on the part of the British, they chose that the treaty should be annulled. But it is said that a declaration by Congress, that the treaty was broken by Great Britain, would be exercising a judicial power, which by the Constitution in all cases of treaties is devolved on the Judges. Surely such a thing was never in the contemplation of the Constitution. If it was, a method is still wanting by which it could be executed; for, if we are to declare, whether Great Britain or the United States, have violated a treaty, we ought to have some way of bringing both the parties before us. The method contended for by the defendant's counsel is very ill suited to another part of their doctrine, which is certainly right, that a nation is a moral person, and that the act of a sovereign power to whom its foreign concerns are entrusted, is the act of every individual of that nation, because he represents the whole. But in this case, the King of Great Britain does not act on behalf of the plaintiff, his subject, and the United States on behalf of the defendants, their citizens; but the plaintiff is alledged to represent the sovereignty of the United States, a dignity for aught I know, of which they may be respectively worthy, but which certainly does not either politically or judicially belong to them. The Judiciary is undoubtedly to determine in all cases in law and equity, coming before them concerning treaties. The subject of treaties, Gentlemen truly say, is to be determined by the law of nations. It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. If Congress, therefore, (who, I conceive, alone have such authority under our Government) shall make such a declaration, in any case like the present, I shall deem it my duty to regard the treaty as void, and then to forbear any share in executing it as a Judge. But the same law of nations tells me, that until that declaration be made, I must regard it (in the language of the law) valid and obligatory. The admission of the fact, stated in the plea, cannot be taken as an admission that the fact is strictly true, because the plaintiff had no way of avoiding the plea but by a demurrer, whether it was true or not. If it was well pleaded, it is an admission of the entire truth, but not otherwise. For the reasons I have given, it is clear to me that it is not well pleaded. [3 U.S. 199, 262] 2. In regard to the second branch of this plea, new acts of hostility, if meant as constituting a breach, (which I don't understand it to be) the observations I have already made will equally apply to this part of the plea. If meant as a proof, that a war in fact, tho' not in name subsists, and therefore that the plaintiff is an alien enemy, the same observations will apply still more forcibly. We must receive a declaration, that we are in a state of war, from that part of the sovereignty of the union to which that important subject is entrusted. We certainly want some better information of the fact than we have at present. However, this point seems so clear, that the defendant's counsel very faintly attempted to maintain this idea of the case. I conclude, therefore, for these reasons, that there is nothing in the fourth plea which is a bar to the plaintiff's action. The great difficulty of the case arises from the second plea. This is the only part of the case, about which I have, from the beginning, entertained any doubt. And I must confess, I have had very great doubts, indeed, on this subject. My opinion has varied more than once in regard to it. I have endeavoured to come to a conclusion by analysing it in all its parts; and the result of my investigation has been, according to the best judgment I am capable of forming, upon the most deliberate examination, that the plea is supportable. My reasons for this opinion, I must give at considerable length, in order to show it is not a rash one, and that Gentlemen may be enabled in the future progress of this case, more easily to detect my errors, if I should have committed any. I will divide the consideration of the plea into two points: 1. Whether the plea would have been a bar, if this case had stood independently of the treaty? 2. Whether the treaty destroys the operation of the plea? In considering the first point, I shall, for the greater perspicuity, consider it under the following heads: 1. Whether the Legislature of this State had a right, agreeable to the law of nations, to confiscate the debt in question? 2. Whether, admitting that the Legislature had not a right, agreeably to the law of nations, to confiscate the debt, yet if they in fact did so, it would not, while it remained unrepealed by any subsequent, sufficient authority, have been valid and obligatory within the limits of the State, so as to bar any suit for the recovery of the debt? 3. Whether, if it shall be considered that the Legislature did not wholly confiscate the debt, so as totally to extinguish all right in the creditor, (as I apprehend they clearly did not) but only sequester it under the peculiar circumstances stated in the act, the payment in question, under the authority of the act, did not, at that time at least, wholly exonerate the debtor? [3 U.S. 199, 263] 1. It being clear that there was no absolute confiscation in this case, I shall not give a conclusive opinion upon the right; but as I think it highly probable such a right did exist, some observations on that subject will naturally and properly lead to those upon which my opinion, as to the validity of the payments, is ultimately founded. For this reason, and this reason only, I discuss the present question.

Whatever doubt might have been entertained, by reasoning on the particular examples of Grotius and Puffendorf, Bynkershoek, (who, I believe, is alone, a very great authority) is full and decisive in the very point as to a general right of confiscating debts of an enemy. His doctrine I take to be this, that the law of nations authorises it, unless in former treaties between the belligerent powers, there be particular stipulations to the contrary. Vattel recognises the general right, but states a prevailing custom in Europe to the contrary; in consequence of which he says, 'As this custom has been generally observed, he who would act contrary to it would injure the public faith; for strangers trusted his subjects only from a firm persuasion that the general custom would be observed.' Vattel mentions the fact, but does not state the origin of the fact; which, I think, it is not improbable, may have arisen in consequence of particular stipulations, as mentioned by Bynkershoek; very few of the civilized nations of Europe, not having treaties with each other.

Whether this customary law (admitting the principle to prevail by custom only) was binding on the American States, during the late war, in respect to Great Britain at least, may be a question of considerable doubt. There were particular circumstances in the relative situation of the two countries, which might possibly exempt this from the force of such a custom, could it be supposed that when this country became an independent nation, this customary law immediately attached upon it. However this country might have been considered bound to observe such a law in regard to any nation recognizing its independence, had we been unfortunately at war with such, and who observed it on her part, (for, undoubtedly, a breach on one side would justify a non-observance by the other) it did not necessarily follow, that the people of this country were bound to observe it to a nation, which not only did not recognize, but fought to destroy their very existence as an independent people, considering them in no other light than as traitors, whose lives and fortunes were forfeited to

the law. The people of this country literally fought pro aris & focis; and, therefore, means of defence, which, when inferior objects were in view, might not be strictly justifiable, might in such an extremity become so, on the great principle, on which the laws of war are [3 U.S. 199, 264] founded, self preservation; an object that may be attained by any means, not inconsistent with the eternal and immutable rules of moral obligation.

The principles of the common law of England, as appears from a case I showed to the bar, (that in Sir Thomas Parker's Reports, p. 267. the Attorney General against Weeden and Shales) do undoubtedly recognize the forfeiture of a chose in action due to an enemy. At the utmost it only requires, that an inquisition should be completed during the war, so as, by ascertaining the fact, fully to establish the title of the crown. I can see no reason why that principle of the common law should not obtain here. If so, then independent of any act of legislation whatever, an inquisition completed during the war, finding the fact, would have vested the title to the debt in question absolutely in the State, unless this debt can be distinguished from any other chose in action. Such a distinction has been attempted: 1st, Because this debt was due before the war. 2nd, Because the State had not possession of the bond. To these objections, I think, easy answers may be given. 1st, The right acquired by war, (detached from custom, which I am not now considering, or any express stipulation, if there be such) depends on the power of seizing the enemy's effects. It is not grounded on any antecedent claim of property, but on the contrary, the property is admitted to be the enemy's, in the very act of seizing it. Its sole justification is, that being forced into a state of hostility, by an injury for which no satisfaction could be obtained in a peaceable manner, reprisals may be made use of, as a means to compel justice to be done, or to enable the injured party to obtain satisfaction for itself. Such a power, from its nature (being grounded on necessity only) seems incapable of limitation by any general rule, and if conscientiously used (of which each nation must judge for itself) the principle applies as well to property, which was in the country before the war began, as to any other which may be accident come into its possession. The same objection would apply to the seizure of any other property of an enemy, which had been in the country before the war began, as of an incorporeal right. The first resolution in the case I cited is, as to choses in action generally, tho' the chose in action there in question, was, in fact, one which had accrued during the war. 2nd, The objection from the State not having possession of the bond, (though countenanced by one or two writers) I think, is also, susceptible of a satisfactory answer. The bond does not create the debt, but is only evidence of it. Possession of it alone can give no right. A robber, or an individual coming to the possession of it by accident, acquires no more title to the money than he had before. The law is so even as to promissory notes payable to bearer, if the fact can be [3 U.S. 199, 265] made to appear. If a bond be lost, equity has long since afforded a remedy. In a modern case in a court of law, a profert of a deed has been dispensed with, upon a special declaration stating the loss of it*. It was while the possession and the right were confounded, that this objection was thought of weight. It is observable also, that it would create an idle and a trifling distinction between debts due by specialty, and simple contract debts, a distinction that might be supported by ingenuity, but certainly not by reason. And it would found harsh, to say that simple contract debts should be forfeitable, if the witnesses were in the country, but otherwise not. Now, if the forfeiture of the debt in question, could have been effected at common law, by an inquisition completed during the war, I can see no reason why the Legislature could not, with equal propriety as to the right, have effected the same object substantially in any other mode. The proceeding, in each case, must be ex parte, and the object affected can be conclusively bound by neither, if his case did not come within the principles of the law. This I argue, upon a supposition that the customary law of nations, was not binding here, at least in this instance. That, however, is a point of some delicacy, and not necessary for me now to determine, because, 2nd, I am of opinion, that admitting that the Legislature had not strictly a right, agreeably to the law of nations, to confiscate the debt in question; yet, if they in fact did so, it would while it remained unimpeached by any subsequent sufficient authority, have been valid and obligatory within the limits of the State, so as to bar any suit for the recovery of the debt.

In this opinion I have the misfortune to differ from a very high authority*, for which I have the greatest respect. But however painful it may be, to differ from gentlemen, whose superior abilities and learning I readily acknowledge, I am under the indispensable necessity of judging according to the best lights of my own understanding, assisted by all the information I can acquire. I confess, therefore, that I agree entirely with the Defendant's counsel in thinking, that the acts of the Legislature of the State, in regard to the subject in question, so far as they were conformable to the Constitution of the State, and not in violation of any article of the confederation (where that was concerned) were absolutely binding de facto, and that if, in respect to foreign nations, or any individual belonging to them, they were not strictly warranted by the law of nations, which ought [3 U.S. 199, 266] to have been their guide, the acts were not for that reason void, but the State was answerable to the United States, for a violation of the law of nations, which the nation injured might complain of to the sovereignty of the Union. There is no doubt that an act of Parliament in Great Britain, would bind in its own country in every possible case in which the Legislature thought proper to act. Blackstone** is precise as to that point, even in cases manifestly unjust, if the words of the law are plain and unequivocal. In this country, thank God, a less arbitrary principle prevails. The power of the Legislatures is limited; of the State Legislatures by their own State Constitutions, and that of the United States; of the Legislature of the Union by the Constitution of the Union. Beyond these limitations, I have no doubt, their acts are void, because they are not warranted by the authority given. But within them, I think, they are in all cases obligatory in the country subject to their own immediate jurisdiction, because in such cases the Legislatures only exercise a discretion expressly confided to them by the constitution of their country, and for the abuse of which, (if it should be abused) they alone are accountable. It is a discretion no more controlable (as I conceive) by a Court of Justice, than a judicial determination is by them, neither department having any right to encroach on the exclusive province of the other, in order to rectify any error in principle, which it may suppose the other has committed. It is sufficient for each to take care that it commits no error of its own. As to a distinction between a State Court and this Court, in this respect, I do, for my part, disclaim, according to my present sentiments, any authority to give a different decision in any case whatsoever from such as a State Court would be competent to give under the same circumstances. I have no conception that this court is in the nature of a foreign jurisdiction. The thing itself would be as improper as it would be odious, in cases where acts of the State have a concurrent jurisdiction with it.

With regard to the exception I speak of, no one has suggested, that the act of October, 1777, was in any manner inconsistent with the Constitution of the state; and at that time the articles of Confederation were not in force; but if they had been, I think there is no colour for alledging any inconsistency with them, since Congress could have passed no act on this subject, but if they had wished for an act, must have recommended to the State Legislatures to pass it. And the very nature of a recommendation implies, that the party recommending cannot, but the party to whom the recommendation is made, can do the thing recommended. [3 U.S. 199, 267] The third question under the present head, that I proposed, was this: 'Whether, if it shall be considered that the Legislature did not absolutely confiscate the debt, so as totally to extinguish all right in the creditor, (as I apprehend they clearly did not) but only sequestered it under the peculiar circumstances stated in the act; the payment in question, under the authority of the act, did not, at that time at least, wholly exonerate the debtor.'

The words of the enacting clause concerning this subject, are as follow: 'That it shall and may be lawful for any citizen of this commonwealth, owing money to a subject of Great Britain, to pay the same, or any part thereof, from time to time, as he shall think fit, into the said loan office, taking thereout a certificate for the said sum, in the name of the creditor, with an indorsement under the hand of the commissioner of the said office, expressing the name of the payer, and shall deliver such certificate to the Governor and Council, whose receipt shall discharge him from so much of the debt. And the Governor and Council shall in like manner say before the General Assembly once in every year, an account of these certificates, specifying the names of the persons, by and for whom they were paid, and shall see to the safekeeping of the same, subject to the future direction of the Legislature.'

We are too apt, in estimating a law passed at a remote period, to combine in our consideration, all the subsequent events which have had an influence upon it, instead of confining ourselves (which we ought to do) to the existing circumstances at the time of its passing. Let us, however, recollect, that at this period no British creditor could institute a suit for the recovery of his debt, as the war constituted him an alien enemy, and therefore his remedy stood suspended at common law, so that he ran the risque of the entire loss of every debt, where his debtor proved insolvent during the war. Consequently, it would, in his own estimation, have been doing him a considerable service, that the state should authorise a receipt on his behalf, had there been no other currency in circulation than gold or silver. It would have been placing him in a state of security, greater than he had any reason to expect. The extremity of the public situation, rendered paper money unavoidable, but this was an evil to which all American as well as British creditors were liable, and the former (as we all know) were compelled, upon a tender, under pain of being deemed enemies of their country, to receive it at its nominal value. It was natural (and perhaps) not altogether, if at all, unjust, if a man had 100 due to him from B. and he himself owed C. 100, and B. paid him the 100, though in depreciated [3 U.S. 199, 268] money, that he should immediately carry it to his creditor. Many, I have no doubt, paid their creditors upon these plain grounds of retribution, though others undoubtedly (for no government can make all men honest) took most scandalous advantages of depreciation in its advanced periods. When this law was passed, the depreciation, I believe, was little felt, and not at all acknowledged. De minimis non curat lex, is an old law maxim. I may parody it on this occasion, by saying De minimis non curat libertas. When life, liberty, property, every thing dear to man was at stake, few could have coldness of heart enough to watch the then scarcely perceptible gradation in the value of money. In this situation the Legislature of the state passed the law in question. It did all that the then situation of affairs would admit of, even for the benefit of the British creditors themselves, and it put it in the power of American creditors, who were compelled to receive the existing currency, to pay their own debts with it. The depositing of money in the loan office, was at that time by many, even in America itself, thought an eligible method of securing it, and with some foreigners, it was a favorite object of speculation. I know, myself, that the proceeds of some very valuable cargoes were ordered to be so applied, and probably there were such instances of which I knew nothing. The increased difficulties of the American war, in a great degree, disappointed the intentions of the original law, but still, British and American creditors were placed on the same footing, so far as it was in the power of the Legislature to effect it.

I thought it proper to say thus much, as introductory to the observations I shall make on the legal operation of those payments.

1. If the state de jure, according to the law of nations (which I strongly incline to think) had a right wholly to confiscate this debt, they had undoubtedly a right to proceed a partial way towards it by receiving the money and discharging the debtor, substituting itself in his place. We are to be governed by things, and not names, and, consequently, if the state had a right to say to a debtor 'We confiscate the right of your creditor, and you must pay your debt to us, and not to him,' they had a right to say 'We do not chuse for the present, absolutely to confiscate this debt, although we have the power so to do, but if you will pay the money to us, you shall be as completely discharged as if we did.' In this point of view, I think there can be no doubt but that a discharge would, under such circumstances, have as completely extinguished the right of the creditor as to the debtor, as if, in case no war had intervened, and therefore no right had accrued under it to the states, the debtor had actually paid the money [3 U.S. 199, 269] to the order of the creditor, and received a discharge from himself.

2. For the reasons I have before given, I think a confiscation, either whole or partial, or any less exercise of that power de facto, though not de jure, would in this state have been perfectly binding, and in legal contemplation as effectual to bar a recovery, as if the law of nations had been strictly and unquestionably pursued.

3. I believe there can be no doubt, but that according to the law of nations, even on the most modern notions of it, a sequestration merely for the purpose of recovering the debts, and preventing the remittance of them to the enemy, and thereby strengthening him, and weakening the government, would be allowable, and if so, surely it follows, as a matter of course, (perhaps it would follow without a solemn declaration) that when, in virtue of any such act, the money was paid to the government, the debtor was wholly discharged, and the government, if it thought proper, not to proceed to confiscation afterwards, became itself liable.

The case cited from the Law of Evidence,* I think is an authority substantially in point, to show the complete discharge of the debtor.

'In debt upon a lease, the Defendant pleaded payment, and in evidence showed, he paid it to sequestrators of the commonwealth, the Plaintiff being a delinquent; and it was ruled this was good payment to prove the issue, which was a payment to the Plaintiff himself.' Clayton, 129. Anonymous Law of Evidence, (Edit of 1744) p. 196. c. 9. c. 11.

This case is certainly very strong, for it was not deemed necessary to plead it in bar, but it was admitted in evidence, upon a plea that he paid the money to the Plaintiff himself. It does not appear whether this action was tried under the commonwealth, or after the restoration. If under the former, it is more parallel to the present action. If it was tried after the restoration, it is a still stronger case, for it showed that courts of justice thought themselves bound to protect individuals, who acted under laws of a government they deemed an usurpation, and on all occasions treated with contempt.k Besides an objection, which I shall notice presently, I can imagine but one real difference between that case and the one before us; and that is, that in England the payment was compelled, here [3 U.S. 199, 270] it was voluntary. I once thought that circumstance of weight, but on reflection, I consider the public faith equally pledged in one case as in the other; that the authority exercised in both is the same, and that it not only would be unjust in itself, but of dangerous example, to tell men that they should be protected under a compulsory obedience to government, but not upon a cheerful submission to it.

4. My observations as to the paper money, which the necessities of this country unfortunately constrained us to use so long, had no other tendency than to show the circumstances of the fact as they really existed. As a judge, I conceive myself bound to say, that that makes no difference as to the right. The competency of such acts at that time was unquestionable. Their justice depended on the degree of necessity which gave rise to them. A payment in paper money, then a legal tender, I must consider as complete and effectual a payment, at that time, as payment in gold or silver. Such was the law of the country! A law which severe necessity dictated! and by which, in the course of the war, in which many sacrifices became unavoidable, many thousand American citizens, as well as many British merchants, suffered. It is the lot of our nature to experience many evils for which we can find no remedy, and therefore nothing can be more fallacious than in any thing of a general nature, to expect perfect exactness.

For these reasons, I am clearly of opinion, that under the act of sequestration, and the payment and discharge, the discharge will be a complete bar in the present case, unless there be something in the Treaty of Peace to revive the right of the creditor against the defendant, so as to disable the latter from availing himself of the payment into the treasury, in bar to the present action.

The operation of that Treaty comes, therefore, now to be considered. None can reverence the obligation of treaties more than I do. The peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. If ever any people on account of the importance of a treaty, were under additional obligations to observe it, the people of the United States surely are to observe the Treaty in question. It gave peace to our country, after a war attended with many calamities, and, in some of its periods, presenting a most melancholy prospect. It insured, so far as peace could insure them, the freest forms of government, and the greatest share of individual liberty, of which, perhaps, the world had seen any example. It presented boundless views of future happiness and greatness, which almost overpower the imagination, and which, I trust, will not be altogether [3 U.S. 199, 271] unrealized: The means are in our power; wisdom and virtue are alone required to avail ourselves of them. Such was the peace which was procured by the Treaty now in question a treaty which, when it shall be fully executed in all its parts, on both sides, future generations will look up to with gratitude and admiration, and with no small degree of fervour towards those who had an active share in procuring it. In proceeding to examine the treaty with these sentiments, it may well be imagined I do it with a reverential and sacred awe, left by any misconstruction of mine, I should weaken any one of its provisions. The question now is, whether, under this treaty, the payment into the Treasury is a bar to so much of the Plaintiff's claim, as comprehends money to that amount? I shall examine this question under two divisions: 1st. Whether it would have been a bar, as the law existed, after the ratification of the treaty, and previous to the passing of the present Constitution of the United States, even if the words of the treaty must be construed to comprehend such a case. 2nd. Whether, under that Constitution, it can now be considered as a bar. My opinion, I confess, as to the first question, is, that if the treaty had plainly comprehended such cases, the Plaintiff could not have recovered in a Court of Justice in this State, as the law stood, previous to the ratification of the present Constitution of the United States. I feel, as I ought to do, great diffidence, when I am under the necessity, in the execution of my duty as a Judge, of differing from the opinions of those entitled from superior talents, and high authority, to my utmost respect. I am compelled to do so in the present instance, but I shall, at the same time, assign my reasons for my opinion, and if, in the future course of this great cause, I can be convinced that in this, or in any other, instance, I have committed an error, I shall most cheerfully acknowledge it. The opinion I have long entertained, and still do entertain, in regard to the operation of the fourth article is, that the stipulation in favour of creditors, so as to enable them to bring suits, and recover the full value of their debts, could not at that time be carried into effect in any other manner, than by a repeal of the statutes of the different States, constituting the impediments to their recovery, and the passing of such other acts as might be necessary to give the recovery entire efficacy, in execution of the treaty. I consider a treaty, (speaking generally, independent of the particular provisions on the subject, in our present Constitution, [3 U.S. 199, 272] the effect of which I shall afterwards observe upon) as a solemn promise by the whole nation, that such and such things shall be done, or that such and such rights shall be enjoyed. I think the distinction taken by the Plaintiff's counsel as to stipulations in the treaty, executed or executory, will enable me to illustrate my meaning, by considering various stipulations in the treaty in question. 1st. I will consider what may be deemed executed articles. In this class I would place, the acknowledgement of independence in the first article; the permission to fish on the Banks in the third; the acknowledgement of the right to navigate the Mississippi in the eighth. These I call executed, because, from the nature of them, they require no further act to be done, 2nd. The executory (so far as they concern our part in the execution) I would place in three classes. Those which concern either, 1st, the Legislative Authority. 2nd. The Executive. 3rd. The Judicial. The fourth article in question, I consider to be a provision, the purpose of which could only be effected by the Legislative authority; because when a nation promises to do a thing, it is to be understood, that this promise is to be carried into execution, in the manner which the Constitution of that nation prescribes. When, therefore, a treaty

stipulates for any thing of a legislative nature, the manner of giving effect to this stipulation is by that power which possesses the Legislative authority, and which consequently is authorized to prescribe laws to the people for their obedience, passing such laws as the public obligation requires. Laws are always seen, and through that medium people know what they have to do. Treaties are not always seen. Some articles (being what are called secret articles) the public never see. The present Constitution of the United States, affords the first instance of any government, which, by saying, treaties should be the supreme law of the land, made it indispensable that they should be published for the information of all. At the same time I admit, that a treaty, when executed pursuant to full power, is valid and obligatory, in point of moral obligation, on all, as well on the Legislative, Executive, and Judicial Departments, (so far as the authority of either extends, which in regard to the last, must, in this respect, be very limited) as on every individual of the nation, unconnected officially with either; because it is a promise in effect by the whole nation to another nation, and if not in fact complied with, unless there be valid reasons for non- compliance, the public faith is violated. I have mentioned this great article which concerns the Legislative [3 U.S. 199, 273] department: Let me now, by way of further illustration, consider one which concerns the Executive.

It is stipulated in one part of this treaty, 'That all prisoners on both sides shall be set at liberty.' I very much doubt, whether the Commander in Chief, without orders from Congress (then possessing the supreme executive authority of the Union) could have been justified in releasing such prisoners as he had then in custody, after the ratification. Certainly no inferior officer, in whose actual care they were, could, without an order directly or indirectly from the Commander in Chief: And yet, I can see no reason, if a treaty is to be considered as operating de facto, by superior authority, notwithstanding any impediment arising from laws then in being, why the rigour of the treaty, which in that instance is said to be uncontroulable, should not be so in every other. If Legislative authority is superseded, why not Executive? Surely the former is not less sacred than the latter.

In like manner as to the judicial. It is stipulated in the sixth article, 'That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for, or by reason of any part, which he or they may have taken in the present war: and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty, or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced, be discontinued.' I apprehend this article, so far as it respected the release of prisoners confined, could only be executed by an order from the Judges of the Court, having judicial authority, in the cases in question, in consequence either of an actual alteration in the law, by the Legislature, in conformity to the treaty, (where that was necessary); or, of a particular pardon by the Executive; and that if a Jailor, merely because the treaty was ratified, and he found this article in it, had set all such prisoners at liberty, he would have been guilty of an escape.

This reasoning, in my opinion, derives considerable weight from the practice in Great Britain.

The King of Great Britain certainly represents the sovereignty of the whole nation, as to foreign negociations, as completely as the Congress of the United States ever represented the sovereignty of the Union, in that particular. His power, as to declaring war and making peace, is as unlimited as the respective authorities for those purposes in the United States. The whole nation of Great Britain speaks as effectually, and as completely through him, as all the people of the United States can now speak through Congress, as to a declaration of [3 U.S. 199, 274] war, or through the President and Senate as to making peace; and of course, as they ever did through Congress, under the old articles of confederation, the power certainly not being lessened. The law of nations equally applies to his treaties on behalf of Great Britain, as it can apply to any treaty made on behalf of the United States. Yet, I believe it is an invariable practice in that country, when the King makes any stipulation of a legislative nature, that it is carried into effect by an act of Parliament. The Parliament is considered as bound, upon a principle of moral obligation, to preserve the public faith, pledged by the treaty, by passing such laws as its obligation requires; but until such laws are passed, the system of law, entitled to actual obedience, remains de facto, as before. I doubt not, if my time had admitted of a full search, and I could have had access to the proper books for information, that I could find many instances of this. I will, however, mention one, which I have been able to procure here. It is a transaction of this nature, so late as the commercial treaty between Great Britain and France, in 1786. The information I derive is from the Annual Registers of 1786 and 1787, which I suppose, as to this point, are correct.

One article of the treaty was in these words:

> 'The wines of France, imported directly from France to Great Britain, shall, in no case, pay any higher duties than those which the wines of Portugal now pay.'

This treaty was signed at Versailles, the 26th of September, 1786.

On the 24th of January, 1787, the King met his Parliament, and among other things, informed the two houses, 'That he had concluded a treaty of commerce with the French King, and had ordered a copy of it to be laid before them. He recommended, as the first object of their deliberations, the necessary measures for carrying it into effect; and expressed his trust, that they would find the provisions, contained in it, to be calculated for the encouragement of industry, and the extension of lawful commerce in both countries; and by promoting a beneficial intercourse between their respective inhabitants, likely to give additional permanency to the blessings of peace.'

On the 15th of February, the House of Commons, being in a committee of the whole house, Mr. Pitt, the principal Minister of the Crown, moved the following resolution:

> 'That the wines of France be imported into this country upon as low duties, as the present duties paid on the importation of Portugal wines.'

I have not had time to examine them all, but, I doubt not, it will be found, on inspection, that there was not a single provision [3 U.S. 199, 275] in the treaty, inconsistent with former parliamentary regulations, but Parliament acted upon it by a new law, calculated to give it effect.

The following quotation, (which is a literal one) I think, is very much to the purpose:

> 'On the Monday following, the report of the committee, upon the commercial treaty, was brought up, and, on the usual motion being made, that the house do agree to the same, notice was taken of the omission of the mention of Ireland, both in the treaty and the Tariff; and, it was asked, whether or no she was understood to be included in it? To this question Mr. Pitt replied, That Ireland was undoubtedly entitled to all the benefits of the treaty; but it was entirely at her own option, whether she would choose to avail herself of those advantages; for it was only to be done by her passing such laws as should put the Tariff on the same footing in that country as it was stipulated should be done in this. Had the adoption of the treaty by Ireland, been a stipulation necessary to be performed before it could be finally concluded on in this country, then this country would have been deprived of all the benefits resulting from it in the event of Ireland's refusal.'

Now it is observable, that in speaking of this Tariff, in the treaty, the King of Great Britain does not promise, that the Parliament shall pass laws to such an effect; but the language is thus:

> 'The two high contracting parties have thought proper to settle the duties on certain goods and merchandises, in order to fix invariably, the footing on which the trade therein shall be established between the two nations. In consequence of which, they have agreed upon the following Tariff, etc.' viz.

In another part, the King of Great Britain says,

> 'His Britannic Majesty reserves the right of countervailing by additional duties on the undermentioned merchandises, the internal duties actually imposed upon the manufactures, or the import duties which are charged on the raw materials; namely, on all linens or cottons, stained or painted, on beer, glass-ware, plate-glass, and iron.'

Here is no mention of the Parliament, and yet, no man living will say that a bare proclamation of the King, upon the ground of the treaty, would be an authority for the levying of any duties whatever; but it must be done in the constitutional mode, by act of parliament, which affords an additional proof, that where any thing of a legislative nature is in contemplation, it is constantly implied and understood, (without express words) that it can alone be effected by the medium of the legislative authority. [3 U.S. 199, 276] That this practice I have noticed is not an occasional one, but has been constantly observed, I think is highly probable from this circumstance; that if treaties were considered in that country as ipso facto repealing all laws inconsistent with them, and imposing new ones, they ought to be bound up with the statutes at large, (which they never have been) otherwise the publication would be at least incomplete, if not deceitful.

These examples from Great Britain I consider of very high authority, as they are taken from a kingdom equally bound by the law of nations as we are; possessing a mixed form of government as we do; and, so far as common principles of legislation are concerned, being the very country from which we derive the rudiments of our legal ideas.

But I must admit that there is also a very high authority, and to which we naturally should be more partial, against this construction. It is the authority of the Congress of the United States in the year 1787. It is an authority derived from an unanimous opinion of that truly respectable body, conveyed in a circular letter from Congress to the different States on this very subject. I bow with proper deference to that great authority: But I should be unworthy of the high station I hold, if I did not speak my real sentiments as a judge, uninfluenced by any authority whatsoever. It is certain, that in this particular, Congress were not exercising a judicial power; and, therefore, the opinion is not conclusive on any court of justice. I feel, however some consolation in differing from an opinion for which so much respect must, and ought to be entertained, by reflecting that though this was the unanimous opinion of Congress, it was not the unanimous opinion of the people of the United States. So far from it, that I believe no suit was ever maintained in any court in the United States, merely on the footing of the treaty when an act of the legislature stood in the way. It was to remove the obstacle arising from such an opinion, that Congress recommended the repeal of all acts inconsistent with the due execution of the treaty. And I must with due submission say, that in my opinion without such a repeal, no British creditor could have maintained a suit in virtue of the treaty, where any legislative impediment existed, until the present constitution of the United States was formed.

2nd. The article in the constitution concerning treaties I have always considered, and do now consider, was in consequence of the conflict of opinions I have mentioned on the subject of the treaty in question. It was found in this instance, as in many others, that when thirteen different legislatures were necessary to act in unison on many occasions, it was in vain to expect that they would always agree to act as Congress might think it their duty to require. Requisitions formerly [3 U.S. 199, 277] were made binding in point of moral obligation, (so far as the amount of money was concerned, of which Congress was the constitutional judge,) but the right and the power being separated, it was found often impracticable to make them act in conjunction. To obviate this difficulty, which every one knows had been the means of greatly distressing the union, and injuring its public credit, a power was given to the Representatives of the whole union to raise taxes by their own authority for the good of the whole. Similar embarrassments had been found about the treaty. This was binding in moral obligation, but could not be constitutionally carried into effect (at least in the opinion of many,) so far as acts of legislation then in being constituted an impediment, but by a repeal. The extreme inconveniencies felt from such a system dictated the remedy which the constitution has now provided, 'that all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and that the judges in every State shall be

bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.' Under this Constitution therefore, so far as a treaty constitutionally is binding, upon principles of moral obligation, it is also by the vigour of its own authority to be executed in fact. It would not otherwise be the supreme law in the new sense provided for, and it was so before in a moral sense.

The provision extends to subsisting as well as to future treaties. I consider, therefore, that when this constitution was ratified, the case as to the treaty in question stood upon the same footing, as if every act constituting an impediment to a creditor's recovery had been expressly repealed, and any further act passed, which the public obligation had before required, if a repeal alone would not have been sufficient.

Before I go to the consideration of the words of the treaty itself, I think it material to say a few words as to the operation which an actual repeal would have had.

I believe no one will doubt, that every thing done under the act while in existence, so far as private rights at least were concerned, would have been unaffected by the repeal. If a statute requires a will of lands to be executed in the presence of two witnesses; and a will is actually executed in that manner, and the statute is afterwards repealed, and three witnesses are made necessary, the will executed in the presence of two others, when the former statute was in being, would be undoubtedly good; and if I am not mistaken, a will made according to a law in being has been held good, even though the devisor died after an alteration of it. Of this, however, I am not sure; but the general position, I imagine, will not be questioned. [3 U.S. 199, 278] Let us now see the words of the treaty.

They are these:

> 'It is agreed, that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.'

The meaning of this provision may perhaps be better considered by an analysation of its parts, so far as they concern the question before us.

1. Creditors There can be no creditor without two corelatives, a debtor and a debt.

Prima facie, therefore, if a debtor has been discharged, he is not the person whom any other person can sue as a creditor. This probably may be fairly applied to the present Defendant, who as a debtor was discharged by legal authority.

With regard to the debt, that in the present instance was not extinguished even by the act of the State, because the right of the creditor to the money was not taken away.

The debt, therefore, remains but not from the same debtor. The state may be considered as substituting itself in some measure in the place of the debtor. The full effect of that substitution, I am not now to consider, nor would it be proper for me at present to give an opinion upon it. The question is not, whether the creditor is entitled to his money, or in what manner, but whether he is entitled to recover it against the present Defendant.

2. No lawful impediment. [278-Continued.]

These words must be construed as relative to the former, for the whole clause must be taken together. Therefore, where there are a creditor and a debtor, there is to be no lawful impediment to the former recovering against the latter.

If the present Defendant be not a debtor to the Plaintiff, how can the treaty operate as against him?

The words 'lawful impediment,' may admit of two senses.

One 'any lawful impediment whatsoever arising from any act done to the prejudice of a creditor's right during the war.' I add that restriction 'during the war,' because the rules of construction as to treaties, must narrow the words as to the object, the war, the affairs of which the Treaty of Peace was intended to operate upon.

Or, 'any impediment arising from any law then in being, or thereafter to be passed, to the prejudice of a creditor's right.'

The latter, I think, is not an unnatural construction, and would give the words great operation, and I think is to be preferred to the former, for the following reasons:

1. This would stipulate for what each Legislature of the Union would rightfully and honestly do, relinquish public claims [3 U.S. 199, 279] to debts existing before the war, and which otherwise might have stood upon a precarious footing; for though peace alone would do away a common law disability to sue, yet I apprehend it would not ipso facto remove a disability expressly created by statute, much less extinguish any public right acquired under any act of confiscation.

2. Though Congress possibly might, as the price of peace, have been authorised to give up, even rights fully acquired by private persons during the war, more especially if derived from the laws of war only against the enemy, and in that case the individual might have been entitled to compensation from the public, for whose interests his own rights were sacrificed; yet, nothing but the most rigorous necessity could justify such a sacrifice; such a sacrifice is not to be presumed even to have been intended under the operation of general words, not making such a construction unavoidable. For, it is reasonable to infer, that in such a case special words would have been used to obviate the least colourable doubt.

Thus (for example) if it was stipulated in a treaty of peace between two European powers, 'that all ships taken during the war should be restored,' I imagine this would not be construed to include ships taken by privateers, and legally condemned during the war, unless it had, in fact, happened that no other ships had been taken, and then I suppose they would be understood as comprehended, and their own nation must have indemnified them.

3. If, according to the practice in Great Britain, in conformity to the law of nations, and upon the principles of a mixed government, in case any impediments had then existed, by acts of Parliament in Great Britain, to the recovery of American debts, such impediments could only have been removed by a repeal, we may presume the British negociator had reason to conclude, that the lawful impediments in this country could only be removed in the same manner; and if so, may we not fairly say, that the impediments in view could be no other than such as the Legislatures in the respective countries could do away by a repeal, or might by subsequent laws enact? If they wanted a further act of legislation, grounded not merely on ordinary legislative authority, but upon power to destroy private rights acquired under legislative faith, long since pledged and relied on, very special words were proper to effect that object, and neither in one country nor the other could it have been effected with the least colour of justice, but by providing at the same time the fullest means of indemnification.

4. This construction derives great weight from the recommendatory letter of Congress I before mentioned, for I will venture to say, had the act they recommended been passed in [3 U.S. 199, 280] the State, in the very words they recommended, they would not have had efficacy enough to destroy those payments as a bar. And yet, if Congress thought such a case ought to have been comprehended, I presume they would have recommended a special provision, clearly comprehending such cases, and accompanied with a full indemnity. I said the words of the treaty would have great operation, without giving them the very rigorous one contended for. And that will more fully appear when we take up the remaining words, viz. 3. 'To the recovery of the full value in sterling money of all bona fide debts heretofore contracted. The operation (exclusive of these payments) would therefore be this: 1st. All creditors whose debts had not been confiscated, or where the confiscations were not complete, and no payments had been made, would have a right of recovering their debts. 2nd. Perhaps all creditors, whether their debts were confiscated or not, or whether confiscations were complete or not, excepting those only from whom the government had received the money, would be entitled to recover, because undoubtedly the respective Legislatures were competent to restore all these. 3rd. Another object of no small importance, was to secure the payment of all these debts in sterling money, so that the creditors might not suffer by paper currency, either then in existence, or that might be thereafter emitted. When these general words, therefore, can comprehend so many cases, all reasonable objects of the article, I cannot think I am compelled as a Judge, and therefore I ought not to do so, to say that the general words of this article, shall extinguish private as well as public rights. I hold public faith so sacred, when once pledged either to citizens or to foreigners, that a violation of that faith is never to be inferred as even in contemplation, but when it is impossible to give any other reasonable construction to a public act. I do not clearly see that it was intended in the present instance. I cannot therefore bring myself to say, that the present Defendant having once lawfully paid the money, shall pay it over again. If the matter be only doubtful, I think the doubt should incline in favour of an innocent individual, and not against him. I should hope that the present Plaintiff will still receive his money, as his right to the money certainly has not been divested, but I think for all the reasons I have given, he is not entitled to recover it from the present Defendant. My opinion, therefore, on the whole of this case is, that judgment ought to be given for the Defendant upon the second plea; upon the third, fourth and fifth for the Plaintiff. [3 U.S. 199, 281]

Wilson, Justice. I shall be concise in delivering my opinion, as it depends on a few plain principles. If Virginia had a power to pass the law of October 1777, she must be equally empowered to pass a similar law in any future war; for, the powers of Congress were, in fact, abridged by the articles of confederation; and in relation to the present Constitution, she still retains her sovereignty and independence as a State, except in the instances of express delegation to the Federal Government. There are two points involved in the discussion of this power of confiscation: The first arising from the rule prescribed by the law of nations; and the second arising from the construction of the treaty of peace. When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable: and, we know, that not a single confiscation of that kind stained the code of any of the European powers, who were engaged in the war, which our revolution produced. Nor did any authority for the confiscation of debts proceed from Congress (that body, which clearly possessed the right of confiscation, as an incident of the powers of war and peace) and, therefore, in no instance can the act of confiscation be considered as an act of the nation. But even if Virginia had the power to confiscate, the treaty annuls the confiscation. The fourth article is well expressed to meet the very case: it is not confined to debts existing at the time of making the treaty; but is extended to debts heretofore contracted. It is impossible by any glossary, or argument, to make the words more perspicuous, more conclusive, than by a bare recital. Independent, therefore, of the Constitution of the United States, (which authoritatively inculcates the obligation of contracts) the treaty is sufficient to remove every impediment founded on the law of Virginia. The State made the law; the State was a party to the making of the treaty: a law does nothing more than express the will of a nation; and a treaty does the same. Under this general view of the subject, I think the judgment of the Circuit Court ought to be reversed.

Cushing, Justice. My state of this case will, agreeably to my view of it, be short, I shall not question the right of a State to confiscate debts. Here is an act of the Assembly of Virginia, passed in 1777, respecting debts; which contemplating to prevent the enemy deriving strength by the receipt of them during the war, provides, that if any British debtor will pay his debt into the Loan Office, obtain a certificate and [3 U.S. 199, 282] receipt as directed, he shall be discharged from so much of the debt. But an intent is expressed in the act not to confiscate, unless Great Britain should set the example. This act, it is said, works a discharge and a bar to the payer. If such payment is to be considered as a discharge, or a bar, so long as the act had force, the question occurs; Was there a power, by the treaty, supposing it contained proper words, entirely to remove this law, and this bar, out of the creditor's way?

This power seems not to have been contended against, by the Defendant's council: And, indeed, it cannot be denied; the treaty having been sanctioned, in all its parts, by the Constitution of the United States, as the supreme law of the land.

Then arises the great question, upon the import of the fourth article of the treaty: And to me, the plain and obvious meaning of it, goes to nullify, ab initio, all laws, or the impediments of any law, as far as they might have been designed to impair, or impede, the creditor's right, or remedy, against his original debtor. 'Creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.'

The article speaking of creditors, and bona fide debts heretofore contracted, plainly contemplates debts, as originally contracted, and creditors and original debtors; removing out of the way all legal impediments; so that a recovery might be had, as if no such laws had particularly interposed. The words 'recovery of the full value in sterling money,' if they have force, or meaning, must annihilate all tender laws, making any thing a tender, but sterling money; and the other words, or at least the whole taken together, must, in like manner, remove all other impediments of law, aimed at the recovery of those debts.

What has some force to confirm this construction, is the sense of all Europe, that such debts could not be touched by States, without a breach of public faith: And for that, and other reasons, no doubt, this provision was insisted upon, in full latitude, by the British negotiators. If the sense of the article be, as stated, it obviates, at once, all the ingenious, metaphysical, reasoning and refinement upon the words, debt, discharge, extinguishment, and affords an answer to the decision made in the time of the interregnum that payment to sequestors, was payment to the creditor.

A State may make what rules it pleases; and those rules must necessarily have place within itself.

But here is a treaty, the supreme law, which overrules all State laws upon the subject, to all intents and purposes; and that makes the difference. Diverse objections are made to this construction: That it is an odious one, and as such, ought to [3 U.S. 199, 283] be avoided: That treaties regard the existing state of things: That it would carry an imputation upon public faith: That it is founded on the power of eminent domain, which ought not to be exercised, but upon the most urgent occasions: That the negociators themselves did not think they had power to repeal laws of confiscation; because they, by the fifth article, only agreed, that Congress should recommend a repeal to the States. As to the rule respecting odious constructions; that takes place where the meaning is doubtful, not where it is clear, as I think it is in this case. But it can hardly be considered as an odious thing, to inforce the payment of an honest debt, according to the true intent and meaning of the parties contracting; especially if, as in this case, the State having received the money, is bound in justice and honor, to indemnify the debtor, for what it in fact received. In whatever other rights this act of Assembly may be reviewed, I consider it in one, as containing a strong implied engagement, on the part of the State, to indemnify every one who should pay money under it, pursuant to the invitation it held out. Having never confiscated the debt, the State must, in the nature and reason of things, consider itself as answerable to the value. And this seems to be the full sense of the legislators upon this subject, in a subsequent act of assembly; but the treaty holds the original debtor answerable to his creditor, as I understand the matter. The State, therefore, must be responsible to the debtor. These considerations will, in effect, exclude the idea of the power of eminent domain; and if they did not, yet there was sufficient authority to exercise it, and the greatest occasion that perhaps could ever happen. The same considerations will also take away all ground of imputation upon public faith. Again, the treaty regarded the existing state of things, by removing the laws then existing, which intended to defeat the creditor of his usual remedy at law. As to the observations upon the recommendatory provision of the fifth article; I do not see that we can collect the private opinion of the negociators, respecting their powers, by what they did not do; and if we could, this court is not bound by their opinion, unless the reasons on which it was founded, being known, were convincing. It would be hard upon them, to suppose they gave up all, that they might think they strictly had a right to give up. We may allow somewhat to skill, policy and fidelity. With respect to confiscations of real and personal estates, which had been compleated, the estates sold, and, perhaps, passed through the hands of a number of purchasers, and improvements made upon real estates, by the then possessors; they knew, that to give them up absolutely, must create much confusion in this [3 U.S. 199, 284] country. Avoiding that, (whether from an apprehension of want of power does not appear from the instrument) they were lead only to agree, that Congress should recommend a restitution, or composition. The fourth article, which is particularly and solely employed about debts, makes provision, according to the doctrine then held sacred by all the sovereigns of Europe. Although our negociators did not gain an exemption for individuals, from bona fide debts, contracted in time of peace, yet they gained much for this country: as rights of fishery, large boundaries, a settled peace, and absolute independence, with their concomitant and consequent advantages: All which, it might not have been prudent for them to risque, by obstinately insisting on such exemption, either in whole or in part, contrary to the humane and meliorated policy of the civilized world, in this particular. The fifth article, it is conceived, can not affect or alter the construction of the fourth article. For, first, it is against reason, that a special provision made respecting debts by name, should be taken away immediately after, in the next article, by general words, or words of implication, which words too, have, otherwise, ample matter to operate upon. 2nd. No implication from the fifth article, can touch the present case, because that speaks only of actual confiscations, and here was no confiscation. If we believe the Virginia legislators, they say, 'We do not confiscate we will not confiscate debts, unless Great Britain sets the example,' which it is not pretended she ever did. The provision, that 'Creditors shall meet with no lawful impediment,' etc is as absolute, unconditional, and peremptory, as words can well express, and made not to depend on the will and pleasure, or the optional conduct of any body of men

whatever. To effect the object intended, there is no want of proper and strong language; there is no want of power, the treaty being sanctioned as the supreme law, by the constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree. The treaty, then, as to the point in question, is of equal force with the constitution itself; and certainly, with any law whatsoever. And the words, 'shall meet with no lawful impediment,' etc. are as strong as the wit of man could devise, to avoid all effects of sequestration, confiscation, or any other obstacle thrown in the way, by any law, particularly pointed against the recovery of such debts. I am, therefore, of opinion, that the judgment of the Circuit Court ought to be reversed. [3 U.S. 199, 285] BY THE COURT. All and singular the premises being seen by the court here and fully understood, and mature deliberation had thereon, because it appears to the court now here, that in the record and process aforesaid, and also in the rendition of the judgment aforesaid, upon the demurrer to the rejoinder of the Defendants in error, to the replication of the second plea, it is manifestly erred, it is considered that the said judgment for those errors and others in the record and process aforesaid, be revoked and annulled, and altogether held for nought, and it is further considered by the court here, that the Plaintiff in error recover against the Defendants, two thousand nine hundred and seventy-six pounds, eleven shillings and six-pence, good British money, commonly called sterling money, his debt aforesaid, and his costs by him about his suit in this behalf expended, and the said Defendants, in mercy, etc. But this judgment is to be discharged by the payment of the sum of 596 dollars, and interest thereon to be computed, after the rate of five per cent per annum, from the 7th day of July, 1782, till payment, besides the costs, and by the payment of such damages as shall be awarded to the Plaintiff in error, on a writ of enquiry to be issued by the Circuit Court of Virginia, to ascertain the sum really due to the Plaintiff in error, exclusively of the said sum of 596 dollars, which was found to be due to the Plaintiff in error, upon the trial in the said Circuit Court, on the issue joined upon the Defendant's plea of payment, at a time when the judgment of the said Circuit Court on the said demurrer was unreversed and in full force and vigor, and for the execution of the judgment of the court, the cause aforesaid is remanded to the said Circuit Court of Virginia.

Judgment reversed.

Footnotes

[Footnote *] As I was not present during the argument, I was in hopes to have obtained the briefs of the counsel themselves, for a more full display of their learning and ingenuity in this cause; but being disappointed in that respect, I have been aided by the notes of Mr. W. Tilghman, to whose kindness, it is just on the present occasion to acknowledge, I have been frequently indebted for similar communications, in the course of the compilation for these Reports.

[Footnote *] ante, p.54.

[Footnote *] See the Ordinance of the 30th of November, 1781. See, also, the Resolution of the 23rd of November, 1781, in which Congress recommended to the states, to pass laws to punish infractions of the law of nations.

[Footnote *] See the oath in the act of the 24th of September, 1789. 1. vol. p. 53. f. 8. Swift's edition.

[Footnote *] Judges of this court have generally pursued, forbore taking any part in this decision, as a Judge, upon the present writ of error, having declared from the first he meant only to do so, in case of an equal division of opinion among the other Judges. But he observed, that he thought there would be no impropriety in his reading in his place the reasons he had given in support of the judgment in the Circuit Court, a practice expressly authorized in the case of the District Judge, upon an appeal to the Circuit Court from his own decision; tho' he is at the same time excluded from voting. And Judge Iredell added, that upon consulting his brethren on the bench, they had acquiesced in the propriety of this proceeding. He therefore read these reasons in his place, so far as they respected the same subject of discussion in both courts, which was only as to the effect of payments into the treasury, every other point in contest in the Circuit Court having been relinquished.

It is, however, thought proper on this occasion, to publish the whole of the argument as delivered in the Circuit Court, there being some observations on that part of the subject that was relinquished which, it is conceived, serve to illustrate the great topic of controversy that occasioned the present writ of error.

The Judge, after reading his opinion, as delivered in the court below, added, that it had not been changed by any thing which had occurred, in arguing the case on the present writ of error.

[Footnote *] Read against Brookman, 3 Term Rep. 151. By three Judges against one, in the Court of King's Bench, in England,

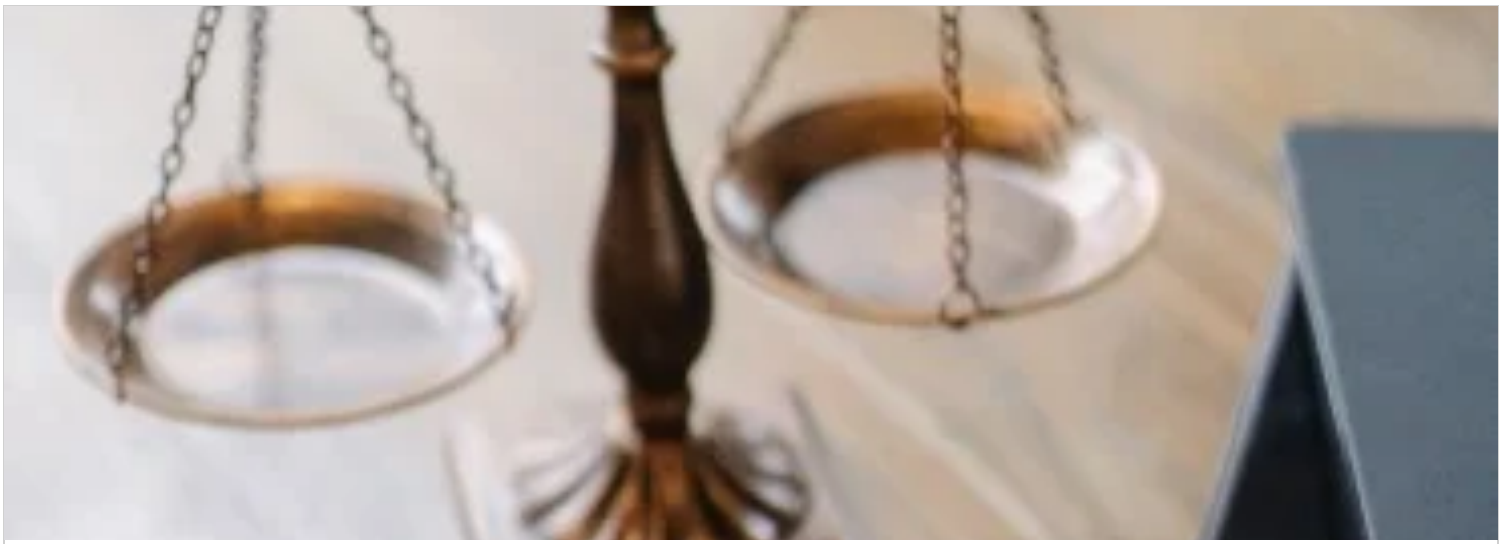
—

[Footnote *] Chancellor Wythe, of Virginia, who had given a contrary opinion in the High Court of Chancery of Virginia, a few days before.

[Footnote *] * 1 Comm. 91.

[Footnote *] The book commonly called 'The Old Law of Evidence; originally printed in 1735, and afterwards in 1739 and 1744.

Upon consulting the Bibliothaca Legum, it appears that Clayton's Reports were published in 1651, so that the decision must have been under the commonwealth.



WARE v. HYLTON , 3 U.S. 199 (1796)

Citation: 3 U.S. 199

Decided: February 01, 1796

Court: United States Supreme Court

BACK TO TOP

FindLaw

Questions?

At FindLaw.com, we pride ourselves on being the number one source of free legal information and resources on the web. **Contact us. (https://www.findlaw.com/company/contact-us/contacts.html)**

Stay up-to-date with how the law affects your life. Sign up for our consumer newsletter.

ENTER YOUR EMAIL ADDRESS

ABOUT US > **(https://www.findlaw.com/company.html)**

Our Team (https://www.findlaw.com/company/our-team.html)

Accessibility (https://www.findlaw.com/company/our-commitment-to-accessibility.html)

Contact Us (https://www.findlaw.com/company/contact-us/contacts.html)

FIND A LAWYER > **(https://lawyers.findlav**

By Location (https://lawyers.findlaw.com/#brow

By Legal Issue (https://lawyers.findlaw.com/lega

By Lawyer Profiles (https://lawyers.findlaw.com/profile/profiles/law

By Name (https://lawyers.findlaw.com/lawyer/lawyer_dir/

SELF-HELP RESOURCES

Legal Forms & Services (https://www.findlaw.com/forms.html)

(https://www.youtube.com/watch?v=WQiNbzazOhw)

one thousand seven hundred and ninety-six, intituled "An act laying duties upon carriages for the conveyance of persons, and repealing the former act for that purpose," as limits the duration of said act, shall be and the same is hereby repealed, and said act is hereby continued in force, without limitation of time.

riages," &c. continued without limitation. May 28, 1796, ch. 37.

Approved, February 25, 1801.

Statute II.

Chap. XII.—*An Act declaring the consent of Congress to an act of the state of Maryland, passed the twenty-eighth day of December, one thousand seven hundred and ninety-three, for the appointment of a Health Officer.*

Feb. 27, 1801. [Expired.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress be, and is hereby granted and declared, to the operation of an act of the General Assembly of Maryland, passed the twenty-eighth day of December, one thousand seven hundred and ninety-three, intituled "An act to appoint a health officer for the port of Baltimore, in Baltimore county," so far as to enable the state aforesaid to collect a duty of one cent per ton, on all vessels coming into the district of Baltimore from a foreign voyage, for the purposes in said act intended.

Sec. 2. *And be it further enacted,* That this act shall be in force for three years, from the passing thereof, and from thence to the end of the next session of Congress thereafter, and no longer.

Continued by Act of March 1, 1805, ch. 19.

Approved, February 27, 1801.

Statute II.

Chap. XIII.—*An Act to allow the transportation of goods, wares and merchandise, to and from Philadelphia and Baltimore, by the way of Appoquinimink and Sassafras.*

Feb. 27, 1801.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any goods, wares and merchandise, which lawfully might be transported to or from the city of Philadelphia and Baltimore, by the way of Elkton, Bohemia or Frenchtown, and Port Penn, Appoquinimink, New Castle, Christiana Bridge, Newport or Wilmington, shall and may lawfully be transported, to and from the city of Philadelphia and Baltimore, by the way of Appoquinimink and Sassafras river, and shall be entitled to all the benefits and advantages, and shall be subject to all the provisions, regulations, limitations and restrictions, existing in the case of goods, wares and merchandise, transported by any of the routes before mentioned.

Goods imported into Baltimore or Philadelphia may be transported by Appoquinimink and Sassafras rivers.

1799, ch. 22.

Approved, February 27, 1801.

Statute II.

Chap. XV.—*An Act concerning the District of Columbia.*(a)

Feb. 27, 1801.

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the

Laws of Virginia and Mary-

(a) District of Columbia. The acts for the government and administration of justice in the District of Columbia, are:

1. An act for establishing the temporary and permanent seat of the government of the United States, July 16, 1790, chap. 28.
2. An act supplementary to an act entitled, "An act concerning the District of Columbia," March 3, 1801, chap. 24.
3. An act concerning the District of Columbia, February 27, 1801, chap. 15.
4. An act additional to an act amendatory of an act entitled, "An act concerning the District of Columbia," May 3, 1802, chap. 52.
5. An act to amend the judicial system of the United States, April 29, 1802, chap. 31, sec. 24.
6. An act for the relief of insolvent debtors within the District of Columbia, March 3, 1803, chap. 31.
7. An act to extend the jurisdiction of justices of the peace in the recovery of debts, in the District of Columbia, March 1, 1823, chap. 24.
8. An act respecting the adjournment of the circuit court of the District of Columbia, March 3, 1825.

land continued in force in the district.

laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland,

---

9. An act altering the times of holding the circuit courts in the District of Columbia, May 20, 1826, chap. 131.

10. An act to establish a criminal court in the District of Columbia, July 7, 1838, chap. 192.

11. An act to restrain the circulation of small notes as a currency in the District of Columbia, and for other purposes, July 7, 1838, chap. 212.

12. Resolution directing the manner in which certain laws of the District of Columbia shall be executed, March 2, 1839.

13. An act for granting possessions, enrolling conveyances and securing the estates of purchasers within the District of Columbia, May 31, 1832, chap. 112.

14. An act changing the times of holding the courts in the District of Columbia, May 31, 1832, chap. 114.

Act of February 30, 1839, chap. 30.

The decisions of the courts of the United States upon this and other statutes relating to the District of Columbia, and other questions arising in the district, have been:

The act of Congress of 27 February, 1801, concerning the District of Columbia, directs that writs of error shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had thereon, as is or shall be provided in case of writs of error on judgments, or appeals upon orders or decrees, rendered in the circuit courts of the United States. United States *v.* Hooe et al., 1 Cranch, 318; 1 Cond. Rep. 322.

By the separation of the District of Columbia from the state of Maryland, the residents in that part of Maryland which became a part of the district ceased to be citizens of the state. Reilly, Appellant *v.* Lamar et al., 2 Cranch, 344; 1 Cond. Rep. 419.

A citizen of the District of Columbia, could not be discharged by the insolvent law of Maryland, out of the district. *Ibid.*

A citizen of the District of Columbia, cannot maintain an action in the circuit court of the United States, out of the district; he not being a citizen of a state within the meaning of the provision in the law of the United States, regulating the jurisdiction of the courts of the United States. Hepburn and Dundas *v.* Ellzey, 2 Cranch, 445; 1 Cond. Rep. 444.

A justice of the peace, in the District of Columbia, is an officer of the government of the United States; and is exempt from militia duty. Wise *v.* Withers, 3 Cranch, 331; 1 Cond. Rep. 552.

Under the sixth and eighth sections of the act of assembly of Virginia, of the 22d of December, 1794, property pledged to the Mutual Assurance Society, &c. continues liable for assessments, on account of the losses insured against, in the hands of a bona fide purchaser, without notice. The Mutual Assurance Society *v.* Watts' Ex'r, 1 Wheat. 279; 3 Cond. Rep. 570.

A mere change of sovereignty produces no change in the state of rights existing in the soil; and the cession of the District of Columbia to the national government did not affect the lien created by the above act on real property situate in the town of Alexandria; though the personal character or liability of a member of the society could not be thereby forced on a purchaser of such property. *Ibid.*

Congress has authority to impose a direct tax on the District of Columbia, in proportion to the census directed to be taken by the constitution. Loughborough *v.* Blake, 5 Wheat. 317; 4 Cond. Rep. 660.

Congress, when legislating for the District of Columbia, under the fifth section of the first article of the constitution, is still the legislature of the Union, and its acts are the laws of the United States. Cohens *v.* Virginia, 6 Wheat. 264; 5 Cond. Rep. 90.

An act of the legislature of Maryland, passed the 19th of December, 1791, entitled "An act concerning the territory of Columbia, and the city of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen. Spratt *v.* Spratt, 1 Peters, 343.

A foreigner who becomes a citizen, is no longer a foreigner, within the view of the act. Thus, after purchase, lands vested in him as a citizen; not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship. *Ibid.*

Land in the county of Washington, and District of Columbia, purchased by a foreigner, before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchasers, who were foreigners: and the capacity so to transmit those lands, is given, absolutely, by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner. *Ibid.*

The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of Congress of February 13, 1801; and by the act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of one thousand dollars, in order to entitle the party to an appeal. Nicholls et al. *v.* Hodges' Ex'rs, 1 Peters, 565.

The statute of Elizabeth is in force in the District of Columbia. Cathcart et al. *v.* Robinson, 5 Peters, 264.

The levy court of Washington county is not entitled to one half of all the fines, penalties, and forfeitures imposed by the circuit court in cases at common law, and under the acts of Congress, as well as the acts of assembly of Maryland, adopted by Congress as the law of the District of Columbia. Levy Court of Washington *v.* Ringgold, 5 Peters, 451.

The supreme court of the United States has no jurisdiction of causes brought before it, upon a certificate of division of opinion of the judges of the circuit court for the District of Columbia. The appellate jurisdiction, in respect to that court, extends only to its final judgments and decrees. Ross *v.* Triplett. 3 Wheat. 600; 4 Cond. Rep. 351.

By the insolvent law of Maryland, of January 3, 1800, the chancellor of Maryland could not discharge one who was an inhabitant of the District of Columbia, after the separation from Maryland, unless previous

as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid.

It shall be formed into two counties.

Sec. 2. *And be it further enacted*, That the said district of Columbia shall be formed into two counties; one county shall contain all that part of said district, which lies on the east side of the river Potomac, together with the islands therein, and shall be called the county of Washington; the other county shall contain all that part of said district, which lies on the west side of said river, and shall be called the county of Alexandria; and the said river in its whole course through said district shall be taken and deemed to all intents and purposes to be within both of said counties.

Washington county.

Alexandria county.

Circuit court established in it.

Sec. 3. *Be it further enacted*, That there shall be a court in said district, which shall be called the circuit court of the district of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States. Said court shall consist of one chief judge and two assistant judges resident within said district, to hold their respective offices during good behaviour; any two of whom shall constitute a quorum; and each of the said judges shall, before he enter on his office, take the oath or affirmation provided by law to be taken by the

To consist of one chief judge and two assistant judges.

---

to that separation he had entitled himself to a discharge by performing all the requisites of the act. Reilly *v.* Lamar et al. 2 Cranch, 344; 1 Cond. Rep. 419.

No appeal or writ of error lies, in a criminal case, from the judgment of the circuit court of the District of Columbia, to the supreme court of the United States: the appellate jurisdiction given by the act of Congress, is confined to civil cases. United States *v.* More, 3 Cranch, 159; 1 Cond. Rep. 480.

There is, in the District of Columbia, no division of powers between the general and the state governments. Congress has the entire control over the district, for every purpose of government: and it is reasonable to suppose that, in organizing a judicial department in the district, all the judicial power, necessary for the purpose of government, would be vested in the courts of justice. Kendall, Postmaster General *v.* The United States, 12 Peters, 524.

The circuit court of the United States, for the District of Columbia, has a right to award a mandamus to the postmaster-general of the United States, requiring him to pass to the credit of certain contractors for conveying the mail of the United States, a sum found to be due to them by the solicitor of the treasury of the United States, the solicitor acting under the special provisions of an act of Congress. *Ibid.*

There can be no doubt, that, in the state of Maryland, a writ of mandamus might be issued to an executive officer, commanding him to perform a ministerial act, required of him by the laws: and if it would lie in that state, there can be no good reason why it should not lie in the District of Columbia, in analogous cases. *Ibid.*

The powers of the supreme court of the United States, and of the circuit courts of the United States, to issue writs of mandamus, granted by the fourteenth section of the judiciary act of 1789, is only for the purpose of bringing the case to a final judgment or decree, so that it may he reviewed. The mandamus does not direct the inferior court how to proceed, but only that it must proceed, according to its own judgment, to a final determination; otherwise it cannot be reviewed in the appellate court. It is different in the circuit court of the District of Columbia, under the adoption of the laws of Maryland, which included the common law. *Ibid.*

The power of the circuit court of the District of Columbia, to exercise the jurisdiction to issue a writ of mandamus to a public officer, to do an act required of him by law, results from the third section of the act of Congress of February 27, 1804; which declares that the court and judges thereof shall have all the powers by law vested in the circuit courts of the United States. The circuit courts referred to, were those established by the act of February 13, 1801. The repeal of that law, fifteen months afterwards, and after that law had gone into operation, under the act of February 27, 1801, could not in any manner affect that law, any further than was provided by the repealing act. *Ibid.*

The circuit courts of the United States, sitting in the states of the Union, have no jurisdiction in a case in which a citizen of the District of Columbia is plaintiff. Westcott's Lessee *v.* Inhabitants, &c. Peters' C. C. R. 45.

The act of Congress of June, 1822, authorizes any person to whom administration has been granted in the states of the United States, to prosecute claims by suits in the District of Columbia, in the same manner as if the same had been granted by proper authority, in the District of Columbia, to such persons. The power is limited by its terms to the institution of suits, and does not authorize suits against an executor or administrator. The effect of this law was to make all debts due by persons in the District of Columbia, not local assets, for which the administrator was bound to account in the courts of the district, but general assets which he had full authority to receive, and for which he was bound to account in the courts of the state from which he derived his letters of administration. Vaughan et al. *v.* Northup et al., 15 Peters' Rep. 1.

The courts of the United States in the District of Columbia, have a like jurisdiction upon personal property, with the courts in England, and in the states of the Union; and in the absence of statutory provisions, in the trial of them they must apply the same common law principle which regulates the mode of bringing such actions, the pleadings and the proof. M'Kenna *v.* Fiske, 17 Peters' Rep. 245.

judges of the circuit courts of the United States; and said court shall have power to appoint a clerk of the court in each of said counties, who shall take the oath and give a bond with sureties, in the manner directed for clerks of the district courts in the act to establish the judiciary of the United States.

Sessions of the court in Washington county, in Alexandria county.

Sec. 4. *Be it further enacted*, That said court shall, annually, hold four sessions in each of said counties, to commence as follows, to wit: for the county of Washington, at the city of Washington, on the fourth Mondays of March, June, September and December; for the county of Alexandria, at Alexandria, on the second Mondays of January, April, July, and the first Monday of October.

Subjects for the cognizance of the court.

Sec. 5. *Be it further enacted*, That said court shall have cognizance of all crimes and offences committed within said district, and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district, and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States.

Where local actions shall be commenced. No suits to be brought, but against inhabitants or persons found in the district.

Sec. 6. *Provided, and be it further enacted*, That all local actions shall be commenced in their proper counties, and that no action or suit shall be brought before said court, by any original process against any person, who shall not be an inhabitant of, or found within said district, at the time of serving the writ

A marshal to be appointed for the district.

Sec. 7. *Be it further enacted*, That there shall be a marshal for the said district, who shall have the custody of the gaols of said counties, and be accountable for the safe keeping of all prisoners legally committed therein; and he shall be appointed for the same term, shall take the same oath, give a bond with sureties in the same manner, shall have generally, within said district, the same powers, and perform the same duties, as is by law directed and provided in the case of marshals of the United States.

Writs of error and appeal.

Sec. 8. *Be it further enacted*, That any final judgment, order or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the supreme court of the United States, by writ of error or appeal,(a) which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees, rendered in the circuit court of the United States.

An attorney to be appointed.

Sec. 9. *Be it further enacted*, That there shall be appointed an attorney of the United States for said district, who shall take the oath and perform all the duties required of the district attornies of the United States; and the said attorney, marshal and clerks, shall be entitled to receive for their respective services, the same fees, perquisites and emoluments, which are by law allowed respectively to the attorney, marshal and clerk of the United States, for the district of Maryland.

Allowances to the attorney, marshal and clerks.

Sec. 10. *Be it further enacted*, That the chief judge, to be appointed by virtue of this act, shall receive an annual salary of two thou-

(a) By an act entitled, "An act to limit the right of appeal from the circuit court of the United States for the District of Columbia, passed April 2, 1816, chap. 39, it is provided that no cause shall be removed from the circuit court of the District of Columbia, unless the matter in dispute in the cause shall be of the value of one thousand dollars and upwards. But when a party in a cause shall deem himself aggrieved by any final judgment or decree of the said circuit court, where the matter in dispute shall be of the value of $100, and of less value than $1000, on a petition to a justice of the supreme court, if the said justice shall be of opinion that errors in the proceedings of the court involve questions of law of such extensive interest and operation as to render the final judgment of the supreme court desirable, the case may be removed at the discretion of the said justice.

sand dollars, and the two assistant judges, of sixteen hundred dollars each, to be paid quarterly, at the treasury of the United States.(a)

Compensation of the judges.

SEC. 11. *Be it further enacted*, That there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to continue in office five years; and such justices, having taken an oath for the faithful and impartial discharge of the duties of the office, shall, in all matters, civil and criminal, and in whatever relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of said district, for which they shall have been respectively appointed; and they shall have cognizance in personal demands to the value of twenty dollars, exclusive of costs; which sum they shall not exceed, any law to the contrary notwithstanding; and they shall be entitled to receive for their services the fees allowed for like services by the laws herein before adopted and continued, in the eastern part of said district.

Justices of the peace to be appointed.

Their jurisdiction.

SEC. 12. *And be it further enacted*, That there shall be appointed in and for each of the said counties, a register of wills, and a judge to be called the judge of the orphans' court, who shall each take an oath for the faithful and impartial discharge of the duties of his office; and shall have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received, by the registers of wills and judges of the orphans' court, within the state of Maryland; and appeals from the said courts shall be to the circuit court of said district, who shall therein have all the powers of the chancellor of the said state.

Registers of wills and judges of the orphans' court to be appointed.

Act of May 19, 1828, ch. 59.

SEC. 13. *And be it further enacted*, That in all cases where judgments or decrees have been obtained, or hereafter shall be obtained, on suits now depending in any of the courts of the commonwealth of Virginia, or of the state of Maryland, where the defendant resides or has property within the district of Columbia, it shall be lawful for the plaintiff in such case upon filing an exemplification of the record and proceedings in such suits, with the clerk of the court of the county where the defendant resides, or his property may be found, to sue out writs of execution thereon, returnable to the said court, which shall be proceeded on, in the same manner as if the judgment or decree had originally been obtained in said court.

How to obtain execution within the district, upon judgments already rendered in courts of Maryland and Virginia.

SEC. 14. *And be it further enacted*, That all actions, suits, process, pleadings, and other proceedings of what nature or kind soever, depending or existing in the courts of Hustings for the towns of Alexandria and Georgetown, shall be, and hereby are continued over to the circuit courts to be holden by virtue of this act, within the district of Columbia, in manner following; that is to say: all such as shall then be depending and undetermined, before the court of Hustings for the town of Alexandria, to the next circuit court hereby directed to be holden in the town of Alexandria; and all such as shall then be depending and undetermined, before the court of Hustings for Georgetown, to the next circuit court hereby directed to be holden in the city of Washington: *Provided nevertheless*, that where the personal demand in such cases, exclusive of costs, does not exceed the value of twenty dollars, the justices of the peace within their respective counties, shall have cognizance hereof.

Suits in the courts of Hustings for Alexandria and Georgetown continued to the circuit court.

SEC. 15. *And be it further enacted*, That all writs and processes whatsoever, which shall hereafter issue from the courts hereby established

Test of writs.

(a) An act concerning the District of Columbia, February 27, 1801, chap. 15; an act to increase the salaries of the judges of the circuit court for the District of Columbia, March 3, 1811; an act to increase the salaries of the judges of the circuit court for the District of Columbia, April 20, 1818; an act concerning the orphans' court of Alexandria county, in the District of Columbia, May 19, 1828, chap. 59.

within the district, shall be tested in the name of the chief judge of the district of Columbia.

Saving of the rights of corporations.

Sec. 16. *And be it further enacted*, That nothing in this act contained shall in any wise alter, impeach or impair the rights, granted by or derived from the acts of incorporation of Alexandria and Georgetown, or of any other body corporate or politic, within the said district, except so far as relates to the judicial powers of the corporations of Georgetown and Alexandria.

Approved, February 27, 1801.

Statute II.

March 2, 1801.

[Obsolete.]

Act of May 7, 1800, ch. 41.

Chap. XVI.—*An Act supplementary to an act, intituled "An act to divide the territory of the United States northwest of the Ohio, into two separate governments."*

Certain suits revived.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all suits, and process and proceedings, which, on the third day of July, one thousand eight hundred, were pending in any court of either of the counties, which by the act intituled "An act to divide the territory of the United States northwest of the Ohio, into two separate governments," has been included within the Indiana territory; and that all suits, process and proceedings, which, on the aforesaid third day of July, were pending in the general court of the territory of the United States northwest of the Ohio, in consequence of any writ of removal or order for trial at bar, had been removed from either of the counties now within the limits of the Indiana territory aforesaid, shall be and they are hereby revived and continued; and the same proceedings, before the rendering of final judgment and thereafter, may and shall be had, in the same courts, in all suits and process aforesaid, and in all things concerning the same, as by law might have been had in case the said territory of the United States northwest of the Ohio had remained undivided.

Approved, March 2, 1801.

Statute II.

March 2, 1801.

[Repealed.]

Chap. XVII.—*An Act to add to the district of Massac, on the Ohio, and to discontinue the district of Palmyra in the state of Tennessee, and therein to amend the act, intituled "An act to egulate the collection of duties on imports and tonnage."*

District of Massac.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the district of Massac, in addition to the territory it already possesses, shall include all waters, shores, and inlets, now included within the district of Palmyra, and all rivers, waters, shores and inlets, lying within the state of Tennessee.

District of Palmyra.

Section 16, Act of March 2, 1799, repealed.

Sec. 2. *And be it further enacted*, That from and after the thirtieth day of June next, so much of the "Act to regulate the collection of duties on imports and tonnage," as establishes the district of Palmyra in the state of Tennessee, shall be repealed, except as to the recovery and receipts of such duties on goods, wares and merchandise, and on the tonnage of ships or vessels, as shall have accrued, and as to the recovery and distribution of fines, penalties and forfeitures, which shall have been incurred before and on the said day.

Approved, March 2, 1801.

Statute II.

March 2, 1801.

[Obsolete.]

Chap. XVIII.—*An Act making appropriations for the Military establishment of the United States, for the year one thousand eight hundred and one.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for defraying the

JUSTIA

Harcourt v. Gaillard, 25 U.S. 523 (1827)

Overview Opinions

Syllabus

U.S. Supreme Court

Harcourt v. Gaillard, 25 U.S. 523 (1827)

Harcourt v. Gaillard

25 U.S. 523

Syllabus

A grant made by the British Governor of Florida, after the declaration of independence within the territory lying between the Mississippi and the Chatahouchee Rivers and between the thirty-first degree of north latitude and a line drawn from the mouth of the Yazoo River due east to the Chatahouchee is invalid as the foundation of title in the courts of the United States.

Page 25 U. S. 524

Show Less

Opinions

Opinions & Dissents

U.S. Supreme Court

Harcourt v. Gaillard, 25 U.S. 523 (1827)
Harcourt v. Gaillard

25 U.S. 523

Syllabus

A grant made by the British Governor of Florida, after the declaration of independence within the territory lying between the Mississippi and the Chatahouchee Rivers and between the thirty-first degree of north latitude and a line drawn from the mouth of the Yazoo River due east to the Chatahouchee is invalid as the foundation of title in the courts of the United States.

Page 25 U. S. 524

MR. JUSTICE JOHNSON delivered the opinion of the Court.

The questions upon which this cause turns arose out of a British grant to the ancestor of the plaintiff dated 24 January, 1777.

The land in controversy is situated in that tract of country which lies between the Mississippi and Chatahouchee Rivers and between the 31st degree of north latitude to the south and a line drawn from the mouth of the Yazoo River, due east to the Chatahouchee. From the earliest times of the settlement of North America, the region of territory in which that tract of country is described was the subject of wars and negotiations with France, Spain, and Great Britain until 1763, when Great Britain became the undisputed proprietor of the whole, from the Lakes Maurepas to Ponchartrain, and the Gulfs of Mexico and Florida by the Mississippi northwardly. Before that time, her claim extended southwardly to the 29th degree of north latitude, as is evidenced by her charter to the lords proprietors of 1677, and from the same instrument it appears that she interfered with the Province of Louisiana by extending her southern line to the Pacific Ocean. The country of Florida, therefore, south of the 29th degree, was a conquest; that north of the 29th degree and up the Mississippi was held as a part of her own territory, concerning which her treaties with France and Spain only established a disputed boundary.

On 7 October, 1763, the King, exercising a right which was never questioned, over what were then called royal provinces, issued his proclamation, by which he established the northern boundary of the Floridas at the 31st degree of north latitude from the Mississippi to the Apalachichola, down that steam to its confluence with Flint River, and from that point by a line to the head of the St. Mary's, and by that river to the sea. And this was the line which, by treaty of peace, was established as the southern boundary of the United States. After the peace, the United States, Spain, South Carolina, and Georgia succeeded to the disputes of Great Britain, France, and Spain relative to the same tract of country.

Page 25 U. S. 525

The original title of South Carolina, under the grant to the lords proprietors was unquestionable, and she contended that she had never then legally devested of soil or sovereignty.

Georgia founded her claim on the commissions to her Governor Wright which comprised within its jurisdiction the territory in question, and the United States claimed it as a conquest from the British Province of West Florida, while Spain insisted that it a was a part of Louisiana or Florida, and as such ceded to her by the treaty of 1783. Finally, South Carolina, by the Treaty of Beaufort, relinquished her claim to Georgia, and the United States settled her claim by taking a cession from Georgia of the land in controversy, so that at present the claims of the United States, of the State of South Carolina, and of Georgia, have become united in the general government.

The grant to Harcourt, it will be perceived from its date, was subsequent to the Declaration of Independence and within the acknowledged limits of the United States; it therefore involves the question whether such a grant can be valid -- a question which would have been involved in less difficulty if the United States had never set up the claim of conquest. That ground would admit the original right of the Governor of West Florida to grant, and if so, his right to grant might have continued in force until the treaty of peace, and the grant in that case to Harcourt might have had extended to it the benefit of those principles of public law which are applicable to territories acquired by conquest, whereas the right set up by South Carolina and Georgia deny all power in the grantor over the soil; the question which they present is one of disputed boundaries within which the power that succeeds in war is not obliged to recognize as valid any acts of ownership exercised by his adversary.

There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear could never have sustained it. The very ground on which she denied the capacity of Spain to conquer or take by cession the territory on the Mississippi was fatal

to the pretensions set up by her against Georgia and South

Page 25 U. S. 526

Carolina, to-wit that Spain could not acquire by conquest a territory within the limits claimed by an ally in the war.

But there was another reason. There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore there could be no acquisition of territory made by the United Stated distinct from or independent of some one of the states.

We are then referred to the belligerent rights of South Carolina and Georgia, and it is immaterial to the question here to which of those states the territory appertained. Each declared itself sovereign and independent according to the limits of its territory, and both extended their claims of territory to the 31st parallel of north latitude. There is no evidence that either at that time had acquiesced in the extension of the Territory of Florida beyond that line.

The facts upon which the right of the Governor of Florida to issue grants beyond the 31st degree of north latitude rested are these: after the proclamation of 1763, the Board of Trade of Great Britain, which at that time had the affairs of the colonies committed to them, passed a resolution of the date of March, 1764, in which it advised the King to extend the limits of West Florida up to a line drawn from the mouth of the Yazoo east to the Chatahouchee. It does not appear that the King ever made an order adopting this recommendation. No proclamation was issued in pursuance of it, but it appears that from that time the commissions to the governors of West Florida designated that line as the northern limit of that province, notwithstanding which Governor Wright continued to preside over Georgia under his commission of 1763, which embraced in its limits the whole of that country, bounded south by the 31st degree of north latitude. Thus stood the rights of the parties at the commencement of the Revolution and when, by the treaty of peace, the southern boundary of the United States was fixed at the ancient boundary of South Carolina or Georgia (it matters not which), Georgia insisted on that line as the limit which she was entitled to, and which she had laid claim to when she declared herself independent, or which the United State had asserted in her behalf in the declaration of independence. But as there had been nothing very unequivocal

Page 25 U. S. 527

done at the time of the declaration of independence, as to designating the limits of the United States, it is still contended that the tract of country in which the grant lies had been legally

separated from Georgia before the Revolution and attached to West Florida, and that therefore a grant by the governor of the latter province was valid if made at any time previous to the treaty of peace.

Two questions here occur -- first whether this separation had taken effect by any valid act, and secondly, if it had, whether it made any difference in the case upon international principles.

On both these points we are of opinion that the law is against the validity of this grant. It is true that the power of the Crown was at that time admitted to be very absolute over the limits of the royal provinces, but there is no reason to believe that it had ever been exercised by any means less solemn and notorious than a public proclamation. And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit by a solemn grant from the Crown to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the Crown.

But this is not the material fact in the case; it is this -- that this limit was claimed and asserted by both of those states in the declaration of independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States that it acquired anything by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of preexisting rights, and on that principle the soil and sovereignty within their acknowledged limits were as much theirs at the declaration of independence as at this hour. By reference to the treaty it will be found that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession or relinquishment of

Page 25 U. S. 528

right on the part of Great Britain. In the last article of the Treaty of Ghent will be found a provision respecting grants of land made in the islands then in dispute between the two states, which affords an illustration of this doctrine. By that article, a stipulation is made in favor of grants before the war, but none for those which were made during the war.

And such is unquestionably the law of nations. War is a suit prosecuted by the sword, and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations. It is not necessary here to consider the rights of the conqueror in case of actual conquest, since the views previously

presented put the acquisition of such rights out of this case.

The remaining question is whether the parties plaintiffs have been established in their rights by any act or treaty of the United States.

The treaty of peace contains no stipulation in their favor. Nor does the treaty with Georgia, since all the reservations there made in favor of British or Spanish grants and inchoate titles are expressly confined to the case of actual settlers. But the spontaneous bounty of the United States has gone further and confirmed a great variety of questionable titles emanating from British and Spanish authority.

Is this one of the titles embraced within the provisions of the statutes passed upon this subject? It is obvious that it is not.

It is true that the Act of 3 March, 1803, although making no express provision in favor of British or Spanish grants unaccompanied with possession, does seem to proceed upon the implication that they are valid, recognizing the principle that a change of sovereignty produces no change in individual property, yet it imputes to them only a modified validity, since by the 5th section it imposes a positive necessity upon the proprietors to record such grants, and makes expressly void all the rights claimed under the three first section of that act or the Georgia treaty if the duty so imposed be not complied with. And with regard to all

Page 25 U. S. 529

other evidences of title not recorded in the time limited declares that they shall never be admitted in evidence against any grant derived from the United States.

The first section of the Supplementary Act of 27 March, 1804, extends the time for recording British grants and vests in the board of commissioners a power of examining and confirming the claims to be filed under its provisions as extensive as that given by the previous act over the rights claimed under the cession from Georgia or the three first sections of that act.

But the grant to Harcourt appears neither to have been recorded nor passed upon by the commissioners; it has therefore nothing to claim from the bounty of the United States, and that provision in the 5th section of the act of 1803 which forbids its being received in evidence as against American grants would certainly have operated against it in any case clearly within the provisions of that act. Here it is contended that the court anticipated the question, and rejected the grant before it was possible that the question could arise whether the same land had passed under

an American grant.

On this subject, it must be observed that neither of the acts of 1803 or 1804 contains an express recognition of the validity of any British grants beside those which were accompanied with possession, and for that reason coming within the Georgia treaty and those which should be confirmed by the commissioners under the first section of the act of 1804, with regard to which there seems to be a very general power given to that board. All others must rest upon their validity according to the principles of the modern law of nations. Upon these principles it has been shown that the grant to Harcourt was invalid, and, if so, it was not admissible as evidence to sustain the plaintiff's action under any circumstances. The rule, therefore, applies to this case that a plaintiff must recover by the strength of his own title, not the weakness of his adversary's, for which reason, we think the grant was properly rejected, and that the judgment below must be

Affirmed with costs.

http://laws.findlaw.com/us/74/700.html

U.S. Supreme Court

STATE OF TEXAS v. WHITE, 74 U.S. 700 (1868)

74 U.S. 700 (Wall.)

TEXAS
v.
WHITE ET AL.

December Term, 1868

[74 U.S. 700, 702] ON original bill.

The Constitution ordains that the judicial power of the United States shall extend to certain cases, and among them 'to controversies between a State and citizens of another State; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects.' It ordains further, that in cases in which 'a State' shall be a party, the Supreme Court shall have original jurisdiction.

With these provisions in force as fundamental law, Texas, entitling herself 'the State of Texas, one of the United States of America,' filed, on the 15th of February, 1867, an original bill against different persons; White and Chiles, one Hardenberg, a certain firm, Birch, Murray & Co., and some others,1 citizens of New York and other States; praying [74 U.S. 700, 703] an injunction against their asking or receiving payment from the United States of certain bonds of the Federal government, known as Texan indemnity bonds; and that the bonds might be delivered up to the complainant, and for other and further relief.

The case was this:

In 1851 the United States issued its bonds-five thousand bonds for $ 1000 each, and numbered successively from No. 1 to No. 5000, and thus making the sum of $5,000,000-to the State of Texas, in arrangement of certain boundary claims made by that State. The bonds, which were dated January 1st, 1851, were coupon bonds, payable, by their terms, to the State of Texas or bearer, with interest at 5 per cent. semi-annually, and ' redeemable after the 31st day of December, 1864.' Each bond contained a statement on its face that the debt was authorized by act of Congress, and was 'transferable on delivery,' and to each were attached six-month coupons, extending to December 31, 1864.2

In pursuance of an act of the legislature of Texas, the controller of public accounts of the State was authorized to go to Washington, and to receive there the bonds; the statute making it his duty to deposit them, when received, in the treasury of the State of Texas, to be disposed of ' as may be provided by law;' and enacting further, that no bond, issued as aforesaid and payable to bearer, should be 'available in the hands of any holder until the same shall have been indorsed, in the city of Austin, by the governor of the State of Texas.'

Most of the bonds were indorsed and sold according to law, and paid on presentation by the United States prior to 1860. A part of them, however,-appropriated by act of legislature as a school fund-were still in the treasury of Texas, in January, 1861, when the late Southern rebellion broke out.

The part which Texas took in that event, and the position [74 U.S. 700, 704] in which the close of it left her, are necessary to be here adverted to.

At the time of that outbreak, Texas was confessedly one of the United States of America, having a State constitution in accordance with that of the United States, and represented by senators and representatives in the Congress at Washington. In January, 1861, a call for a convention of the people of the State was issued, signed by sixty-one individuals. The call was without authority and revolutionary. Under it delegates were elected from some sections of the State, whilst in others no vote was taken. These delegates assembled in State convention, and on the 1st of February, 1861, the convention adopted an ordinance 'to dissolve the union between the State of Texas and the other States, united under the compact styled, 'the Constitution of the United States of America." The ordinance contained a provision requiring it to be submitted to the people of Texas, for ratification or rejection by the qualified voters thereof, on the 23d of February, 1861. The legislature of the State, convened in extra session, on the 22d of January, 1861, passed an act ratifying the election of the delegates, chosen in the irregular manner above mentioned, to the convention. The ordinance of secession submitted to the people was adopted by a vote of 34,794 against 11,235. The convention, which had adjourned immediately on passing the ordinance, reassembled. On the 4th of March, 1861, it declared that the ordinance of secession had been ratified by the people, and that Texas had withdrawn from the union of the States under the Federal Constitution. It also passed a resolution requiring the officers of the State government to take an oath to support the provisional government of the Confederate States, and providing, that if 'any officer refused to take such oath, in the manner and within the time prescribed, his office should be deemed vacant, and the same filled as though he were dead.' On the 16th of March, the convention passed an ordinance, declaring, that whereas the governor and the secretary of state had refused or omitted to take the oath prescribed, their offices were vacant; that [74 U.S. 700, 705] the lieutenant-governor should exercise the authority and perform the duties appertaining to the office of governor, and that the deposed officers should deliver to their successors in office the great seal of the State, and all papers, archives, and property in their possession belonging or appertaining to the State. The convention further assumed to exercise and administer the political power and authority of the State.

Thus was established the rebel government of Texas.

The senators and representatives of the State in Congress now withdrew from that body at Washington. Delegates were sent to the Congress of the so-called Confederate States at Montgomery, Alabama, and electors for a president and vice-president of these States appointed. War having become necessary to complete the purposed destruction by the South of the Federal government, Texas joined the other Southern States, and made war upon the United States, whose authority was now recognized in no manner within her borders. The oath of allegiance of all persons exercising public functions was to both the State of Texas, and to the Confederate States of America; and no officer of any kind representing the United States was within the limits of the State except military officers, who had been made prisoners. Such was and had been for several months the condition of things in the beginning of 1862.

On the 11th of January, of that year, the legislature of the usurping government of Texas passed an act-'to provide arms and ammunition, and for the manufacture of arms and ordnance for the military defences of the State.' And by it created a 'military board,' to carry out the purpose indicated in the title. Under the authority of this act, military forces were organized.

On the same day the legislature passed a further act, entitled 'An act to provide funds for military purposes,' and therein directed the board, which it had previously organized, 'to dispose of any bonds and coupons which may be in the treasury on any account, and use such funds or their proceeds for the defence of the State;' and passed an additional act repealing the act [74 U.S. 700, 706] which made an indorsement of the bonds by the governor of Texas necessary to make them available in the hands of the holder.

Under these acts, the military board, on the 12th January, 1865, a date at which the success of the Federal arms seemed probable, agreed to sell to White & Chiles one hundred and thirty-five of these bonds, then in the treasury of Texas, and seventy-six others deposited with certain bankers in England, in payment for which White & Chiles were to deliver to the board a large quantity of cotton cards and medicines. The former bonds were delivered to White & Chiles on the 15th March following, none of them being indorsed by any governor of Texas.

It appeared that in February, 1862, after the rebellion had broken out, it was made known to the Secretary of the Treasury of the United States, in writing, by the Hon. G. W. Paschal, of Texas, who had remained constant to the Union, that an effort would be made by the rebel authorities of Texas to use the bonds remaining in the treasury in aid of the rebellion; and that they could be identified, because all that had

been circulated before the war were indorsed by different governors of Texas. The Secretary of the Treasury acted on this information, and refused in general to pay bonds that had not been indorsed. On the 4th of October, 1865, Mr. Paschal, as agent of the State of Texas, caused to appear in the money report and editorial of the New York Herald, a notice of the transaction between the rebel government of Texas and White & Chiles, and a statement that the treasury of the United States would not pay the bonds transferred to them by such usurping government. On the 10th October, 1865, the provisional governor of the State published in the New York Tribune, a 'Caution to the Public,' in which he recited that the rebel government of Texas had, under a pretended contract, transferred to White & Chiles 'one hundred and thirty-five United States Texan indemnity bonds, issued January 1, 1851, payable in fourteen years, of the denomination of $1000 each, and coupons attached thereto to the amount of $ 1287.50, amounting in the aggregate, bonds and coupons, to the sum of $156, 287.50.' [74 U.S. 700, 707] His caution did not specify, however, any particular bonds by number. The caution went on to say that the transfer was a conspiracy between the rebel governor and White & Chiles to rob the State treasury, that White & Chiles had never paid the State one farthing, that they had fled the State, and that these facts had been made known to the Secretary of the Treasury of the United States. And 'a protest was filed with him by Mr. Paschal, agent of the State of Texas, against the payment of the said bonds and coupons unless presented for payment by proper authority.' The substance of this notice, it was testified, was published in money articles of many of the various newspapers of about that date, and that financial men in New York and other places spoke to Mr. Paschal, who had caused it to be inserted in the Tribune, about it. It was testified also, that after the commencement of the suit, White & Chiles said that they had seen it.

The rebel forces being disbanded on the 25th May, 1865, and the civil officers of the usurping government of Texas having fled from the country, the President, on the 17th June, 1865, issued his proclamation appointing Mr. A. J. Hamilton, provisional governor of the State; and directing the formation by the people of a State government in Texas.

Under the provisional government thus established, the people proceeded to make a constitution, and reconstruct their State government.

But much question arose as to what was thus done, and the State was not acknowledged by the Congress of the United States as being reconstructed. On the contrary, Congress passed, in March 1867, three certain acts, known as the Reconstruction Acts. By the first of these, reciting that no legal State governments or adequate protection for life or property then existed in the rebel States of Texas, and nine other States named, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established, Congress divided the States named into five military districts (Texas with Louisiana being the fifth), and made it the duty [74 U.S. 700, 708] of the President to assign to each an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce authority within his district. The act made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military commissions, which the act authorized. It provided, further, that when the people of any one of these States had formed a constitution in conformity with that of the United States, framed in a way which the statute went on to specify, and when the State had adopted a certain article of amendment named, to the Constitution of the United States, and when such article should have become a part of the Constitution of the United States, then that the States respectively should be declared entitled to representation in Congress, and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede them.

A State convention of 1866 passed an ordinance looking to the recovery of these bonds; and by act of October of that year, the governor of Texas was authorized to take such steps as he might deem best for the interests of the State in the matter; either to recover the bonds, or to compromise with holders. Under this act the governor appointed an agent of the State to look after the matter.

It was in this state of things, with the State government organized in the manner and with the status above mentioned, that this present bill was directed by this agent to be filed.

The bill was filed by Mr. R. T. Merrick and others, solicitors in this court, on behalf of the State, without precedent written warrant of attorney. But a letter from J. W. Throckmorton, elected governor under the constitution of 1866, ratified their act, and authorized them to prosecute [74 U.S. 700, 709] the suit. Mr.

Paschal, who now appeared with the other counsel, in behalf of the State, had been appointed by Governor Hamilton to represent the State, and Mr. Pease, a subsequent governor, appointed by General Sheridan, commander under the reconstruction acts, renewed this appointment.

The bill set forth the issue and delivery of the bonds to the State, the fact that they were seized by a combination of persons in armed hostility to the government of the United States, sold by an organization styled the military board, to White & Chiles, for the purpose of aiding the overthrow of the Federal government; that White & Chiles had not performed what they agreed to do. It then set forth that they had transferred such and such numbers, specifying them, to Hardenberg, and such and such others to Birch, Murray & Co., &c.; that these transfers were not in good faith, but were with express notice on the part of the transferees of the manner in which the bonds had been obtained by White & Chiles; that the bonds were overdue at the time of the transfer; and that they had never been indorsed by any governor of Texas. The bill interrogated the defendants about all these particulars; requiring them to answer on oath; and, as already mentioned, it prayed an injunction against their asking, or receiving payment from the United States; that the bonds might be delivered to the State of Texas, and for other and further relief.

As respected White & Chiles, who had now largely parted with the bonds, the case rested much upon what precedes, and their own answers.

The answer of CHILES, declaring that he had none of the bonds in his possession, set forth:

1. That there was no sufficient authority shown to prosecute the suit in the name of Texas.

2. That Texas by her rebellious courses had so far changed her status, as one of the United States, as to be disqualified from suing in this court.

3. That whether the government of Texas, during the term in question, was one de jure or de facto, it had authorized the [74 U.S. 700, 710] military board to act for it, and that the State was estopped from denying its acts.

4. That no indorsement of the bonds was necessary, they having been negotiable paper.

5. That the articles which White & Chiles had agreed to give the State, were destroyed in transitu, by disbanded troops, who infested Texas, and that the loss of the articles was unavoidable.

The answer of WHITE went over some of the same ground with that of Chiles. He admitted, however, 'that he was informed and believed that in all cases where any of the bonds were disposed of by him, it was known to the parties purchasing for themselves, or as agents for others, that there was some embarrassment in obtaining payment of said bonds at the treasury of the United States, arising out of the title of this respondent and his co-defendant Chiles.'

As respected HARDENBERG, the case seemed much thus:

In the beginning of November, 1866, after the date of the notices given through Mr. Paschal, one Hennessey, residing in New York, and carrying on an importing and commission business, then sold to Hardenberg thirty of these bonds, originally given to White and Chiles; and which thirty, a correspondent of his, long known to him, in Tennessee, had sent to him for sale. Hardenberg bought them 'at the rate of 1.20 for the dollar on their face,' and paid for them. Hennessey had 'heard from somebody that there was some difficulty about the bonds being paid at the treasury, but did not remember whether he heard that before or after the sale.'

Hardenberg also bought others of these bonds near the same time, at 1. 15 per cent., under circumstances thus testified to by Mr. C. T. Lewis, a lawyer of New York:

'In conversation with Mr. Hardenberg, I had learned that he was interested in the Texas indemnity bonds, and meditated purchasing same. I was informed in Wall Street that such bonds were offered for sale by Kimball & Co., at a certain price, which price I cannot now recollect. I informed Mr. Hardenberg of this fact, and he requested me to secure the bonds for him at [74 U.S. 700, 711] that price. I went to C. H. Kimball & Co, and told them to send the bonds to Mr. Hardenberg's office and get a check for them, which I understand they did. I remember expressing to Mr. Hardenbery the opinion that these bonds, being on their face negotiable by delivery, and payable in gold, must, at no distant day, be redeemed according to their tenor, and were, therefore, a good purchase at the price at which they were offered.

'My impression is, that before this negotiation I had read a paragraph in some New York newspaper, stating that the payment of the whole issue of the Texas indemnity bonds was suspended until the history of a certain portion of the issue, supposed to have been negotiated for the benefit of the rebel service, should be understood. I am not at all certain whether I read this publication before or after the date of the transaction. If the publication was made before this transaction I had probably read the article before the purchase was made. My impression is, that it was a paragraph in a money article, but I attributed no great importance to it. I acted in this matter simply as the friend of Mr. Hardenberg, and received no commission for my services. I am a lawyer by profession, and not a broker.'

Kimball & Co. (the brokers thus above referred to by Mr. Lewis), testified that they had received the bonds thus sold, from a firm which they named, 'in perfect good faith, and sold them in like good faith, as we would any other lot of bonds received from a reputable house.' It appeared, however, that in sending the bonds to Kimball & Co., for sale, the firm had requested that they might not be known in the transaction.

Hardenberg's own account of the matter, as declared by his answer, was thus:

'That he was a merchant in the city of New York; that he purchased the bonds held by him in open market in said city; that the parties from whom he purchased the same were responsible persons, residing and doing business in said city; that he purchased of McKim, Brothers & Co., bankers in good standing in Wall Street, one bond at 1.15 per cent., on the 6th of November, 1866, when gold was at the rate of $1.47 1/4, and declining; that when he purchased the same he made no inquiries of [74 U.S. 700, 712] McKim, Brothers & Co., but took the bonds on his own observation of their plain tenor and effect at what he conceived to be a good bargain; that afterwards, and before the payment of said bonds and coupons by the Secretary of the Treasury, and at the request of the Comptroller, Hon. R. W. Tayler, he made inquiry of said firm of McKim, Brothers & Co., and they informed him that said bonds and coupons had been sent to them to be sold by the First National Bank of Wilmington, North Carolina; that he purchased on the 8th of November, 1866, thirty of said bonds, amounting to the sum of $32,475, of J. S. Hennessey, 29 Warren Street, New York City, doing business as a commission merchant, who informed him that, in the way of business, they were sent him by Hugh Douglas, of Nashville, Tennessee; that he paid at the rate of 120 cents at a time, to wit, the 8th of November, 1866, when gold was selling at 146 and declining; that the three other bonds were purchased by him on the 8th of November, 1866, of C. H. Kimball & Co., 30 Broad Street, brokers in good standing, who informed him, on inquiry afterwards, that said bonds were handed them to be sold by a banking house in New York of the highest respectability, who owned the same, but whose names were not given, as the said firm informed him they could 'see no reason for divulging private transactions;' and that he paid for last-mentioned bonds at the rate of 120 cents, on said 8th day of November, 1866, when gold was selling at 146 and declining.

'Further answering, he saith that he had no knowledge at the time of said purchase, that the bonds were obtained from the State of Texas, or were claimed by the said State; that he acted on information obtained from the public report of the Secretary of the Treasury, showing that a large portion of similar bonds had been redeemed, and upon his own judgment of the nature of the obligation expressed by the bonds themselves, and upon his own faith in the full redemption of said bonds; and he averred that he had no knowledge of the contract referred to in the bill of complaint, nor of the interest or relation of White & Chiles, nor of any connection which they had with said complainant, or said bonds, nor of the law of the State of Texas requiring indorsement.'

The answer of White mentioned, in regard to Hardenberg's bonds, that they were sold by his (White's) broker; [74 U.S. 700, 713] that he, White, had no knowledge of the name of the real purchaser, who, however, paid 115 per cent. for them; 'that at the time of the sale, his (White's) broker informed him that the purchaser, or the person acting for the purchaser, did not want any introduction to the respondent, and required no history of the bonds proposed to be sold; that he only desired that they should come to him through the hands of a loyal person, who had never been identified with the rebellion.'

Another matter, important possibly in reference to the relief asked by the bill, and to the exact decree3 made, should, perhaps, be mentioned about these bonds of Hardenberg.

The answer of Hardenberg stated, that 'on the 16th of February, 1867, the Secretary of the Treasury ordered the payment to the respondent of all said bonds and coupons, and the same were paid on that day.' This was literally true; and the books of the treasury showed these bonds as among the redeemed bonds; and showed nothing else. As a matter of fact, it appeared that the agents of Texas on the one hand, urging the government not to pay the bonds, and the holders, on the other, pressing for payment- it being insisted by these last that the United States had no right to withhold the money, and thus deprive the holder of the bonds of interest- the Controller of the Treasury, Mr. Tayler, made a report, on the 29th of

January, 1867, to the Secretary of the Treasury, in which he mentioned, that it seemed to be agreed by the agents of the State, that her case depended on her ability to show a want of good faith on the part of the holders of bonds; and that he had stated to the agents, that as considerable delay had already been incurred, he would, unless during the succeeding week they took proper legal steps against the holders, feel it his duty to pay such bonds as were unimpeached in title in the holders' hands. He accordingly recommended to the secretary payment of Hardenberg's and of some others. The agents, on the same day that the controller made his report, [74 U.S. 700, 714] and after he had written most of it, informed him that they would take legal proceedings on behalf of the State; and were informed in turn that the report would be made on that day, and would embrace Hardenberg's bonds. Two days afterwards a personal action was commenced, in the name of the State of Texas, against Mr. McCulloch, the then Secretary of the Treasury, for the detention of the bonds of Hardenberg and others. This action was dismissed February 19th. On the 15th of the same February, the present bill was filed. On the 16th of the month, the personal suit against the secretary having at the time, as already above stated, been withdrawn, and no process under the present bill having then, nor until the 27th following, been served on Hardenberg, Mr. Tayler, Controller of the Treasury, and one Cox, the agent of Hardenberg, entered into an arrangement, by which it was agreed that this agent should deposit with Mr. Tayler government notes known as 'seven-thirties,' equivalent in value to the bonds and coupons held by Hardenberg; to be held by Mr. Tayler 'as indemnity for Mr. McCulloch, against any personal damage, loss, and expense in which he may be involved by reason of the payment of the bonds.' The seven-thirties were then delivered to Mr. Tayler, and a check in coin for the amount of the bonds and interest was delivered to Hardenberg's agent. The seven-thirties were subsequently converted into the bonds called 'five-twenties,' and these remained in the hands of Mr. Tayler, being registered in his name as trustee. The books of the treasury showed nothing in relation to this trust; nor, as already said, anything more or other than that the bonds were paid to Hardenberg or his agent.

Next, as respected the bonds of BIRCH, MURRAY & Co. It seemed in regard to these, that prior to July, 1855, Chiles wanting money, applied to this firm, who lent him $5000, on a deposit of twelve of the bonds. The whole of the twelve were taken to the treasury department. The department at first declined to pay them, but finally did pay [74 U.S. 700, 715] four of them (amounting with the coupons to $4900), upon the ground urged by the firm, that it had lent the $5000 to Chiles on the hypothecation of the bonds and coupons without knowledge of the claim of the State of Texas, and because the firm was urged to be, and was apparently, a holder in good faith, and for value; the other bonds, eight in number, remaining in the treasury, and not paid to the firm, because of the alleged claim of the State of Texas, and of the allegation that the same had come into the possession of said White and Chiles improperly, and without consideration.

The difficulty now was less perhaps about the four bonds, than about these eight, whose further history was thus presented by the answer of Birch, one of the firm, to the bill. He said in this answer, and after mentioning his getting with difficulty the payment of the four bonds--

'That afterwards, and during the year 1866, Chiles called upon him with the printed report of the First Comptroller of the Treasury, Hon. R. W. Tayler, from which it appeared that the department would, in all reasonable probability, redeem all said bonds; and requested further advances on said eight remaining bonds; and that the firm thereupon advanced said Chiles, upon the said eight bonds, from time to time, the sum of $4185.25, all of which was due and unpaid. That he made the said advances as well upon the representations of said Chiles that he was the bon a fide holder of said bonds and coupons, as upon his own observation and knowledge of their legal tenor and effect; and of his faith in the redemption thereof by the government of the United States.'
The answer said further, that--

'At the time of the advances first made, the firm had no knowledge of the contract referred to in the bill; nor of the interest or connection of said White & Chiles with the complainant, nor of the law of the State of Texas referred to in the bill passed December 16, 1851; and that the bonds were taken in good faith.'
It appeared further, in regard to the whole of these bonds, [74 U.S. 700, 716] that, in June, 1865, Chiles, wanting to borrow money of one Barret, and he, Barret, knowing Mr. Hamilton, just then appointed provisional governor, but not yet installed into office, nor apparently as yet having the impressions which he afterwards by his caution made public, went to him, supposing him well acquainted with the nature of these bonds, and sought his opinion as to their value, and as to whether they would be paid. Barret's testimony proceeded:

'He advised me to accept the proposition of Chiles, and gave it as his opinion that the government would

have to pay the bonds. I afterwards had several conversations with him on the subject, in all of which he gave the same opinion. Afterwards, (I cant't remember the exact time), Mr. Chiles applied to Birch, Murray & Co. for a loan of money, proposing to give some bonds as collateral security; and at his request I went to Birch, Murray & Co., and informed them of my conversations with Governor Hamilton, and of his opinion as expressed to me. They then seemed willing to make a loan on the security offered. In order to give them further assurance that I was not mistaken in my report of Governor Hamilton's opinion verbally expressed, I obtained from him a letter [letter produced]. It reads thus:
NEW YORK, June 25th, 1865.

HON. J. R. BARRET.

DEAR SIR: In reply to your question about Texas indemnity bonds issued by the U. S., I can assure you that they are perfectly good, and the gov't will certainly pay them to the holders.

Yours truly,

A. J. HAMILTON.'

The witness 'mentioned the conversations had with Governor Hamilton, and also spoke of the letter, and sometimes read it to various parties, some of whom were dealing in these bonds,' and, as he stated, had 'reason to believe that Governor Hamilton's opinion in regard to the bonds became pretty generally known among dealers in such paper.' The witness, however, did not know Mr. Hardenberg.

The questions, therefore, were:

1. A minor preliminary one; the question presented by Chiles's answer, as to whether sufficient authority was shown [74 U.S. 700, 717] for the prosecution of the suit in the name and in behalf of Texas.

2. A great and principal one; a question of jurisdiction, viz., whehter Texas, at the time of the bill filed or now, was one of the United States of America, and so competent to file an original bill here.

3. Assuming that she was, a question whether the respective defendants, any, all, or who of them, were proper subjects for the injunction prayed, as holding the bonds without sufficient title, and herein-and more particularly as respected Hardenberg, and Birch, Murray & Co.-a question of negotiable paper, and the extent to which holders, asserting themselves holders bon a fide and for value, of paper payable 'to bearer,' held it discharged of precedent equities.

4. A question as to the effect of the payments, at the treasury, of the bonds of Hardenberg and of the four bonds of Birch, Murray & Co.

The case was argued by Messrs. Paschal and Merrick, in behalf of Texas; and contra, by Mr. Phillips, for White; Mr. Pike, for Chiles; Mr. Carlisle, for Hardenberg; and Mr. Moore, for Birch, Murray & Co.

The CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State.

It appears from the bill, answers, and proofs, that the United States, by act of September 9, 1850, offered to the State of Texas, in compensation for her claims connected with the settlement of her boundary, $ 10,000,000 in five per cent. bonds, each for the sum of $1000; and that this offer was accepted by Texas. One-half of these bonds were retained for certain purposes in the National treasury, and the other half were delivered to the State. The bonds thus delivered [74 U.S. 700, 718] livered were dated January 1, 1851, and were all made payable to the State of Texas, or bearer, and redeemable after the 31st day of December, 1864. They were received in behalf of the State by the comptroller of public accounts, under authority of an act of the legislature, which, besides giving that authority, provided that no bond should be available in the hands of any holder until after indorsement by the governor of the State.

After the breaking out of the rebellion, the insurgent legislature of Texas, on the 11th of January, 1862, repealed the act requiring the indorsement of the governor,4 and on the same day provided for the organization of a military board, composed of the governor, comptroller, and treasurer; and authorized a majority of that board to provide for the defence of the State by means of any bonds in the treasury, upon

any account, to the extent of $1,000,000.5 The defence contemplated by the act was to be made against the United States by war. Under this authority the military board entered into an agreement with George W. White and John Chiles, two of the defendants, for the sale to them of one hundred and thirty-five of these bonds, then in the treasury of the State, and seventy- six more, then deposited with Droege & Co., in England; in payment for which they engaged to deliver to the board a large quantity of cotton cards and medicines. This agreement was made on the 12th of January, 1865. On the 12th of March, 1865, White and Chiles received from the military board one hundred and thirty-five of these bonds, none of which were indorsed by any governor of Texas. Afterward, in the course of the years 1865 and 1866, some of the same bonds came into the possession of others of the defendants, by purchase, or as security for advances of money.

Such is a brief outline of the case. It will be necessary hereafter to refer more in detail to some particular circumstances of it.

The first inquiries to which our attention was directed by [74 U.S. 700, 719] counsel, arose upon the allegations of the answer of Chiles (1), that no sufficient authority is shown for the prosecution of the suit in the name and on the behalf of the State of Texas; and (2) that the State, having severed her relations with a majority of the States of the Union, and having by her ordinance of secession attempted to throw off her allegiance to the Constitution and government of the United States, has so far changed her status as to be disabled from prosecuting suits in the National courts.

The first of these allegations is disproved by the evidence. A letter of authority, the authenticity of which is not disputed, has been produced, in which J. W. Throckmorton, elected governor under the constitution adopted in 1866, and proceeding under an act of the State legislature relating to these bonds, expressly ratifies and confirms the action of the solicitors who filed the bill, and empowers them to prosecute this suit; and it is further proved by the affidavit of Mr. Paschal, counsel for the complainant, that he was duly appointed by Andrew J. Hamilton, while provisional governor of Texas, to represent the State of Texas in reference to the bonds in controversy, and that his appointment has been renewed by E. M. Pease, the actual governor. If Texas was a State of the Union at the time of these acts, and these persons, or either of them, were competent to represent the State, this proof leaves no doubt upon the question of authority.

The other allegation presents a question of jurisdiction. It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at he time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it. [74 U.S. 700, 720] We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may, be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge,6 in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor. [74 U.S. 700,

721] In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said. [74 U.S. 700, 722] The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States.

On the 1st of February,7 a convention, called without authority, but subsequently sanctioned by the legislature regularly elected, adopted an ordinance to dissolve the union between the State of Texas and the other States under the Constitution of the United States, whereby Texas was declared to be 'a separate and sovereign State,' and 'her people and citizens' to be 'absolved from all allegiance to the United States, or the government thereof.'

It was ordered by a vote of the convention8 and by an act of the legislature,9 that this ordinance should be submitted to the people, for approval or disapproval, on the 23d of February, 1861.

Without awaiting, however, the decision thus invoked, the convention, on the 4th of February, adopted a resolution designating seven delegates to represent the State in the convention of seceding States at Montgomery, 'in order', as the resolution declared, 'that the wishes and interests of the people of Texas may be consulted in reference to the constitution and provisional government that may be established by said convention.'

Before the passage of this resolution the convention had [74 U.S. 700, 723] appointed a committee of public safety, and adopted an ordinance giving authority to that committee to take measures for obtaining possession of the property of the United States in Texas, and for removing the National troops from her limits. The members of the committee, and all officers and agents appointed or employed by it, were sworn to secrecy and to allegiance to the State. 10 Commissioners were at once appointed, with instructions to repair to the headquarters of General Twiggs, then representing the United States in command of the department, and to make the demands necessary for the accomplishment of the purposes of the committee. A military force was orgnaized in support of these demands, and an arrangement was effected with the commanding general, by which the United States troops were engaged to leave the State,

and the forts and all the public property, not necessary to the removal of the troops, were surrendered to the commissioners. 11

These transactions took place between the 2d and the 18th of February, and it was under these circumstances that the vote upon the ratification or rejection of the ordinance of secession was taken on the 23d of February. It was ratified by a majority of the voters of the State.

The convention, which had adjourned before the vote was taken, reassembled on the 2d of March, and instructed the delegates already sent to the Congress of the seceding States, to apply for admission into the confederation, and to give the adhesion of Texas to its provisional constitution.

It proceeded, also, to make the changes in the State constitution which this adhesion made necessary. The words 'United States,' were stricken out wherever they occurred, and the words 'Confederate States' substituted; and the members of the legislature, and all officers of the State, were required by the new constitution to take an oath of fidelity to the constitution and laws of the new confederacy.

Before, indeed, these changes in the constitution had been [74 U.S. 700, 724] completed, the officers of the State had been required to appear before the committee and take an oath of allegiance to the Confederate States.

The governor and secretary of state, refusing to comply, were summarily ejected from office.

The members of the legislature, which had also adjourned and reassembled on the 18th of March, were more compliant. They took the oath, and proceeded on the 8th of April to provide by law for the choice of electors of president and vice-president of the Confederate States.

The representatives of the State in the Congress of the United States were withdrawn, and as soon as the seceded States became organized under a constitution, Texas sent senators and representatives to the Confederate Congress.

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be amintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the State, except under the immediate protection of the National military forces.

Did Texas, in consecuence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and [74 U.S. 700, 725] arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that cthe people of each State compose a State, having its own government, and endowed with all

the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' 12 Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States. [74 U.S. 700, 726] When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National [74 U.S. 700, 727] governmet, so far as least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re- establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. [74 U.S. 700, 728] The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate

officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty13 by President Lincoln, in December, 1863, and by President Johnson in May, 1865.14 And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States. 15

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some [74 U.S. 700, 729] extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guaranty.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State.

In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re- establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. [74 U.S. 700, 730] The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. 'Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not.'

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island,16 arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government

is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconsturction [74 U.S. 700, 731] Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their 'Senators and Representatives into the councils of the Union.'

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But, it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance.

By the act of March 2, 1867,17 the first of the series, these governments were, indeed, pronounced illegal and were subjected to military control, and were declared to be provisional only; and by the supplementary act of July 19, 1867, the third of the series, it was further declared that it was the true intent and meaning of the act of March 2, that the governments then existing were not legal State governments, and if continued, were to be continued subject to the military commanders of the respective districts and to the paramount authority of Congress. We do not inquire here into the constitutionality of this legislation so far as it relates to military authority, or to the paramount authority of Congress. It suffices to say, that the terms of the acts necessarily imply recognition of actually existing governments; and that in point of fact, the governments thus recognized, in some important respects, still exist.

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the [74 U.S. 700, 732] three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence.

And the first question to be answered is, whether or not the title of the State to the bonds in controversy was divested by the contract of the military board with White and Chiles?

That the bonds were the property of the State of Texas on the 11th of January, 1862, when the act prohibiting alienation without the indorsement of the governor, was repealed, admits of no question, and is not denied. They came into her possession and ownership through public acts of the general government and of the State, which gave notice to all the world of the transaction consummated by them. And, we think it clear that, if a State, by a public act of her legislature, imposes restrictions upon the alienation of her property, that every person who takes a transfer of such property must be held affected by notice of them. Alienation, in disregard of such restrictions, can convey no title to the alienee.

In this case, however, it is said, that the restriction imposed by the act of 1851 was repealed by the act of 1862. And this is true if the act of 1862 can be regarded as valid. But, was it valid?

The legislature of Texas, at the time of the repeal, constituted one of the departments of a State government, established in hostility to the Constitution of the United States. It cannot be regarded, therefore, in the courts of the United States, as a lawful legislature, or its acts as lawful [74 U.S. 700, 733] acts. And, yet, it is an historical fact that the government of Texas, then in full control of the State, was its

only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void.

What, then, tried by these general tests, was the character of the contract of the military board with White and Chiles?

That board, as we have seen, was organized, not for the defence of the State against a foreign invasion, or for its protection against domestic violence, within the meaning of these words as used in the National Constitution, but for the purpose, under the name of defence, of levying war against the United States. This purpose was, undoubtedly, unlawful, for the acts which it contemplated are, within the express definition of the Constitution, treasonable. [74 U.S. 700, 734] It is true that the military board was subsequently reorganized. It consisted, thereafter, of the governor and two other members, appointed and removable by him; and was, therefore, entirely subordinate to executive control. Its general object remained without change, but its powers were 'extended to the control of all public works and supplies, and to the aid of producing within the State, by the importation of articles necessary and proper for such aid.'

And it was insisted in argument on behalf of some of the defendants, that the contract with White and Chiles, being for the purchase of cotton- cards and medicines, was not a contract in aid of the rebellion, but for obtaining goods capable of a use entirely legitimate and innocent, and, therefore, that payment for those goods by the transfer of any property of the State was not unlawful. We cannot adopt this view. Without entering, at this time, upon the inquiry whether any contract made by such a board can be sustained, we are obliged to say that the enlarged powers of the board appear to us to have been conferred in furtherance of its main purpose, of war against the United States, and that the contract, under consideration, even if made in the execution of these enlarged powers, was still a contract in aid of the rebellion, and, therefore, void. And we cannot shut our eyes to the evidence which proves that the act of repeal was intended to aid rebellion by facilitating the transfer of these bonds. It was supposed, doubtless, that negotiation of them would be less difficult if they bore upon their face no direct evidence of having come from the possession of any insurgent State government. We can give no effect, therefore, to this repealing act.

It follows that the title of the State was not divested by the act of the insurgent government in entering into this contract.

But it was insisted further, in behalf of those defendants who claim certain of these bonds by purchase, or as collateral security, that however unlawful may have been the means by which White and Chiles obtained possession of the bonds, [74 U.S. 700, 735] they are innocent holders, without notice, and entitled to protection as such under the rules which apply to securities which pass by delivery. These rules were fully discussed in Murray v. Lardner. 18 We held in that case that the purchaser of coupon bonds, before due, without notice and in good faith, is unaffected by want of title in the seller, and that the burden of proof in respect to notice and want of good faith, is on the claimant of the bonds as against the purchaser. We are entirely satisfied with this doctrine.

Does the State, then, show affirmatively notice to these defendants of want of title to the bonds in White and Chiles?

It would be difficult to give a negative answer to this question if there were no other proof than the

legislative acts of Texas. But there is other evidence which might fairly be held to be sufficient proof of notice, if the rule to which we have adverted could be properly applied to this case.

But these rules have never been applied to matured obligations. Purchasers of notes or bonds past due take nothing but the actual right and title of the vendors. 19

The bonds in question were dated January 1, 1851, and were redeemable after the 31st of December, 1864. In strictness, it is true they were not payable on the day when they became redeemable; but the known usage of the United States to pay all bonds as soon as the right of payment accrues, except where a distinction between redeemability and payability is made by law, and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction has been made.

Now, all the bonds in controversy had become redeemable before the date of the contract with White and Chiles; and all bonds of the same issue which have the indorsement of [74 U.S. 700, 736] a governor of Texas made before the date of the secession ordinance,-and there were no others indorsed by any governor,-had been paid in coin on presentation at the treasury Department; while, on the contrary, applications for the payment of bonds, without the required indorsement, and of coupons detached from such bonds, made to that department, had been denied.

As a necessary consequence, the negotiation of these bonds became difficult. They sold much below the rates they would have commanded had the title to them been unquestioned. They were bought in fact, and under the circumstances could only have been bought, upon speculation. The purchasers took the risk of a bad title, hoping, doubtless, that through the action of the National government, or of the government of Texas, it might be converted into a good one.

And it is true that the first provisional governor of Texas encouraged the expectation that these bonds would be ultimately paid to the holders. But he was not authorized to make any engagement in behalf of the State, and in fact made none. It is true, also, that the Treasury Department, influenced perhaps by these representations, departed to some extent from its original rule, and paid bonds held by some of the defendants without the required indorsement.

But it is clear that this change in the action of the department could not affect the rights of Texas as a State of the Union, having a government acknowledging her obligations to the National Constitution.

It is impossible, upon this evidence, to hold the defendants protected by absence of notice of the want of title in White and Chiles. As these persons acquired no right to payment of these bonds as against the State, purchasers could acquire none through them.

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly. 20 [74 U.S. 700, 737]

Mr. Justice GRIER, dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points raised and decided in this case. $ The first question in order is the jurisdiction of the court to entertain this bill in behalf of the State of Texas.

The original jurisdiction of this court can be invoked only by one of the United States. The Territories have no such right conferred on them by the Constitution, nor have the Indian tribes who are under the protection of the military authorities of the government.

Is Texas one of these United States? Or was she such at the time this bill was filed, or since?

This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation.

If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States. I do not think it necessary to notice any of the very astute arguments which have been advanced by the learned counsel in this case, to find the definition of a State, when we have the subject treated in a clear and common sense manner by Chief Justice Marshall, in the case of Hepburn & Dundass v. Ellxey. 21 As the case is short, I hope to be excused for a full report of it, as stated and decided by the court. He says:

'The question is, whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia. This depends on the act of Congress describing the jurisdiction of that court. The act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought, and a citizen of another State. To support the jurisdiction in this case, it must appear that Columbia is a State. On the part of the plaintiff, it has been urged that Columbia is a distinct political society, and is, therefore, a 'State' according to the [74 U.S. 700, 738] definition of writers on general law. This is true; but as the act of Congress obviously uses the word 'State' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States, and each State shall have at least one representative. 'The Senate of the United States shall be composed of two senators from each State.' Each State shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives. These clauses show that the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations.'

Now we have here a clear and well-defined test by which we may arrive at a conclusion with regard to the questions of fact now to be decided.

Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she not now held and governed as a conquered province by military force? The act of Congress of March 2d, 1867, declares Texas to be a 'rebel State,' and provides for its government until a legal and republican State government could be legally established. It constituted Louisiana and Texas the fifth military district, and made it subject, not to the civil authority, but to the 'military authorities of the United States.'

It is true that no organized rebellion now exists there, and the courts of the United States now exercise jurisdiction over the people of that province. But this is no test of the State's being in the Union; Dacotah is no State, and yet the courts of the United States administer justice there as they do in Texas. The Indian tribes, who are governed by military force, cannot claim to be States of the Union. Wherein does the condition of Texas differ from theirs?- [74 U.S. 700, 739] Now, by assuming or admitting as a fact the present status of Texas as a State not in the Union politically, I beg leave to protest against any charge of inconsistency as to judicial opinions heretofore expressed as a member of this court, or silently assented to. I do not consider myself bound to express any opinion judicially as to the constitutional right of Texas to exercise the rights and privileges of a State of this Union, or the power of Congress to govern her as a conquered province, to subject her to military domination, and keep her in pupilage. I can only submit to the fact as decided by the political position of the government; and I am not disposed to join in any essay to prove Texas to be a State of the Union, when Congress have decided that she is not. It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not is a question not before the court.

But conceding now the fact to be as judicially assumed by my brethren, the next question is, whether she has a right to repudiate her contracts? Before proceeding to answer this question, we must notice a fact in this case that was forgotten in the argument. I mean that the United States are no party to this suit, and refusing to pay the bonds because the money paid would be used to advance the interests of the rebellion. It is a matter of utter insignificance to the government of the United States to whom she makes the payment of these bonds. They are payable to the bearer. The government is not bound to inquire into the bon a fides of the holder, nor whether the State of Taxes has parted with the bonds wisely or foolishly. And although by the Reconstruction Acts she is required to repudiate all debts contracted for the purposes of the rebellion, this does not annul all acts of the State government during the rebellion, or contracts for other purposes, nor authorize the State to repudiate them.

Now, whether we assume the State of Texas to be judicially in the Union (though actually out of it) or not, it will not alter the case. The contest now is between the State of Texas and her own citizens. She seeks to annul a contract [74 U.S. 700, 740] with the respondents, based on the allegation that there was no authority in Texas competent to enter into an agreement during the rebellion. Having relied upon one fiction, namely, that she is a State in the Union, she now relies upon a second one, which she wishes this court to adopt, that she was not a State at all during the five years that she was in rebellion. She now sets up the plea of insanity, and asks the court to treat all her acts made during the disease as void.

We have had some very astute logic to prove that judicially she was not a State at all, although governed by her own legislature and executive as 'a distinct political body.'

The ordinance of secession was adopted by the convention on the 18th of February, 1861; submitted to a vote of the people, and ratified by an overwhelming majority. I admit that this was a very ill-advised measure. Still it was the sovereign act of a sovereign State, and the verdict on the trial of this question, 'by battle,'22 as to her right to secede, has been against her. But that verdict did not settle any question not involved in the case. It did not settle the question of her right to plead insanity and set aside all her contracts, made during the pending of the trial, with her own citizens, for food, clothing, or medicines. The same 'organized political body,' exercising the sovereign power of the State, which required the indorsement of these bonds by the governor, also passed the laws authorizing the disposal of them without such indorsement. She cannot, like the chameleon, assume the color of the object to which she adheres, and ask this court to involve itself in the contradictory positions, that she is a State in the Union and was never out of it, and yet not a State at all for four years, during which she acted and claims to be 'an organized political body,' exercising all the powers and functions of an independent sovereign State. Whether a State de facto or de jure, she is estopped from denying her identity in disputes with her own citizens. If they have not fulfilled their [74 U.S. 700, 741] contract, she can have her legal remedy for the breach of it in her own courts.

But the case of Hardenberg differs from that of the other defendants. He purchased the bonds in open market, bon a fide, and for a full consideration. Now, it is to be observed that these bonds are payable to bearer, and that this court is appealed to as a court of equity. The argument to justify a decree in favor of the commonwealth of Texas as against Hardenberg, is simply this: these bonds, though payable to bearer, are redeemable fourteen years from date. The government has exercised her privilege of paying the interest for a term without redeeming the principal, which gives an additional value to the bonds. Ergo, the bonds are dishonored. Ergo, the former owner has a right to resume the possession of them, and reclaim them from a bon a fide owner by a decree of a court of equity.

This is the legal argument, when put in the form of a logical sorites, by which Texas invokes our aid to assist her in the perpetration of this great wrong.

A court of chancery is said to be a court of conscience; and however astute may be the argument introduced to defend this decree, I can only say that neither my reason nor my conscience can give assent to it.

Mr. Justice SWAYNE:

I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

THE DECREE.

The decree overruled the objection interposed by way of plea, in the answer of defendants to the authority of the solicitors of [74 U.S. 700, 742] the complainant to institute this suit, and to the right of Texas, as one of the States of the National Union, to bring a bill in this court.

It declared the contract of 12th January, 1865, between the Military Board and White and Chiles void, and enjoined White and Chiles from asserting any claim under it, and decreed that the complainant was entitled to receive the bonds and coupons mentioned in the contract, as having been transferred or sold to White and Chiles, which, at the several times of service of process, in this suit, were in the possession, or under the control of the defendants respectively, and any proceeds thereof which had come into such possession or control, with notice of the equity of the complainant.

It enjoined White, Chiles, Hardenberg, Birch, Murray, Jr., and other defendants, from setting up any claim to any of the bonds and coupons attached, described in the first article of said contract, and that the complainant was entitled to restitution of such of the bonds and coupons and proceeds as had come into the possession or control of the defendants respectively.

And the court, proceeding to determine for which and how many bonds the defendants respectively were accountable to make restitution of, or make good the proceeds of, decreed that Birch and Murray were so accountable for eight, numbered in a way stated in the decree, with coupons attached; and one Stewart (a defendant mentioned in the note at page 702), accountable for four others, of which the numbers were given, with coupons; decreed that Birch and Murray, as also Stewart, should deliver to the complainant the bonds for which they were thus made accountable, with the coupons, and execute all necessary transfers and instruments, and that payment of those bonds, or any of them, by the Secretary of the Treasury, to the complainant, should be an acquittance of Birch and Murray, and of Stewart, to that extent, and that for such payment this decree should be sufficient warrant to the secretary.

And, it appearing-the decree went on to say-upon the pleadings and proofs, that before the filing of the bill, Birch and Murray had received and collected from the United States the full amount of four other bonds, numbered, &c., and that Hardenberg, before the commencement of the suit, had deposited thirty-four bonds, numbered, &c., in the Treasury Department for redemption, of which bonds he claimed to have received payment [74 U.S. 700, 743] from the Secretary of the Treasury before the service of process upon him in this suit, in respect to which payment and the effect thereof the counsel for the said Birch and Murray, and for the said Hardenberg respectively, desired to be heard, it was ordered that time for such hearing should be given to the said parties.

Both the complainant and the defendants had liberty to apply for further directions in respect to the execution of the decree.

Footnotes

[Footnote 1] These were Stewart, Shaw, &c., who made no resistance by counsel at the argument.

[Footnote 2] For a particular account of these bonds, see Paschal's Annotated Digest, Arts. 442-450.

[Footnote 3] See this last, infra, foot of p. 742.

[Footnote 4] Acts of Texas, 1862, p. 45.

[Footnote 5] Texas Laws, 55.

[Footnote 6] Mr. Justice Paterson, in Penhallow v. Doane's Admrs., 3 Dallas, 93.

[Footnote 7] Paschal's Digest Laws of Texas, 78.

[Footnote 8] Id. 80.

[Footnote 9] Laws of Texas, 1859-61, p. 11.

[Footnote 10] Paschal's Digest, 80.

[Footnote 11] Texas Reports of the Committee (Library of Congress), 45.

[Footnote 12] County of Lane v. The State of Oregon, supra, p. 76.

[Footnote 13] 13 Stat. at Large, 737.

[Footnote 14] Ib. 758.

[Footnote 15] Ib. 774-5.

[Footnote 16] Luther v. Borden, 7 Howard, 42.

[Footnote 17] 14 Stat. at Large, 428.

[Footnote 18] 2 Wallace, 118.

[Footnote 19] Brown v. Davies, 3 Term, 80; Goodman v. Simonds, 20 Howard, 366.

[Footnote 20] See the decree, infra, p. 741.

[Footnote 21] 2 Cranch, 452.

[Footnote 22] Prize Cases, 2 Black, 673.

For expenses under the neutrality act, twenty thousand dollars. Neutrality. 1818, ch. 88. Vol. iii. p. 447.

For expenses incurred under instructions of the Secretary of State, of bringing home from foreign countries persons charged with crimes, and expenses incident thereto, including loss by exchange, five thousand dollars. Persons charged with crime.

For relief and protection of American seamen in foreign countries, one hundred thousand dollars. American seamen.

For expenses which may be incurred in acknowledging the services of masters and crews of foreign vessels in rescuing American citizens from shipwreck, five thousand dollars. Rescuing seamen.

For payment of the seventh annual instalment of the proportion contributed by the United States toward the capitalization of the Scheldt dues, fifty-five thousand five hundred and eighty-four dollars; and for such further sum, not exceeding five thousand dollars, as may be necessary to carry out the stipulations of the treaty between the United States and Belgium. Scheldt dues. Vol. xiii. p. 649.

To pay to the government of Great Britain and Ireland, the second and last instalment of the amount awarded by the commissioners under the treaty of July one, eighteen hundred and sixty-three, in satisfaction of the claims of the Hudson's Bay and of the Puget Sound Agricultural Company, three hundred and twenty-five thousand dollars in gold coin: *Provided*, That before payment shall be made of that portion of the above sum awarded to the Puget Sound Agricultural Company, all taxes legally assessed upon any of the property of said company covered by said award, before the same was made, and still unpaid, shall be extinguished by said Puget Sound Agricultural Company; or the amount of such taxes shall be withheld by the government of the United States from the sum hereby appropriated. Award to Hudson's Bay and Puget Sound Agricultural Companies. Vol. xiii. p. 651. Certain taxes to be settled before payment of award; or amount withheld.

APPROVED, February 21, 1871.

CHAP. LXII. — *An Act to provide a Government for the District of Columbia.* Feb. 21, 1871. Vol. xvii. p. 16.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act. District of Columbia constituted a body corporate for municipal purposes. Powers, &c.

SEC. 2. *And be it further enacted*, That the executive power and authority in and over said District of Columbia shall be vested in a governor, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall hold his office for four years, and until his successor shall be appointed and qualified. The governor shall be a citizen of and shall have resided within said District twelve months before his appointment, and have the qualifications of an elector. He may grant pardons and respites for offenses against the laws of said District enacted by the legislative assembly thereof; he shall commission all officers who shall be elected or appointed to office under the laws of the said District enacted as aforesaid, and shall take care that the laws be faithfully executed. Governor, appointment, and term of office; qualifications; powers and duties.

SEC. 3. *And be it further enacted*, That every bill which shall have passed the council and house of delegates shall, before it becomes a law, be presented to the governor of the District of Columbia; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at Veto power.

Veto power of governor.

large on their journal, and proceed to reconsider it. If, after such reconsideration, two thirds of all the members appointed or elected to the house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of all the members appointed or elected to that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislative assembly by their adjournment prevent its return, in which case it shall not be a law.

Bills not returned within ten days, &c.

Secretary of the District.

Residence, term of office, duties.

SEC. 4. *And be it further enacted*, That there shall be appointed by the President, by and with the advice and consent of the Senate, a secretary of said District, who shall reside therein and possess the qualification of an elector, and shall hold his office for four years, and until his successor shall be appointed and qualified; he shall record and preserve all laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session, and one copy of the executive proceedings and official correspondence semiannually, on the first days of January and July in each year, to the President of the United States, and four copies of the laws to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress; and in case of the death, removal, resignation, disability, or absence, of the governor from the District, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy, disability, or absence, or until another governor shall be duly appointed and qualified to fill such vacancy. And in case the offices of governor and secretary shall both become vacant, the powers, duties, and emoluments of the office of governor shall devolve upon the presiding officer of the council, and in case that office shall also be vacant, upon the presiding officer of the house of delegates, until the office shall be filled by a new appointment.

When to act as governor.

Provision if offices of governor and secretary are vacant, &c.

Legislative assembly.

Council; number, residence, appointment, term of office, &c.

SEC. 5. *And be it further enacted*, That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. The assembly shall consist of a council and house of delegates. The council shall consist of eleven members, of whom two shall be residents of the city of Georgetown, and two residents of the county outside of the cities of Washington and Georgetown, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall have the qualification of voters as hereinafter prescribed, five of whom shall be first appointed for the term of one year, and six for the period of two years, provided that all subsequent appointments shall be for the term of two years. The house of delegates shall consist of twenty-two members, possessing the same qualifications as prescribed for the members of the council, whose term of service shall continue one year.

House of delegates; number, term of office, &c.

Districts.

An apportionment shall be made, as nearly equal as practicable, into eleven districts for the appointment of the council, and into twenty-two districts for the election of delegates, giving to each section of the District representation in the ratio of its population as nearly as may be.

Residence.

First election.

And the members of the council and of the house of delegates shall reside in and be inhabitants of the districts from which they are appointed or elected, respectively. For the purposes of the first election to be held under this act, the governor and judges of the supreme court of the District of Columbia shall designate the districts for members of the house of delegates, appoint a board of registration and persons to superintend

the election and the returns thereof, prescribe the time, places, and manner of conducting such election, and make all needful rules and regulations for carrying into effect the provisions of this act not otherwise herein provided for: *Provided*, That the first election shall be held within sixty days from the passage of this act. In the first and all subsequent elections the persons having the highest number of legal votes for the house of delegates, respectively, shall be declared by the governor duly elected members of said house. In case two or more persons voted for shall have an equal number of votes for the same office, or if a vacancy shall occur in the house of delegates, the governor shall order a new election. And the persons thus appointed and elected to the legislative assembly shall meet at such time and at such place within the District as the governor shall appoint; but thereafter the time, place, and manner of holding and conducting all elections by the people, and the formation of the districts for members of the council and house of delegates, shall be prescribed by law, as well as the day of the commencement of the regular sessions of the legislative assembly: *Provided*, That no session in any one year shall exceed the term of sixty days, except the first session, which may continue one hundred days.

Elections of delegates; when to be held. Plurality to elect. New election, if vote is equal, or in case of vacancy. Time and place of meeting. Sessions not to exceed sixty days, except the first.

SEC. 6. *And be it further enacted*, That the legislative assembly shall have power to divide that portion of the District not included in the corporate limits of Washington or Georgetown into townships, not exceeding three, and create township officers, and prescribe the duties thereof; but all township officers shall be elected by the people of the townships respectively.

Part of district may be divided into townships. Township officers.

SEC. 7. *And be it further enacted*, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the passage of this act, except such as are non compos mentis and persons convicted of infamous crimes, shall be entitled to vote at said election, in the election district or precinct in which he shall then reside, and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said District, and for all subsequent elections twelve months' prior residence shall be required to constitute a voter; but the legislative assembly shall have no right to abridge or limit the right of suffrage.

Voters, their qualifications, &c. Right of suffrage not to be abridged.

SEC. 8. *And be it further enacted*, That no person who has been or hereafter shall be convicted of bribery, perjury, or other infamous crime, nor any person who has been or may be a collector or holder of public moneys who shall not have accounted for and paid over, upon final judgment duly recovered according to law, all such moneys due from him, shall be eligible to the legislative assembly or to any office of profit or trust in said District.

Certain persons disqualified from membership in the assembly or holding office.

SEC. 9. *And be it further enacted*, That members of the legislative assembly, before they enter upon their official duties, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and will faithfully discharge the duties of the office upon which I am about to enter; and that I have not knowingly or intentionally paid or contributed anything, or made any promise in the nature of a bribe, to directly or indirectly influence any vote at the election at which I was chosen to fill the said office, and have not accepted, nor will I accept, or receive, directly or indirectly, any money or other valuable thing for any vote or influence that I may give or withhold on any bill, resolution, or appropriation, or for any other official act." Any member who shall refuse to take the oath herein prescribed shall forfeit his office, and every person who shall be convicted of having sworn falsely to or of violating his said oath shall forfeit his office and be disqualified thereafter from holding any office of profit or trust in said District, and shall be

Oath of members of the legislative assembly. Refusal to take oath to forfeit office. False oath, &c. to disqualify and to be perjury.

deemed guilty of perjury, and upon conviction shall be punished accordingly.

Quorum of legislative assembly. Members. Rules.

SEC. 10. *And be it further enacted*, That a majority of the legislative assembly appointed or elected to each house shall constitute a quorum. The house of delegates shall be the judge of the election returns and qualifications of its members. Each house shall determine the rules of its proceedings, and shall choose its own officers. The governor shall call the council to order at the opening of each new assembly; and the secretary of the District shall call the house of delegates to order at the opening of each new legislative assembly, and shall preside over it until a temporary presiding officer shall have been chosen and shall have taken his seat. No member shall be expelled by either house except by a vote of two thirds of all the members appointed or elected to that house. Each house may punish by imprisonment any person not a member who shall be guilty of disrespect to the house by disorderly or contemptuous behavior in its presence; but no such imprisonment shall extend beyond twenty-four hours at one time. Neither house shall, without the consent of the other, adjourn for more than two days, or to any other place than that in which such house shall be sitting. At the request of any member the yeas and nays shall be taken upon any question and entered upon the journal.

Organization of each new assembly.

Expulsion of members.

Punishment for contempt.

Adjournment.

Yeas and nays.

Bills, where to originate. Vote on final passage.

SEC. 11. *And be it further enacted*, That bills may originate in either house, but may be altered, amended, or rejected by the other; and on the final passage of all bills the vote shall be by yeas and nays upon each bill separately, and shall be entered upon the journal, and no bill shall become a law without the concurrence of a majority of the members elected to each house.

Reading of bills. Acts to embrace but one subject; when to take effect.

SEC. 12. *And be it further enacted*, That every bill shall be read at large on three different days in each house. No act shall embrace more than one subject, and that shall be expressed in its title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed in the title; and no act of the legislative assembly shall take effect until thirty days after its passage, unless, in case of emergency, (which emergency shall be expressed in the preamble or body of the act,) the legislative assembly shall by a vote of two thirds of all the members appointed or elected to each house otherwise direct.

Money not to be drawn from treasury, except, &c. Appropriation bills.

SEC. 13. *And be it further enacted*, That no money shall be drawn from the treasury of the District, except in pursuance of an appropriation made by law, and no bill making appropriations for the pay or salaries of the officers of the District government shall contain any provisions on any other subject.

Appropriations, how to be provided for; when to end.

SEC. 14. *And be it further enacted*, That each legislative assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government of the District until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two thirds of the members elected or appointed to each house as herein provided, nor exceed the amount of revenue authorized by law to be raised in such time, and all appropriations, general or special, requiring money to be paid out of the District treasury, from funds belonging to the District, shall end with such fiscal quarter; and no debt, by which the aggregate debt of the District shall exceed five per cent. of the assessed property of the District, shall be contracted, unless the law authorizing the same shall at a general election have been submitted to the people and have received a majority of the votes cast for members of the legislative assembly at such election. The legislative assembly shall provide for the publication of said law in at least two newspapers in the District for three months, at least, before the vote of

No debt by which, &c. to be contracted unless, &c. See § 20. *Post*, p. 424.

the people shall be taken on the same, and provision shall be made in the act for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt be paid: *Provided*, That the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted.

People to vote thereon, and on tax levy.

SEC. 15. *And be it further enacted*, That the legislative assembly shall never grant or authorize extra compensation, fee, or allowance to any public officer, agent, servant, or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law; and all such unauthorized agreements or contracts shall be null and void.

No extra allowances, &c. to any public officer.

Certain payments not to be made.

SEC. 16. *And be it further enacted*, That the District shall never pay, assume, or become responsible for the debts or liabilities of, or in any manner give, loan, or extend its credit to or in aid of any public or other corporation, association, or individual.

Credit of the District not to be loaned, &c.

SEC. 17. *And be it further enacted*, That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to the District or to any municipal corporation therein, nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency.

Special laws not to be passed in certain specified cases.

Assembly to have no power to do certain acts.

SEC. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted.

Legislative power of the District to extend to what.

All acts subject to repeal, &c. by Congress.

SEC. 19. *And be it further enacted*, That no member of the legislative assembly shall hold or be appointed to any office, which shall have been created or the salary or emoluments of which shall have been increased while he was a member, during the term for which he was appointed or elected, and for one year after the expiration of such term; and no person holding any office of trust or profit under the government of the United States shall be a member of the legislative assembly.

Members of assembly not to hold, &c. certain offices.

Certain persons not to be members of assembly.

SEC. 20. *And be it further enacted*, That the said legislative assembly shall not have power to pass any ex post facto law, nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax, in any one year, for all general objects, territorial and municipal, than two dollars on

Limit to power of assembly.

Special taxes.

Borrowing money or issuing bonds.

See § 14. *Ante*, p. 422.

every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particular local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed value of the property of said District, unless authorized by a vote of the people, as *hereinafter* [hereinbefore] provided.

Certain property not to be taxed for certain purposes.

SEC. 21. *And be it further enacted*, That the property of that portion of the District not included in the corporations of Washington or Georgetown shall not be taxed for the purposes either of improving the streets, alleys, public squares, or other public property of the said cities, or either of them, nor for any other expenditure of a local nature, for the exclusive benefit of said cities, or either of them, nor for the payment of any debt heretofore contracted, or that may hereafter be contracted by either of said cities while remaining under a municipal government not coextensive with the District.

Property in Georgetown and Washington not to be taxed for certain purposes.

SEC. 22. *And be it further enacted*, That the property within the corporate limits of Georgetown shall not be taxed for the payment of any debt heretofore or hereafter to be contracted by the corporation of Washington, nor shall the property within the corporate limits of Washington be taxed for the payment of any debt heretofore or hereafter to be contracted by the corporation of Georgetown; and so long as said cities shall remain under distinct municipal governments, the property within the corporate limits of either of said cities shall not be taxed for the local benefit of the other; nor shall said cities, or either of them, be taxed for the exclusive benefit of the county outside of the limits thereof: *Provided*, That the legislative assembly may make appropriations for the repair of roads, or for the construction or repair of bridges outside the limits of said cities.

Roads and bridges.

Schools and school moneys.

SEC. 23. *And be it further enacted*, That it shall be the duty of said legislative assembly to maintain a system of free schools for the education of the youth of said District, and all moneys raised by general taxation or arising from donations by Congress, or from other sources, except by bequest or devise, for school purposes, shall be appropriated for the equal benefit of all the youths of said District between certain ages, to be defined by law.

Justices of the peace and notaries public.

Jurisdiction and duties.

Those now in office to continue.

SEC. 24. *And be it further enacted*, That the said legislative assembly shall have power to provide for the appointment of as many justices of the peace and notaries public for said District as may be deemed necessary, to define their jurisdiction and prescribe their duties; but justices of the peace shall not have jurisdiction of any controversy in which the title of land may be in dispute, or in which the debt or sum claimed shall exceed one hundred dollars: *Provided, however*, That all justices of the peace and notaries public now in commission shall continue in office till their present commissions expire, unless sooner removed pursuant to existing laws.

Judicial courts to remain, &c.

Practice thereof and jurisdiction.

SEC. 25. *And be it further enacted*, That the judicial courts of said District shall remain as now organized until abolished or changed by act of Congress; but such legislative assembly shall have power to pass laws modifying the practice thereof, and conferring such additional jurisdiction as may be necessary to the due execution and enforcement of the laws of said District.

Board of health.

Appointment, powers and duties.

SEC. 26. *And be it further enacted*, That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a board of health for said District, to consist of five persons, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; to make and

enforce regulations to prevent domestic animals from running at large in the cities of Washington and Georgetown; to prevent the sale of unwholesome food in said cities; and to perform such other duties as shall be imposed upon said board by the legislative assembly. Board of health.

SEC. 27. *And be it further enacted*, That the offices and duties of register of wills, recorder of deeds, United States attorney, and United States marshal for said District shall remain as under existing laws till modified by act of Congress; but said legislative assembly shall have power to impose such additional duties upon said officers, respectively, as may be necessary to the due enforcement of the laws of said District. Register of wills, recorder of deeds. Attorney and marshal.

SEC. 28. *And be it further enacted*, That the said legislative assembly shall have power to create by general law, modify, repeal, or amend, within said District, corporations aggregate for religious, charitable, educational, industrial, or commercial purposes, and to define their powers and liabilities: *Provided*, That the powers of corporations so created shall be limited to the District of Columbia. Corporations; limited to the District.

SEC. 29. *And be it further enacted*, That the legislative assembly shall define by law who shall be entitled to relief as paupers in said District, and shall provide by law for the support and maintenance of such paupers, and for that purpose shall raise the money necessary by taxation. Paupers.

SEC. 30. *And be it further enacted*, That the legislative assembly shall have power to provide by law for the election or appointment of such ministerial officers as may be deemed necessary to carry into effect the laws of said District, to prescribe their duties, their terms of office, and the rate and manner of their compensation. Ministerial officers.

SEC. 31. *And be it further enacted*, That the governor, secretary, and other officers to be appointed pursuant to this act, shall, before they act as such, respectively, take and subscribe an oath or affirmation before a judge of the supreme court of the District of Columbia, or some justice of the peace in the limits of said District, duly authorized to administer oaths or affirmations by the laws now in force therein, or before the Chief Justice or some associate justice of the Supreme Court of the United States, to support the Constitution of the United States, and faithfully to discharge the duties of their respective offices; which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken; and such certificates shall be received and recorded by the said secretary among the executive proceedings; and all civil officers in said District, before they act as such, shall take and subscribe a like oath or affirmation before the said governor or secretary, or some judge or justice of the peace of the District, who may be duly commissioned and qualified, or before the Chief Justice of the Supreme Court of the United States, which said oath or affirmation shall be certified and transmitted by the person administering the same to the secretary, to be by him recorded as aforesaid; and afterward the like oath or affirmation shall be taken and subscribed, certified and recorded in such manner and form as may be prescribed by law. Governor, secretary, &c. to take oath or affirmation. Oaths to be certified, &c.

SEC. 32. *And be it further enacted*, That the governor shall receive an annual salary of three thousand dollars; and the secretary shall receive an annual salary of two thousand dollars, and that the said salaries shall be paid quarter-yearly, from the dates of the respective appointments, at the treasury of the United States; but no payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive four dollars each per day during their actual attendance at the session thereof, and an additional allowance of four dollars per day shall be paid to the presiding officer of each house for each day he shall so preside. And a chief clerk, one assistant clerk, one engrossing and one enrolling clerk, and a sergeant-at-arms may be chosen for each house; Salaries of governor and secretary. Pay of members of assembly. Clerks and sergeant-at-arms.

and the chief clerk shall receive four dollars per day, and the said other officers three dollars per day, during the session of the legislative assembly: *Provided*, That there shall be but one session of the legislative assembly annually, unless, on an extraordinary occasion, the governor shall think proper to call the legislative assembly together. And the governor and secretary of the District shall, in the disbursement of all moneys appropriated by Congress and intrusted to them, be governed solely by the instructions of the Secretary of the Treasury of the United States, and shall semiannually account to the said Secretary for the manner in which the aforesaid moneys shall have been expended; and no expenditure shall be made by the said legislative assembly of funds appropriated by Congress, for objects not especially authorized by acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

Sessions of legislative assembly.

Disbursements of appropriations by Congress.

First session of legislative assembly.

SEC. 33. *And be it further enacted*, That the legislative assembly of the District of Columbia shall hold its first session at such time and place in said District as the governor thereof shall appoint and direct.

Delegate to the House of Representatives.

SEC. 34. *And be it further enacted*, That a delegate to the House of Representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States and of the District of Columbia, and shall have the qualifications of a voter, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several Territories of the United States to the House of Representatives, and shall also be a member of the committee for the District of Columbia; but the delegate first elected shall hold his seat only during the term of the Congress to which he shall be elected. The first election shall be held at the time and places and be conducted in such manner as the elections for members of the House of Representatives are conducted; and at all subsequent elections the time and places and the manner of holding the elections shall be prescribed by law. The person having the greatest number of legal votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly; and the Constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States.

Plurality to elect.

Constitution and laws to be in force in the District.

Disbursing officers to give security approved by Secretary of Treasury.

SEC. 35. *And be it further enacted*, That all officers to be appointed by the President of the United States, by and with the advice and consent of the Senate, for the District of Columbia, who, by virtue of the provisions of any law now existing, or which may be enacted by Congress, are required to give security for moneys that may be intrusted to them for disbursement, shall give such security at such time and in such manner as the Secretary of the Treasury may prescribe.

Valuation of property of the United States in the District except, &c. to be made every five years, and return thereof made.

SEC. 36. *And be it further enacted*, That there shall be a valuation taken in the District of Columbia of all real estate belonging to the United States in said District, except the public buildings, and the grounds which have been dedicated to the public use as parks and squares, at least once in five years, and return thereof shall be made by the governor to the President of the Senate and Speaker of the House of Representatives on the first day of the session of Congress held after such valuation shall be taken, and the aggregate of the valuation of private property in said District, whenever made by the authority of the legislative assembly, shall be reported to Congress by the governor: *Provided*, That all valuations of property belonging to the United States shall be made by such persons as the Secretary of the Interior shall appoint, and under such regulations as he shall prescribe.

Valuation to be made by whom.

Board of public works.

SEC. 37. *And be it further enacted*, That there shall be in the District of Columbia a board of public works, to consist of the governor, who

shall be president of said board; four persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, one of whom shall be a civil engineer, and the others citizens and residents of the District, having the qualifications of an elector therein; one of said board shall be a citizen and resident of Georgetown, and one of said board shall be a citizen and resident of the county outside of the cities of Washington and Georgetown. They shall hold office for the term of four years, unless sooner removed by the President of the United States. The board of public works shall have entire control of and make all regulations which they shall deem necessary for keeping in repair the streets, avenues, alleys, and sewers of the city, and all other works which may be intrusted to their charge by the legislative assembly or Congress. They shall disburse upon their warrant all moneys appropriated by the United States, or the District of Columbia, or collected from property-holders, in pursuance of law, for the improvement of streets, avenues, alleys, and sewers, and roads and bridges, and shall assess in such manner as shall be prescribed by law, upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one third of such cost, which sum shall be collected as all other taxes are collected. They shall make all necessary regulations respecting the construction of private buildings in the District of Columbia, subject to the supervision of the legislative assembly. All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made. All contracts made by said board in which any member of said board shall be personally interested shall be void, and no payment shall be made thereon by said District or any officers thereof. On or before the first Monday in November of each year, they shall submit to each branch of the legislative assembly a report of their transactions during the preceding year, and also furnish duplicates of the same to the governor, to be by him laid before the President of the United States for transmission to the two houses of Congress; and shall be paid the sum of two thousand five hundred dollars each annually.

Board of public works, of whom to consist; Vol. xvii. p. 7.

term of office;

powers and duties.

Streets and sewers.

Disbursement of moneys.

Betterments.

Private buildings.

Contracts.

Limit to power to contract.

Annual report.

Pay.

SEC. 38. *And be it further enacted*, That the officers herein provided for, who shall be appointed by the President, by and with the advice and consent of the Senate, shall be paid by the United States by appropriations to be made by law as hereinbefore provided; and all other officers of said District provided for by this act shall be paid by the District: *Provided*, That no salary shall be paid to the governor as a member of the board of public works in addition to his salary as governor, nor shall any officer of the army appointed upon the board of public works receive any increase of pay for such service.

Officers appointed by the President to be paid by the United States.

Other officers.

Proviso.

SEC. 39. *And be it further enacted*, That if, at any election hereafter held in the District of Columbia, any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious, or vote more than once at the same election for any candidate for the same office, or vote at a place where he may not be entitled to vote, or vote without having a lawful right to vote, or do any unlawful act to secure a right or opportunity to vote for himself or any other person, or by force, threats, menace, or intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of the District of Columbia from freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right, or compel or induce, by any such means or otherwise, any

Penalty for illegal voting and illegal conduct at elections.

Penalty for illegal voting and illegal conduct at elections.

officer of any election in said District to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any unlawful means induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution.

Charters of Washington and Georgetown repealed from June 1, 1871, and offices abolished.

Levy court.

Laws and ordinances to be in force until

Washington.

Georgetown

Special tax.

SEC. 40. *And be it further enacted*, That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. eighteen hundred and seventy-one, and all offices of said corporations abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall remain in full force until modified or repealed by Congress or the legislative assembly of said District; that portion of said District included within the present limits of the city of Washington shall continue to be known as the city of Washington; and that portion of said District included within the limits of the city of Georgetown shall continue to be known as the city of Georgetown; and the legislative assembly shall have power to levy a special tax upon property, except the property of the government of the United States, within the city of Washington for the payment of the debts of said city; and upon property, except the property of the government of the United States, within the limits of the city of Georgetown for the payment of the debts of said city; and upon property, except the property of the government of the United States, within said District not included within the limits of either of said cities to pay any debts owing by that portion of said District: *Provided*, That the charters of said cities severally, and the powers of said levy court, shall be continued for the following purposes, to wit: For the collection of all sums of money due to said cities, respectively, or to said levy court; for the enforcement of all contracts made by said cities, respectively, or by said levy court, and all taxes, heretofore assessed, remaining unpaid; for the collection of all just claims against said cities, respectively, or against said levy court; for the enforcement of all legal contracts against said cities, respectively, or against said levy court, until the affairs of said cities, respectively, and of said levy court, shall have been fully closed; and no suit in favor of or against said corporations, or either of them, shall abate by reason of the passage of this act, but the same shall be prosecuted to final judgment as if this act had not been passed.

Charters and levy court continued for certain purposes.

Pending suits.

No election for mayor, &c. of Georgetown prior to June 1, 1871.

No taxes to be assessed by municipal authorities.

SEC. 41. *And be it further enacted*, That there shall be no election holden for mayor or members of the common council of the city of Georgetown prior to the first day of June, eighteen hundred and seventy-one, but the present mayor and common council of said city shall hold their offices until said first day of June next. No taxes for general purposes shall hereafter be assessed by the municipal authorities of the cities of Washington or Georgetown, or by said levy court. And upon the repeal of the charters of the cities of Washington and Georgetown,

the District of Columbia be, and is hereby, declared to be the successor of said corporations, and all the property of said corporations, and of the county of Washington, shall become vested in the said District of Columbia, and all fines, penalties, costs, and forfeitures, which are now by law made payable to said cities, respectively, or said levy court, shall be paid to said District of Columbia, and the salaries of the judge and clerk of the police court, the compensation of the deputy clerk and bailiffs of said police court, and of the marshall of the District of Columbia shall be paid by said District: *Provided*, That the moneys collected upon the judgements of said police court, or so much thereof as may be necessary, shall be applied to the payment of the salaries of the judge and other officers of said court, and to the payment of the necessary expenses thereof, and any surplus remaining after paying the salaries, comp tion, and expenses aforesaid, shall be paid into the treasury of the District at the end of every quarter.

District of Columbia to be the successor of the cities of Washington and Georgetown, &c.

Fines and costs.

Salaries of judge and other officers of police court.

Surplus to be paid into the treasury.

APPROVED, February 21, 1871.

CHAP. LXIII. — *An Act to change the Times for holding the district and circuit Courts of the United States at Erie, Pennsylvania.* Feb. 21, 1871.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after this date the July terms of the district and circuit courts of the United States in and for the western district of Pennsylvania, at Erie, shall be commenced and held on and after the third Monday of July in each year; and the January terms of said court at the same place shall be commenced and held at Erie, Pennsylvania, on and after the second Monday in January of each year.

Terms of United States courts at Erie, Pa.

APPROVED, February 21, 1871.

CHAP. LXIV. — *An Act to provide for the Apportionment of the Members of the legislative Assembly of the Territory of Colorado.* Feb. 21, 1871.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the governor, chief justice, and United States attorney for the Territory of Colorado, on or before the first day of June next, to make an apportionment of the members of the council and house of representatives of the said Territory, among the several districts, for the election of members of the council and house of representatives, giving to each section of the Territory representation in ratio of its population, as near as may be, as ascertained by the census taken by authority of the United States in the year eighteen hundred and seventy.

Apportionment of members of the legislative assembly of Colorado.

Ratio of population.

SEC. 2. *And be it further enacted*, That it shall be the duty of said governor, chief justice, and United States attorney to make an official certificate showing the number of members of the council and house of representatives the several districts of said Territory are entitled [to] as apportioned under the provisions of this act, and file said certificate in the office of the secretary of said Territory, on or before the first day of July next, and said apportionment so made shall be held to be the proper and legal apportionment for the members of the next legislative assembly of the Territory of Colorado.

Official certificate of apportionment.

APPROVED, February 21, 1871.

CHAP. LXV. — *An Act to repeal an Act of the Legislature of Wyoming Territory apportioning said Territory for Members of the Council and House of Representatives of the Territorial Legislature.* Feb. 21, 1871.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act of the legislature of the Territory of Wyoming, entitled "An act apportioning

Apportionment act of legislature of Wyoming Ter-

U.S. Supreme Court

HOOVEN & ALLISON CO. v. EVATT, 324 U.S. 652 (1945)

324 U.S. 652

HOOVEN & ALLISON CO.
v.
EVATT, Tax Commissioner of Ohio.
No. 38.

Argued Nov. 7-8, 1944.
Decided April 9, 1945.

Rehearing Denied May 7, 1945

See 325 U.S. 892 , 65 S.Ct. 1198. [324 U.S. 652, 653] Messrs. Luther Day and Curtis C. Williams, Jr., both of Cleveland, Ohio, for petitioner.

[324 U.S. 652, 654] Mr. Aubrey A. Wendt, of Columbus, Ohio, for respondent.

Mr. Chief Justice STONE delivered the opinion of the Court.

Respondent, a tax official of the state of Ohio, has assessed for state ad valorem taxes certain bales of hemp and other fibers belonging to petitioner. The fibers had been brought from the Philippine Islands or from other places outside the United States. When assessed for the tax, they were stored in the original packages in which they had been imported, in petitioner's warehouse at its factory at Xenia, Ohio, preliminary to their use by petitioner in the manufacture of cordage and similar products.

The State Board of Tax Appeals sustained the assessment for the three years in question, 1938, 1939, and 1940. Petitioner then brought the present proceeding in the Supreme Court of Ohio to review the Board's determination. That court rejected petitioner's contention that the fibers are imports, immune from state taxation under Article, I, 10, cl. 2, of the Constitution, which prohibits state taxation of imports or exports; and it sustained the tax. 142 Ohio St. 235, 51 N.E.2d 723.

The State Court recognized that Brown v. Maryland, 12 Wheat. 419, established the rule that imports in their original packages may not be taxed by a state. But it thought that the present case fell within the qualification upon that rule laid down in Waring v. City of Mobile, 8 Wall. 110. The Waring case held that since a purpose of importation is sale, imports are immune from state taxation only so long as they are in the hands of the importer, and lose their immunity upon being sold by him. The Supreme Court of Ohio held that petitioner acquired title to the merchandise here taxed after its arrival in this country. It concluded from this that the foreign [324 U.S. 652, 655] sellers or their agents, and not petitioner, were the importers, and that the merchandise, after the sale to petitioner, had ceased to be an import constitutionally immune from state taxation.

In any case the Ohio court thought that even if petitioner were the importer and the merchandise were immune from taxation on its receipt by petitioner, it nevertheless ceased to be an import, and lost its immunity as such, upon its storage at petitioner's warehouse, awaiting its use in manufacturing. The Court thought that Brown v. Maryland, supra, laid down a rule applicable only to imports for the purpose of sale, and that imports for use became, upon storage, even if still in the original package, so intermingled with

the common mass of property within the state as to be subject to the state power of taxation. 1 The Court found it unnecessary to decide whether the fibers brought from the Philippine Islands, which are not a foreign country, could be imports within the meaning of the constitutional immunity, since they would be taxable in any event upon the two grounds already stated.

We granted certiorari, 321 U.S. 762 , 64 S.Ct. 939, because of the novelty and importance of the constitutional questions raised. The questions for decision are (1) whether, with respect to the fibers brought from foreign countries, petitioner was their importer; if so, (2) whether, as stored in petitioner's warehouse, they continued to be imports at the time of the tax assessment; and (3) whether the fibers brought from the Philippine Islands, despite the place of their origin, are likewise imports rendered immune from taxation by the constitutional provision.

The Constitution confers on Congress the power to lay and collect import duties, Art. I, 8, and provides that 'no [324 U.S. 652, 656] State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws ....' Art. I, 10, Cl. 2. These provisions were intended to confer on the national government the exclusive power to tax importations of goods into the United States. That the constitutional prohibition necessarily extends to state taxation of things imported, after their arrival here and so long as they remain imports, sufficiently appears from the language of the constitutional provision itself and its exposition by Chief Justice Marshall in Brown v. Maryland, supra. We do not understand anyone to challenge that rule in this case.

It is obvious that if the states were left free to tax things imported after they are introduced into the country and before they are devoted to the use for which they are imported, the purpose of the constitutional prohibition would be defeated. The fears of the framers, that importation could be subjected to the burden of unequal local taxation by the seaboard, at the expense of the interior states, would be realized, as effectively as though the states had been authorized to lay import duties. 2 It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, 'there must be a point of time when the prohibition ceases, and the power of the state to tax commences.' Brown v. Maryland, supra, 12 Wheat. 441.

In Brown v. Maryland, supra, the state sought to impose a license tax on the sale by the importer of goods stored in his warehouse in the original packages in which they [324 U.S. 652, 657] were imported. In holding the levy to be a prohibited tax on imports, Chief Justice Marshall said (12 Wheat. at pages 441, 442):

'It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution.'

Although one Justice dissented in Brown v. Maryland, supra, from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. Waring v. City of Mobile, supra, 8 Wall. 122, 123; Low v. Austin, 13 Wall. 29, 32, 33; Cook v. Pennsylvania, 97 U.S. 566 , 573; F. May & Co. v. New Orleans, 178 U.S. 496, 501 , 507 S., 508, 20 S.Ct. 976, 977, 979, 980; People of State of New York ex rel. Edward & John Burke v. Wells, 208 U.S. 14, 21 , 22 S., 24, 28 S.Ct. 193, 195, 196; Gulf Fisheries Co. v. MacInerney, 276 U.S. 124, 126 , 127 S., 48 S.Ct. 227, 228; McGoldrick v. Gulf Oil Corporation, 309 U.S. 414, 423 , 60 S.Ct. 664, 667.

All the taxed fibers, with the exception of those brought from the Philippine Islands, which will presently be separately considered, were brought to this country from foreign lands and were undoubtedly imports, clothed as such with a tax immunity which survived their importation, until the happening of some event sufficient to alter their character as imports. As we have said, the Supreme Court of Ohio found such events in what it deemed to be a sale of the merchandise to petitioner after it had been landed in the United States, and in the further cir- [324 U.S. 652, 658] cumstance that by storing the merchandise in the warehouse at petitioner's factory, it had become a part of the common mass of property subject to state taxation and so could no longer be regarded as an import.

Resolution of either point in favor of respondent is decisive of the case. Hence we must first consider whether petitioner, rather than the foreign producers or shippers acting through their American agents, was the importer. If so, the tax immunity of the imported merchandise survived its receipt by petitioner and we must determine the further question whether petitioner's subsequent treatment of the merchandise deprived it of its character, and hence its immunity, as an import.

I.

Petitioner's relationship to the merchandise at the time of importation and afterward is of significance only in determining whether, as the state court has found, the relationship was so altered after importation that it can be said that the purpose of the importation had been fulfilled. If it had, there was no longer either occasion or reason for the further survival of the immunity from taxation. That relationship is to be ascertained by reference to all the circumstances attending the importation, particularly as shown by the long established course of busines by which petitioner's supply of fibers has been brought into the country for use in manufacturing its finished product.

The state introduced no evidence, and there is no dispute in point of substance as to petitioner's evidence. The latter consists of the oral testimony of petitioner's general manager, some examples of the contracts by which petitioner procured the merchandise to be brought to this country, and two stipulations containing statements, admitted to be true, which were made by the American agents of the producers and shippers of the merchandise. [324 U.S. 652, 659] Both the Board of Tax Appeals and the state court, without specially finding some of the facts which we regard as of controlling significance, contented themselves with stating the facts generally. They inferred from these facts that petitioner technically was but a purchaser of the merchandise, after it had been imported into this country. They concluded that petitioner was not the importer, and the fibers had ceased to be imports after the sale to petitioner.

In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right of immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. Kansas City Southern Ry. v. C. H. Albers Commission Co., 223 U.S. 573, 591 , 32 S.Ct. 316, 321; Truax v. Corrigan, 257 U.S. 312, 325 , 42 S.Ct. 124, 127, 27 A.L.R. 375; First National Bank v. Hartford, 273 U.S. 548, 552 , 47 S.Ct. 462, 463, 59 A. L.R. 1, and cases cited; Fiske v. Kansas, 274 U.S. 380, 385 , 386 S., 47 S.Ct. 655, 656, 657; Norris v. Alabama, 294 U.S. 587, 589 , 590 S., 55 S.Ct. 579, 580.

In this case it appears without contradiction that petitioner, in the regular course of its business, contracts for its manufacturing requirements of hemp, jute, sisal and other fibers, before their shipment to this country, and sometimes even before they are produced in the various foreign countries of their origin. Petitioner's negotiations for the purchase are carried on with brokers located in New York City, who represent the foreign producers. After an agreement as to price, petitioner enters into a firm contract to purchase the fibers. A standard form of contract is executed in duplicate or triplicate by petitioner and the broker who signs as agent for or 'for account of' his named principal. The contract specifies [324 U.S. 652, 660] the kind and amount of fibers purchased, the time of shipment, the American port to which the shipment is to be made, and frequently the steamship company, designated by petitioner, upon whose vessel the merchandise is to be shipped. While the contract gave the seller the option to make deliveries from merchandise warehoused in the United States, no such deliveries were made of any of the merchandise here in question.

The price is a 'landed price', which includes as its components the contract cost of the goods at point of origin, the normal charges for ocean freight, marine and war risk insurance and United States customs clearance (including customs duties in the case of hemp which alone of the purchased merchandise is subject to import duties), and the expense of arranging for transshipment from the port of entry to petitioner at Xenia, Ohio. Any variation from the normal rates for these components (other than the contract cost of the goods at point of origin) is for account of petitioner. 'Extra value' insurance covering any increase in value of the merchandise over the contract price during the voyage, is effected, if petitioner requests, at its expense.

Upon shipment the merchandise is consigned to the broker in this country or to a banker, either on an order or a straight bill of lading, in either case with directions to 'Notify The Hooven & Allison Co.' When the bales of purchased merchandise are loaded for shipment on board vessel at the point of origin, they

are given distinctive markings referable to petitioner's contract. A declaration is then cabled to the New York broker referring to the contract upon which the shipment is made, stating the name of the vessel, the approximate number of bales shipped, their identification marks, and the approximate date of arrival in the United States. The broker communicates this information to petitioner and sometimes follows it before arrival of the shipment at the port of entry, with [324 U.S. 652, 661] a pro forma invoice, which states the approximate tonnage and value of the shipment. Petitioner then gives instructions to the broker for the shipment from the port to Xenia.

The broker enters the shipment at the custom house in its own name as an accommodation to the petitioner, which has no facilities for clearance of the goods through the customs. The broker then ships the merchandise upon a straight bill of lading to Xenia, where it is delivered by the carrier to petitioner. At that time petitioner pays the freight, and ten to fifteen days after the receipt of the final invoice, it pays the purchase price to the broker. It is stipulated that the sale is upon the unsecured credit of petitioner and it does not appear that there is any retention of a security title either by the foreign seller, the broker, or any intervening banker, to secure payment by petitioner of the purchase price.

From all this it is clear that from the beginning, after the contract of purchase is signed, the foreign producer is obligated to sell the merchandise on credit, to ship it to an American port and to deliver it to petitioner, which is obligated to accept and pay for it. Performance of the contract calls for, and necessarily results in, importation of the merchandise from its country of origin to the United States. Petitioner's contracts of purchase are the inducing and efficient cause of bringing the merchandise into the country, which is importation. Examination of the documents and consideration of the course of business can leave no doubt that the petitioner not only causes the importation but that the purpose and necessary consequence of it are to supply petitioner with the raw material for its manufacture of cordage at its factory in Ohio.

From the moment of shipment the taxed merchandise was identified and appropriated to the purchase contract and to that ultimate purpose, by both the seller and the buyer. Petitioner could resell the merchandise while it [324 U.S. 652, 662] was in transit. The risk of loss from change in market value was on petitioner, save as it might insure against such loss at its own expense. The right to demand, receive and use the merchandise, subject only to the payment of the contract 'landed price', was in petitioner. And obviously if the possibility of the seller's right of stoppage in transitu, the carrier's lien or the necessity of payment of customs duties are to be regarded as inconsistent with importation, there would be few importations and few importers in the constitutional sense. For there are few who are not subject to some or all of these contingencies.

Here it is agreed that the sale was on credit. So far as appears in those instances where the merchandise was consigned to a banker, it was for the purpose of financing the producer or shipper, pending receipt of the merchandise and payment for it by petitioner, which appears always to have purchased on credit and to have received the merchandise before payment, and never to have given security for its payment. There was therefore no occasion for an implied reservation of a security 'title' as against petitioner in either the sellers or their agents, or the banker in those cases where the goods were consigned on shipment to a banker.

For the purpose of determining whether petitioner was the importer in the constitutional sense, it is immaterial whether the title to the merchandise imported vested in him who caused it to be brought to this country at the time of shipment or only after its arrival here. 3 Decision in Waring v. City of Mobile supra, upon which the Supreme Court of Ohio relied, did not turn on technical questions [324 U.S. 652, 663] of passage of title. 4 For in determining the meaning and application of the constitutional provision, we are concerned with matters of substance not of form. When the merchandise is brought from another country to this, the extent of its immunity from state taxation turns on the essential nature of the transaction, considered in the light of the constitutional purpose, and not on the formalities with which the importation is conducted or on the technical procedures by which it is effected. It is common knowledge to lawyers and businessmen that vast quantities of merchandise are annually imported into this country by purchasers resident here, for sale or manufacture here. Sometimes the buyer completes the purchase abroad, in person, and ships to this country; sometimes, as in this case, the purchase is on unsecured credit, but more often it is under contracts by which the vendor reserves in himself or his agent or a banker a lien or title as security for payment of the purchase price on or after arrival. To say that the purchaser is any the less an importer in the one case than in the others, is to ignore [324 U.S. 652, 664] the constitutional purpose and substitute form for substance.

As we have said, the constitutional purpose is to protect the exclusive power of the national government to tax imports and to prevent what in matter of substance would amount to the imposition of additional import duties by states in which the property might be found or stored before its sale or use. It is evident that the constitutional prohibition envisages the present quite as much as if the petitioner had sent his own agent abroad where he had purchased and paid for the merchandise and shipped it to petitioner in this country. The purpose and result of the transaction are the same in either case. The apprehended evils of the local taxation of imports after their arrival here are the same.

It is enough for present purposes that the merchandise in this case was imported; and that petitioner was the efficient cause of its importation, the purpose and effect of which was petitioner's acquisition of the merchandise for its manufacture into finished goods. We conclude that petitioner was the importer, and that the merchandise in its hands was entitled to the constitutional tax immunity, surviving delivery of the imports to it.

II.

We turn now to the question whether the immunity was lost by the storage of the merchandise in the original packages in petitioner's warehouse at its factory, pending its use in petitioner's manufacturing operations. For the purpose of the immunity it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state. The reason for the original package doctrine, as fully expounded in Brown v. Maryland, supra, is that un- [324 U.S. 652, 665] less the immunity survives to some extent the arrival of the merchandise in the United States, the immunity itself would be destroyed. For there is no purpose of taxing importation, itself, even its ultimate suppression, which could not be equally accomplished by laying a like tax on things imported after their arrival and while they are in the hands of the importer.

On the other hand the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since Brown v. Maryland, supra, an import is deemed to retain its character as such 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported,' see Brown v. Maryland, supra, 12 Wheat. 442, or until put to the use for which it was imported. Chief Justice Marshall, in Brown v. Maryland, supra, 12 Wheat. at pages 442, 443, rejected the suggestion that 'an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.' Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, 12 Wheat. at page 443: 'The same observations (i.e., the importer has mixed the goods with the common mass of property, rendering them taxable) apply to plate, or other furniture used by the importer.' (Italics added.)

We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In the one case [324 U.S. 652, 666] the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported. Woodruff v. Parham, 8 Wall. 123; Brown v. houston, 114 U.S. 622 , 5 S.Ct. 1091; American Steel & Wire Co. v. Speed, 192 U.S. 500, 521 , 24 S. Ct. 365, 371; Sonneborn Bros. v. Cureton, 262 U.S. 506 , 508- 513, 43 S.Ct. 643-645; Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 526 , 527 S., 55 S.Ct. 497, 501, 502, 101 A.L.R. 55.

This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, F. May & Co. v. New Orleans, supra, 178 U.S. 501 , 20 S.Ct. 977; Gulf Fisheries Co. v. MacInerney, supra, 276 U.S. 126 , 48 S.Ct. 228; McGoldrick v. Gulf Oil Corporation, supra, 309 U.S. 423 , 60 S.Ct. 667, or when the original packages in which they were imported are broken, Low v. Austin, supra, 13 Wall. 34; F. May & Co. v. New Orleans, supra, 178 U.S. 508, 509 , 20 S.Ct. 980, 981. But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of Brown v. Maryland, in which he appeared as

counsel for the State, declared, as we now affirm: 'Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.' License Cases, 5 How, 504, 575. [324 U.S. 652, 667] In Brown v. Maryland, supra, the imported merchandise held in original packages in the importer's warehouse for sale, was deemed tax immune. We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases.

It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question.

It is said that our decision will result in discrimination against domestic and in favor of foreign producers of goods. But such discriminations as there may be, are implicit in the constitutional provision and in its pur- [324 U.S. 652, 668] pose to protect imports from state taxation. It is also suggested that it will be difficult to ascertain in particular cases when an original package is broken, a difficulty which arises, not out of the present decision, but out of the original package rule itself, which we do not understand to be challenged here. Moreover, this supposed difficulty does not seem to have baffled judicial decision in any case in the more than a hundred years which have followed the decision in Brown v. Maryland, supra.

As was emphasized in Brown v. Maryland, supra, the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter. In view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture. Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package and before they are devoted to the purpose for which they were imported.

III.

There remains the question whether the fibers which petitioner brought from the Philippine Islands and stored in its warehouse in the original packages are also imports, constitutionally immune from state taxation.

Respondents argue that the Philippine Islands are not a foreign country and that only articles brought here [324 U.S. 652, 669] from foreign countries are imports within the meaning of the constitutional provision. Goods transported from one state to another are not imports, since they are articles originating in the United States and not brought into it. Woodruff v. Parham, supra; Sonneborn Bros. v. Cureton, supra; Baldwin v. G. A. F. Seelig, Inc., supra. It is petitioner's argument that merchandise brought from the Philippines to the United States is an import because it is brought into the United States from a place without, even though not from a foreign country. Implicit in this argument is the contention that the Philippines, while belonging to the United States as a sovereign, are not part of it; and that merchandise brought from the Philippines is an import because it originates outside of and is brought into the territory comprising the several states which are united under and by the Constitution, territory in which the constitutional prohibition against the state taxation of imports, is alone applicable.

The Constitution provides us with no definition of the term 'imports' other than such as is implicit in the word itself. Imports were defined by Chief Justice Marshall in Brown v. Maryland, supra, 12 Wheat. 437,

as 'things imported' and 'articles brought into a country.' He added: 'If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country.'

He thus defined imports by reference not to their foreign origin but to the physical fact that they are articles brought into the country from some place without it. Since most imports originate in foreign countries, courts have not unnaturally fallen into the habit of referring to imports as things brought into this country from a foreign country. Waring v. City of Mobile, supra; Woodruff v. Parham, supra; Pittsburgh & Southern Coal Co. v. Louisiana, 156 U.S. 590, 600 , 15 S.Ct. 459, 464; Patapsco Guano Co. v. North Carolina, [324 U.S. 652, 670] 171 U.S. 345, 350 , 18 S.Ct. 862, 864; F. May & Co. v. New Orleans, supra. 5 But the Constitution says nothing of the foreign origin of imports, and in none of these cases was it necessary to decision to formulate the rule in terms of origin in a foreign country. In each case the result would have been the same if the Court had treated imports merely as articles brought into the country from a point without.

Chief Justice Marshall's definition has received support in cases holding or suggesting that fish caught in the open sea and brought into this country are imports entitled to the constitutional protection, although they did not come from a foreign country. Gulf Fisheries Co. v. Darrouzet, D.C., 17 F.2d 374, 376; Booth Fisheries Corp. v. Case, 182 Wash. 392, 395, 47 P.2d 834. In Gulf Fisheries Co. v. MacInerney, supra, we found it unnecessary to decide the point. In that case the fish had been subjected to a manufacturing process after their arrival in port and before they were taxed. Hence, even if originally imports, they had ceased to be such and were no longer immune from the challenged state tax. See also Fishermen's Co-operative Ass'n v. State, 193 Wash. 413, 88 P.2d 593, 92 P.2d 202. The definition of imports as articles brought into the country finds support also in the circumstance that it has never been seriously doubted that merchandise brought into the United States from without is subject to the power of Congress to impose customs duties, even though the merchandise is not of foreign origin. And the occasion for protecting the [324 U.S. 652, 671] power of the national government to lay and collect customs duties upon such merchandise, is precisely the same as in the case of that of foreign origin. Hence it is plain that such importations, although not of foreign origin, are within the design and purpose of the constitutional prohibition against the local taxation of imports.

We find it impossible to say that merely because merchandise, brought into the country from a place without, does not come from a foreign country, it is not an import envisaged by the words and purpose of the constitutional prohibition. The interpretation in Brown v. Maryland, supra, the occasional judicial decisions that foreign origin is not a necessary characteristic of imports so long as they are brought into the country from a place without it, and the purpose of the constitutional prohibition, are alike persuasive that there may be imports in the constitutional sense which do not have a foreign origin.

The fact that the merchandise here in question did not come from a foreign country, if the contention be accepted that the Philippines are not to be regarded as such, is therefore without significance. It is material only whether it came from a place without the 'country'. Hence, in determining what are imports for constitutional purposes, we must ascertain the territorial limits of the 'country' into which they are brought. Obviously, if the Philippines are to be regarded as a part of the United States in this sense, merchandise brought from the Philippines to the United States would not be brought into the United States from a place without, and would not be imports, more than articles transported from one state to another.

The term 'United States' may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States ex- [324 U.S. 652, 672] tends, or it may be the collective name of the states which are united by and under the Constitution. 6

When Brown v. Maryland, supra, was decided, the United States was without dependencies or territories outside its then territorial boundaries on the North American continent, and the Court had before it only the question whether foreign articles brought into the State of Maryland could be subjected to state taxation. It seems plain that Chief Justice Marshall, in his reference to imports as articles brought into the country, could have had reference only to articles brought into a state which is one of the states united by and under the Constitution, and in which alone the constitutional prohibition here involved is applicable.

The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which,

when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States. See Balzac v. Porto Rico, 258 U.S. 298, 304 , 305 S., 42 S.Ct. 343, 345, 346, and cases cited. Hence we do not stop to inquire whether articles brought into such territories or brought from such territories into a state, could have been regarded as imports, constitutionally immune from state taxation. We confine the present discussion to the question whether such articles, brought from the Philippines and introduced into the United States, are imports so immune.

We have adverted to the fact that the reasons for protecting from interference, by state taxation, the consti- [324 U.S. 652, 673] tutional power of the national government to collect customs duties, apply equally whether the merchandise brought into the country is of foreign origin or not. The Constitution has not made the foreign origin of articles imported the test of importation, but only their origin in a place over which the Constitution has not extended its commands with respect to imports and their taxation. Hence out question must be decided, not by determining whether the Philippines are a foreign country, as indeed they have been held not to be within the meaning of the general tariff laws of the United States, Fourteen Diamond Rings v. United States, 183 U.S. 176 , 22 S.Ct. 59, cf. De Lima v. Bidwell, 182 U.S. 1 , 21 S.Ct. 743; Dooley v. United States, 182 U.S. 222 , 21 S.Ct. 762, and within the scope of other general laws, Faber v. United States, 221 U.S. 649 , 31 S.Ct. 659; cf. Huus v. New York & P. R. Steamship Co., 182 U.S. 392 , 21 S.Ct. 827; Gonzales v. Williams, 192 U.S. 1 , 24 S.Ct. 177; West India Oil Co. v. Domenech, 311 U.S. 20 , 61 S.Ct. 90, but by determining whether they have been united governmentally with the United States by and under the Constitution.

That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with The Insular Tax Cases in 1901; De Lima v. Bidwell, supra; Dooley v. United States, supra, 182 U.S. 222 , 21 S. Ct. 762; Downes v. Bidwell, 182 U.S. 244 , 21 S.Ct. 770; Dooley v. United States, 183 U.S. 151 , 22 S.Ct. 62; and see also Public Utility Commissioners v. Ynchausti & Co., 251 U.S. 401, 406 , 407 S., 40 S.Ct. 277, 279; Balzac v. Porto Rico, supra. This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regu- [324 U.S. 652, 674] lations respecting the Territory or other Property belonging to the United States.' Dooley v. United States, supra, 183 U.S. at page 157, 22 S.Ct. at page 65; Dorr v. United States, 195 U.S. 138, 149 , 24 S.Ct. 808, 813, 1 Ann.Cas. 697; Balzac v. Porto Rico, supra, 258 U.S. 305 , 42 S.Ct. 346; Cincinnati Soap Co. v. United States, 301 U.S. 308, 323 , 57 S.Ct. 764, 771.

In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See Downes v. Bidwell, supra; Territory of Hawaii v. Mankichi, 190 U.S. 197 , 23 S.Ct. 787; Dorr v. United States, supra; Dowdell v. United States, 221 U.S. 325, 332 , 31 S.Ct. 590, 593; Ocampo v. United States, 234 U.S. 91, 98 , 34 S.Ct. 712, 715; Public Utility Commissioners v. Ynchausti & Co., supra, 251 U.S. 406, 407 , 40 S.Ct. 279; Balzac v. Porto Rico, supra. And in general the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See Balzac v. Porto Rico, supra. The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States, do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of 8 and 9 of Article I of the Constitution, such articles may be taxed by Congress and without apportionment. Downes v. Bidwell, supra. If follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from territory, which is not a part of the United States, into the territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable.

The status of the Philippines as territory belonging to the United States, but not constitutionally united with it, has been maintained consistently in all the governmental relations between the Philippines and the United [324 U.S. 652, 675] States. Following the conquest of the Philippines, they were governed for a period under the war power. After annexation by the Treaty of Paris of December 10, 1898, military government was succeeded by a form of executive government. By the Spooner Amendment to the Army Appropriation Bill of March 2, 1901, c. 803, 31 Stat. 895, 910, it was provided that 'all military, civil, and judicial powers necessary to govern the Philippine Islands ... shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United

States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion ....' On July 1, 1902 Congress provided for a complete system of civil government by the original Philippine Organic Act, c. 1369, 32 Stat. 691. Step by step Congress has conferred greater powers upon the territorial government, and those of the federal government have been diminished correspondingly, although Congress retains plenary power over the territorial government until such time as the Philippines are made independent. This process culminated in the Act of March 24, 1934, c. 84, 48 Stat. 456, providing for the independence of the islands. The adoption by the Philippines and approval by the United States of a constitution for the Commonwealth of the Philippine Islands, as provided by the Act, have prepared the way for their complete independence.

The Act of 1934 made special provisions for the relations between the two governments pending the final withdrawal of sovereignty of the United States from the Philippines and in particular provided for a limit on the number and amount of articles produced or manufactured in the Philippine Islands that might be 'exported' to the United States free of duty. 6, 48 U.S.C.A. 1236. It provided for the complete withdrawal and surrender of all right of posses- [324 U.S. 652, 676] sion, supervision, jurisdiction, control or sovereignty of the United States over the Philippines on the 4th of July following the expiration of ten years from the date of the inauguration of the new government, organized under the Constitution provided for by the Independence Act. 7 10(a), 48 U.S.C.A. 1240(a). The new Philippine Constitution was adopted on February 8, 1935, and the new government under it was inaugurated on November 14, 1935. By the provisions of the Independence Act, the United States retained certain powers with respect to our trade relations with the Islands, with respect to their financial operations and currency, and the control of their foreign relations. The power of review by this Court of Philippine cases is continued and extended to all cases involving the Constitution of the Commonwealth of the Philippine Islands. 7(6), 48 U.S. C.A. 1237(6). Thus by the organization of the new Philippine government under the constitution of 1935, the Islands have been given, in many aspects, the status of an independent government, which has been reflected in its relations as such with the outside world. 8 [324 U.S. 652, 677] In the meantime, and ever since The Insular Tax Cases, supra, Congress has often treated as imports, articles brought to the United States from the Philippines. By the Act of August 29, 1916, c. 416, 39 Stat. 548, 48 U.S.C. 1042, 48 U.S.C.A. 1042, the territorial government of the Philippines was authorized to enact tariff laws. The Sugar Quota Law, 7 U.S.C. 608a(1), 7 U.S.C.A. 608a(1), defined as imports the amounts of sugar permitted to be brought into the United States from the Philippines, and prohibited such importation in excess of prescribed quotas. The Act of June 14, 1935, c. 240, 49 Stat. 340, 48 U.S. C. 1236a, 48 U.S.C.A. 1236a provided for restriction of the amount of hard fibers and its products which could be brought annually from the Philippines to the United States. See also 48 U.S.C. 1236, 48 U.S.C.A. 1236. And the Independence Act, supra, 48 U.S.C. 1236(a)(b), 48 U.S.C.A . 1236(a, b) also regulated the amount of 'export tax' which might be levied by the Philippines on articles shipped to the United States from the Philippine Islands. 9

The Independence Act, while it did not render the Philippines foreign territory, Cincinnati Soap Co. v. United States, supra, 301 U.S. 318 -320, 57 S.Ct. 769, 770, treats the Philippines as a foreign country for certain purposes. In 48 U.S.C. 1238(a)(1), 48 U.S.C.A. 1238(a)(1) it established immigration quotas for Filipinos coming to the United States, as if the Philippines were a separate country, and in that connection extended to Filipinos the immigration laws relating to the exclusion or expulsion of aliens. It also provided, 48 U.S.C. 1238(a)(2), 48 U.S.C.A. 1238(a)(2), that citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For purposes of 8 U.S.C. 154 and 156, 8 U.S.C.A. 154, 156, relating to deportation, the Philippine Islands are declared to be a foreign country. 48 U.S.C. 1238(a)(4), 48 U.S.C.A. 1238(a)(4). Foreign [324 U.S. 652, 678] service officers of the United States may be assigned to the Philippines, and are to be considered as stationed in a foreign country. 48 U.S.C. 1238a, 48 U.S.C.A. 1238a. And the Independence Act, 6, 48 Stat. 456, 460, provides that 'when used in this section in a geographical sense, the term 'United States' includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam.' As we have said, the Philippines have frequently dealt with other countries, as a sovereignty distinct from the United States.

The United States acquired the Philippines by cession without obligation to admit them to statehood or incorporate them in the Union of states or to make them a part of the United States, as distinguished from merely belonging to it. As we have seen, they are not a part of the United States in the sense that they are subject to and enjoy the benefits or protection of the Constitution, as do the states which are united by and under it. In particular, the constitutional provisions governing imports and exports and their taxation, do

not extend to articles brought into or out of the Philippines. The several acts of Congress providing for the government of the Philippines have not altered their status in these respects, and Congressional legislation governing trade relations of the United States with the Philippines has not only been consistent with that status, but has often treated articles brought from the Philippines to the United States as imports. Our tariff laws in their practical operation have in general placed merchandise brought from the Philippines into the United States in the same relationship to the constitutional taxing power of the national government and the states as articles brought here from foreign countries.

The national concern in protecting national commercial relations, by exempting imports from state taxation, would seem not to be essentially different or less in the [324 U.S. 652, 679] case of merchandise brought from the Philippines, which are not included in the territory organized under the Constitution, but for which we have assumed a national responsibility, than in the case of articles originating on the high seas or in foreign countries. As we have said, the reasons for protecting from state taxation articles thus brought into the territorial United States are the same in either case. The advantages and disadvantages, if any, which result from the tax immunity, are inherent in the import clause. But those advantages and disadvantages in the case of the Philippines are no more beyond the reach of Congress than in the case of other imports. Congress is left free by the terms of the import clause to remove the prohibition of state taxation of imports and with it the advantages or disadvantages, whatever they may be, arising from the tax immunity. Congress through the commerce clause, possesses the same power of control of state taxation of all merchandise moving in interstate or foreign commerce. And Congress is free, as in the case of other imports, to regulate the flow of merchandise from the Philippines into the United States by the imposition of either customs duties or internal revenue taxes.

We conclude that practical as well as theoretical considerations and the structure of our constitutional system require us to hold that articles brought from the Philippines into the United States are imports, subject to the constitutional provisions relating to imports both because, as was said in Brown v. Maryland, they are brought into the United States, and because the place from whence they are brought is not a part of the United States in the constitutional sense to which the provisions with respect to imports are applicable.

REVERSED.

Mr. Justice REED, dissenting in part.

My disagreement with the Court is confined to that portion of the opinion which determines that the Philippine [324 U.S. 652, 680] Islands is not a part of this 'country' as that word is defined in the opinion.

The practical effect of the decision is to place the products of those territories and possessions which have not been incorporated into our 'country' as integral parts thereof-Puerto Rico, the Philippines, Guam, Canal Zone, and perhaps other territories or possessions-at a considerable advantage over the competing products of states of the continental United States. It enables importers, whether for manufacture or sale, from these possessions to keep on hand, tax free, quantities of non-taxable original packages of imported goods, such as clothing, embroideries, liquors, tobacco, sugars, vegetable oils and fibres. Freedom from taxation has today become an appreciable advantage. Furthermore this freedom from state taxation is gained through an interpretation of Constitutional power and therefore is beyond the reach of equalization by the states alone in all circumstances and by the Congress except by complex tariff legislation which would only reach warehoused imports from dependencies. The Congressional relief to producers of the several states of the Union, therefore, is an awkward approach, which will create irritation with the importing territories by reason of countervailing tariff increases.

These are only practical disadvantages of today's decision which should not override a Constitutional requirement but as it does not seem to me the Constitution clearly calls for this sacrifice of markets by producers in the states, I would not construe the Constitution to put the Philippines entirely beyond the pale of the American economic union. I do not see the necessity for such a ruling and, in fact, I think the Constitution calls for precisely the opposite conclusion for the following reasons.

(1) In the consideration of the taxability by Ohio of shipments from the Philippines which have completed [324 U.S. 652, 681] their journey from the Philippines but remain intact in their original packages, the significant Constitutional provision is Article I, Section 10, Clause 2, which reads as follows:

'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports,

except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.'
The Constitution contains no definition of the word 'imports' and nothing appears in its history or in the decisions of this Court which indicate that the word was used otherwise in this section than in its normal meaning of a thing brought into the limits of the nation which possesses power over the external commerce which may flow into a state or states which are subject to the prohibitions of the quoted Constitutional provision. Normally these imports are from foreign countries and hence there are many references to imports in legislation and decisions which indicate that the source of imports is foreign countries. 1

Lands are either within the sovereign power of the United States or are outside and beyond that power. When conquest ripens into cession, lands lose their for- [324 U.S. 652, 682] eign character and become a part of the territories of the victor. 2 The United States has been content to leave its possessions with a large measure of self-government. To the Philippines it has promised full independence but the time for the fulfillment of that promise has not arrived. Until that date, the United States has responsibilities toward the Philippines and has exercised power unilaterally to make further concessions to the Islands. 3 Until complete independence is reached, the citizens of the Philippines owe allegiance to the United States and every Philippine official recognizes this duty. 48 Stat. 456. The interrelation between the United States and the Philippines is for both a basis for amicable relations after complete dissolution of the existing ties. 4

(2) This Court, however, determines that an import under Article I, Section 10, Clause 2, is a commodity brought into this 'country' and that the Philippines is not a part of this 'country' within the meaning which the Court attributes to that word. The Court is of the view that this 'country' includes only those sections of the lands under our jurisdiction which have been so incorporated into our system by act of Congress as to be entitled to government under all provisions of the Constitution rather than by Clause 2, Section 3, Article IV, regarding 'Territory ... belonging to the United States.' Downes v. [324 U.S. 652, 683] Bidwell, 182 U.S. 244 , 21 S.Ct. 770. As a basis for this distinction, the Court depends upon a statement in Brown v. Maryland, 12 Wheat. at page 437, that a 'duty on imports, is a custom or tax levied on articles brought into a country.' The Court must make this argument to support its position as of course the Philippines is not a foreign country. Cincinnati Soap Co. v. United States, 301 U.S. 308, 319 , 57 S.Ct. 764, 769.

There are a number of reasons why I think that this reliance on this language of Brown v. Maryland leaves the opinion without support in its conclusion that shipments from the Philippines are imports. In the first place, in Brown v. Maryland, there was no occasion to distinguish between articles brought into the country and articles brought from foreign places. The words used are descriptive of commerce from foreign lands. Secondly, Woodruff v. Parham, 8 Wall. 123, 131, interprets the meaning of 'brought into the country' as used in Brown v. Maryland, 12 Wheat. at pages 131, 132, as follows:

'In the case of Brown v. Maryland, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of Brown v. Maryland was decided-namely, in 1827-it is reasonable to suppose that the geneal usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word country as a synonyme for United States.' See also American Steel & Wire Co. v. Speed, 192 U.S. 500, 520 , 24 S.Ct. 365, 370. Thirdly, the writer of the opinion in Brown v. Maryland, 12 Wheat. at page 439, referred to the purpose of the prohibition against state taxation of imports as a thing de- [324 U.S. 652, 684] sirable 'to preserve ... our commercial connections with foreign nations.' The dissent referred repeatedly to foreign merchandise as did counsel in their argument. Fourthly, the suggestion that the Court's view is supported by the decisions that sea products are imports seems to me unfounded. Deep sea products come from waters beyond the national sovereignty or jurisdiction and hence are imports under any definition. American fisheries even may require, unless American bottoms are American territory, legislation to relieve their catch of general tariff charges. Procter & Gamble Manufacturing Co. v. United States, 19 C.C.P.A., Customs, 415. The required conclusion, it seems to me, is that an import is an article brought from beyond the sovereignty or jurisdiction of the United States. De Lima v. Bidwell, 182 U.S. 1, 180 , 21 S.Ct. 743, 746.
(3) Land within the jurisdiction of the United States cannot export to the United States under Section 10,

Article I, any more than one state can export to or import from another state. American Steel & Wire Co. v. Speed, 192 U.S. at page 520, 24 S.Ct. at page 370. When the Insular Cases determined that articles from the lands Spain ceded to us were subject to tariff duties at the will of Congress, the decisions were based on the power of Congress to impose duties unequally, i.e., without uniformity, despite Article I, Section 8, Clause 1, of the Constitution,5 on commodities from lands under our flag because these lands had not been incorporated by act of Congress into the Union as an integral part of the United States. Downes v. Bidwell, 182 U.S. 244 , 298 et seq., 21 S.Ct. 770, 791 et seq.; Dorr v. United States, 195 U.S. 138, 149 , 24 S. Ct. 808, 813, 1 Ann.Cas. 697; Balzac v. Porto Rico, 258 U.S. 298, 305 , 42 S.Ct. 343, 346. The question as to the meaning of imports or imported was [324 U.S. 652, 685] not discussed. Whether or not the articles were imports, so long as the lands of their origin were not an integral part of the United States, the Congress could put such duties as it chose on the products. It does not follow that because the Philippines is not an integral part of the United States its shipments are imports under Article I, Section 10, unless the view of the Court's opinion of today is adopted that an import is an article brought into the United States as that country is defined in the Court's opinion. The argument advanced by the Court to sustain its declaration that the articles brought from the Philippines are imports would have made shipments from the Louisiana Purchase, Downes v. Bidwell, 182 U.S. 244, 322 , 333 S., 21 S.Ct. 770, 800, 801; Florida, 182 U.S. at pages 333, 334, 21 S.Ct. at pages 804, 805, and Hawaii, Hawaii v. Territory of Mankichi, 190 U.S. 197, 219 , 23 S.Ct. 787, 791, also imports until these territories were incorporated into the United States. History refutes such a position.

We are thus left to define the word import as used in Section 10, Article I, in its normal sense to accomplish the purpose of the section. It may have had several purposes. Brown v. Maryland, supra, 12 Wheat. at page 439. Whether it was to grant the union a source of revenue, to preserve harmony among its members or to avoid state tariffs which would affect relations with foreign governments, the purpose is not advanced by molding Philippine shipments into imports in the Constitutional sense. Revenue may be exacted by the federal government from Philippine products brought into the states and a state cannot collect a duty from such articles if they are not imports. Downes v. Bidwell, 182 U.S. 244 , 21 S.Ct. 770; Woodruff v. Parham, 8 Wall. 123, 133; Coe v. Errol, 116 U.S. 517, 526 , 6 S.Ct. 475, 478. No light can come from the history of the adoption of the section. The idea of an American possession was not in being. But since the Founding Fathers were creating a commercial as well as a political entity, it seems more consonant with their purpose to define imports under the section as things [324 U.S. 652, 686] brought into the territory under the jurisdiction or sovereignty of the American government.

(4) Such a conclusion probably meant little to the Philippines. Congress has provided for their early independence. But the principle established by this decision will persist for the other lands which became American by the Treaty of Paris. The Court's opinion disclaims determination of any rights beyond the Philippines but the basis upon which the decision rests supports similar rights for all lands covered by the Treaty of Paris. Similar articles covered all the ceded lands. 6 Puerto Rico is in the same status as the Philippines. Balzac v. Porto Rico, 258 U.S. 298, 305 , 42 S.Ct. 343, 346. Today's decision thus assumes a continuing importance which justifies setting out my reasons for dissenting.

Mr. Justice BLACK, dissenting.

In Brown v. Maryland, 12 Wheat. 419, 422, Marshall, C.J., pointedly rejected the argument that the rule announced in that case would permit an importer to 'bring in goods ... for his own use, and thus retain much valuable property exempt from taxation.' 1 Today, this Court, [324 U.S. 652, 687] in holding that an Ohio manufacturer may escape payment of a nondiscriminatory state ad valorem tax on goods imported from abroad and held for use in its factory, interprets Marshall's opinion in a manner which squarely conflicts with his own interpretation of the rule he announced.

It has, from the very beginning, been recognized that '... there must be a point of time when the prohibition (to tax) ceases, and the power of the state to tax commences;' although the task of drawing this line is so difficult that no general rule 'universal in its application' can be stated, yet that line nevertheless '... exists, and must be marked as the cases arise.' Brown v. Maryland, supra, 12 Wheat. 441. The Court did othere draw an arbitrary line of demarcation marking the boundary of a state's power to tax property 'imported for sale.' It held that, as to property imported for sale, 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution.' Brown v. Maryland, supra, 12 Wheat. at page 442. The right to sell, it was there said, was an element of the right to import, and thus a state tax imposed before, or as a condition upon, the sale, would substantially impair the right of sale granted by the government to importers. The Court reinforced its conclusion by referring to its belief that

a state tax on the importer would increase the cost to the ultimate domestic purchasers, and that the effect of this would be to enable the great seaport states indirectly to levy tribute upon consumers of imported articles living in the nonseaport states, a practice which the constitutional clause here invoked was intended to prevent. 2 [324 U.S. 652, 688] While the rule announced in Brown v. Maryland has at times been severely criticized, see e.g. License Cases, 5 How. 504, opinion of Mr. Justice Daniel, 5 How. 615-617, and has in some cases been narrowly restricted in its application,3 it has been, and still is, the general rule of decision in this Court, as regards imports for sale from foreign countries. But neither the rule nor the reasoning in Brown v. Maryland, nor any of the cases which followed it, support the Court's holding that one who imports an article for his own use or consumption can enjoy the full benefits of ownership, and simultaneously claim an immunity from state taxation on the ground that it is still an import. The Court, in Brown v. Maryland, was in reality treating goods in the hands of an importer for sale, as though they were still in transit until the first sale had been made. This was in accord with the interpretation of the rule by Chief Iustice Taney in the License Cases, supra, 5 How. 575. He there said that while imported articles 'are in the hands of the importer for sale ... they may be regarded as merely in transitu, and on their way to the distant cities, villages, and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported.'

But the fibers here were not in transitu in any possible sense of the phrase. Every conceivable relationship they had once borne to the process of importation had ended. They were at rest in the petitioner's factory along with its other raw materials, having arrived at the point where they were 'to be used and consumed' in current produc- [324 U.S. 652, 689] tion, and kept as a 'backlog' to assure constant operation of the plant.

Brown v. Maryland and the cases which followed it stand for the rule that one who pays import duties on goods intended for sale thereby purchases the right to sell the goods, free from state taxation so long as the goods are held in the original package. Until today, none of this Court's decisions have ever held or even intimated that one who imports goods for his own use purchases from the federal government, by payment of import duties, a right to hold them free from liability for state taxes, after they have reached the end of their import journey and are being held for use in the importer's factory. Neither the 'purchase-of-a-right-to- sell' argument nor any of the other reasons deemed relevant to support the 'import-for-sale-original-package' doctrine call for its extension to goods imported for use.

It is clear under the doctrine of Brown v. Maryland, that after sale by an importer, imported goods are subject to state taxation. The opinion of the Court today, holding that goods held for use are immune from state taxation, results in this rather odd situation: One who imports goods himself and holds them for his own use in his factory is not liable to state taxes on such goods; but if he bought the goods from one engaged in the business of importing, he would be liable to taxation on the same goods. The artificiality of this tax distinction suggests grave reasons to question the soundness of the Court's interpretation of the rule. Furthermore, implicit in Marshall's opinion is a recognition of the importance of protecting goods imported for sale from discrimination in the form of taxes. The net effect of today's opinion is to accomplish just such discrimination, in favor of goods imported for use, and against goods imported for sale.

Again, state taxation of previously imported goods held for use in manufacturing does not afford the great seaport [324 U.S. 652, 690] states an opportunity to tax imports to the detriment of other states. This was one of the apprehended evils which the 'import for sale' rule in Brown v. Maryland was fashioned to prevent. The most fertile imagination would be hard put to prove that it would injure or threaten any other state for Ohio to collect its non-discriminatory ad valorem tax on fibers held for use in that state. Certainly the Court advances no persuasive argument in this respect. On the contrary, it does appear that Ohio, as well as other states, will be injured by a constitutional interpretation which denies Ohio the right to collect the tax. Ohio is injured by the Court's new rule because it cannot apportion its tax fairly upon all who carry on business under the protection of Ohio's laws.

The rule announced by the Court also discriminates against other states. Their products held for use are subject to state taxation. Products from abroad are not. Wines offer an illustration. Wines, stocked in one's private cellar, produced from California or New York grapes, are held for future use in the original package or otherwise, are subject to state taxation. Today's rule renders a state wholly powerless to tax wines imported from abroad and held for future use side by side with taxable wines made in the United States. Thus, through constitutional interpretation, all foreign products are granted a tax subsidy at the expense of the individual states affected. If I thought the Constitution required such tax discriminations against

American products, I should agree to the Court's opinion. The whole history of events leading up to the Constitution, and this Court's opinions in construing it, persuade me that no such consequence was ever contemplated by those who wrote or approved our Constitution.

A final word as to today's new constitutional doctrine. Precisely how it is to be applied the Court does not tell [324 U.S. 652, 691] us. From one part of the Court's opinion it appears that the state can never tax these fibers at all, since it seems to be said the state can never tax until they 'are subjected to the manufacture for which they were imported.' Another part of the opinion indicates they can be taxed when the original package is broken. Previous opinions of this Court have indicated the difficulties and defects of an original package doctrine. 4 Are these fibers to be taxed when the 'reed' which covers them is removed, or must the state wait until it can prove one of the steel bands has been broken? Other questions suggest themselves in regard to wine imported for use and stored in one's private cellar for individual consumption. When, if at all, can a state tax it? Is it when the wine reaches the cellar or must the state withhold its taxing hand until the wine is 'subjected to the (consumption) for which it was imported'? Or can the state tax each crate when the owner, or someone for him, removes the crate's top with a crowbar? If the wine is imported in large casks, does it become taxable when the stopper is removed from the bunghole or only when a part or all of it has been consumed? The states are entitled to have a definite answer to these practical questions.

Mr. Justice DOUGLAS, Mr. Justice MURPHY, and Mr. Justice RUTLEDGE join in this opinion. Mr. Justice DOUGLAS is of the view that, accepting the Court's ruling that these products are 'imports', the rule should be applied without discrimination against the Philippines.

Mr. Justice MURPHY, concurring in part.

With Mr. Justice BLACK'S view that whatever constitutional tax immunity the merchandise in question may have had was lost by virtue of its storage in petitioner's [324 U.S. 652, 692] warehouse pending its use in petitioner's manufacturing operations I agree. But the Court holds otherwise on that issue. We therefore are met with the further issue as to whether the fact that the merchandise was shipped from the Philippine Islands to the United States made the merchandise an import within the meaning of Article I, Section 10, Clause 2 of the Constitution and therefore immune from state taxation. As to that problem I am convinced that the affirmative answer given by the CHIEF JUSTICE is the correct one and I concur in that portion of his opinion.

That affirmative answer, in my estimation, is compelled in good measure by practical considerations. The moral and legal obligations owed the Philippine Islands by the United States are, so far as I am aware, matchless and unique. The United States is committed to a policy of granting complete independence to the Philippines. It has already granted their people and their officials a large measure of autonomy. But until the sovereignty of the United States is finally withdrawn, the United States retains plenary and unrestricted powers over them and is responsible for their welfare.

We have as a nation exhibited an ideal and a selfless concern for the well-being of the Philippine people, a concern that has been deepened by the devastation that war has brought to their land. Since the Islands were ceded to us, we have at once fostered their economic development through preferential trade agreements and encouraged their desires for freedom and independence. Their industries and their agriculture have gradually been adjusted in contemplation of their eventual sovereign independence. But war has stricken their land and their peoples. Their growing economy has been largely decimated by over three years of ruthless invasion and occupation. Filipinos in countless numbers have yielded up [324 U.S. 652, 693] not only their property but their lives and their liberties. Their economic and social structure has fallen about them in ruins.

Now, with the Islands liberated, our moral and legal obligations are greater than ever before. Our responsibility for providing urgent relief and rehabilitation has been readily assumed. But the more complex and difficult duty of helping to reconstruct the Philippine economic structure remains to be fulfilled. It is clear that the Philippines cannot safely be thrown into the world market and left to shift for themselves. For the foreseeable future, at least, their economy must be closely linked to that of the United States, without either country abandoning or retreating from the common ideal of independence for the Phillippines.

Accordingly it is my view that if it is reasonably possible to do so we should avoid a construction of the term 'imports,' as used in Article I, Section 10, Clause 2 of the Constitution, that would place Philippine

products at a disadvantage on the American market to the advantage of products from other countries or that might be a means of impeding the economic rehabilitation of the Philippines. If we can justifiably construe that term to prohibit state taxation on shipments from the Philippines we shall to that extent have conformed to the national policy of aiding the Philippine reconstruction. Any taxation or tariff on Philippine shipments that may be felt to be necessary from the standpoint of the United States would then become a matter solely for Congress, which could properly balance any conflicting interests of the two nations.

Such a construction, in my estimation, is entirely fair and reasonable. There are, to be sure, statements by this Court to the effect that the term 'imports' refers only to those goods brought in from a country foreign to the United States. Woodruff v. Parham, 8 Wall. 123, 136; [324 U.S. 652, 694] Dooley v. United States, 183 U.S. 151, 154 , 22 S.Ct. 62, 63. But such statements, as pointed out by the Court today, were unnecessary to the decision of the issues there involved and cannot control the problem presented here. It has also been held that the Philippine Islands are not a foreign country within the meaning of tariff laws specifically referring to any 'foreign country.' Fourteen Diamond Rings v. United States, 183 U.S. 176 , 22 S.Ct. 59; De Lima v. Bidwell, 182 U.S. 1 , 21 S.Ct. 743. The inapplicability of these cases is obvious.

It further appears that Congress has usually avoided the use of the term 'imports' in the enactment of legislation affecting trade with the Philippines and other dependencies and that the term has been regarded by certain government agencies as inapplicable to articles coming from the Philippines. But such usage clearly cannot affect our interpretation of a constitutional provision.

As appears more fully in the Court's opinion, there is thus no controlling authority requiring us to hold that shipments from the Philippines are not imports within the meaning of Article I, Section 10, Clause 2 of the Constitution. Under such circumstances the interpretation of this constitutional provision adopted by the CHIEF JUSTICE is a permissible one. And, in view of what I conceive to be the practical considerations, it is a highly necessary and desirable one. Only under that interpretation can this part of the Constitution be consistent with our duties as trustee for the Philippines.

Footnotes

[Footnote 1] The Supreme Court of Washington has held contrary to the decision of the Ohio Court. See Washington Chocolate Co. v. King County, Wash., 152 P.2d 981.

[Footnote 2] See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.).

[Footnote 3] Section 1483(1) of 19 U.S.C. 19 U.S.C.A. 1483(1), provides that merchandise imported into the United States 'shall be held to be the property of the person to whom the same is consigned.' We do not deem this provision to be significant here, since it is designed merely to identify the person liable for the payment of customs duties, and since, as we have said, the time when title passes to petitioner is immaterial to decision.

[Footnote 4] In the Waring case, the purchaser, claiming tax immunity as the importer, purchased the merchandise, after its shipment from abroad, from the American consignee, sometimes before and sometimes after its arrival in the port of entry. Risk of loss was to be on the seller until the merchandise was entered at the custom house and delivered from the vessel into the purchaser's lighters alongside. The Court thought it immaterial whether the purchase contract was entered into before or after arrival. Since the risk of loss remained on the shipper until the custom house entry and delivery to the purchaser, it held that the shipper or the consignee was the importer; that the purchaser's sale of the goods, which was taxed, was the second sale after importation, and for that reason was not free of tax. In these circumstances it is clear that the purchaser was not the cause of the importation, that the purchaser had no control over or right to demand the merchandise before arrival in port and that the foreign shipper, who bore the risk of loss and retained control of the merchandise and the right to control it until its delivery to petitioner, was the importer.

[Footnote 5] In Dooley v. United States, 183 U.S. 151 , 22 S.Ct. 62, the Court sustained under the Foraker Act of April 12, 1900, c. 191, 31 Stat. 77, the levy and collection of a tax in Puerto Rico upon goods brought there from New York. The tax was held to be a valid exercise of the power of Congress to enact laws for the government of a dependency acquired by treaty, see Downes v. Bidwell, 182 U.S. 244 , 21 S.Ct. 770. The Court stated also as an alternative ground, but one unnecessary for decision, that the levy was not a prohibited tax on exports, since Puerto Rico was not a foreign country.

[Footnote 6] See Langdell, 'The Status of our New Territories', 12 Harv.L.Rev. 365, 371; see also Thayer, 'Our New Possessions', 12 Harv.L.Rev. 464; Thayer, 'The Insular Tariff Cases in the Supreme Court', 15 Harv.L.Rev. 164; Littlefield, 'The Insular Cases', 15 Harv.L.Rev. 169, 281.

[Footnote 7] Since the war with Japan and that country's temporary occupation of the Philippines, Congress has provided that the date of the independence of the Philippines may be advanced by the President of the United States, upon his proclamation of their liberation and the restoration of the normal functions of government. Act of June 29, 1944, c. 322, Public Law No. 380, 78th Cong., 2d Sess., 58 Stat. 625, 48 U.S.C.A. 1235a, 1240 note.

[Footnote 8] The Philippine Commonwealth participated as a signatory in the following: Agreement and Protocol Regarding Production and Marketing of Sugar of May 6, 1937; Universal Postal Convention of May 23, 1939; Declaration by United Nations of January 1, 1942 (the Philippines signed the Declaration on June 14, 1942); Agreement for United Nations Relief and Rehabilitation Administration of November 9, 1943; United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, of July 1 to 22, 1944; The Protocol Prolonging the International Agreement Regarding the Regulation of Production and Marketing of Sugar of August 31, 1944; The International Civil Aviation Conference of November 1 to December 7, 1944.

[Footnote 9] This Court has referred to goods brought here from the Philippines as 'imports'. See Cincinnati Soap Co. v. United States, 301 U.S. 308, 320 , 57 S.Ct. 764, 770.

[Footnote 1] Products of the sea brought in as imports are a minor variation.

Tariff Act of 1930, 46 Stat. 590, 19 U.S.C.A. 1001 et seq. provides that dutiable articles are those 'imported from any foreign country.' The Philippines is not a foreign country under a tariff act which prohibits importation from a foreign country of goods made by convict labor. 28 Op. Atty.Gen. 422. The Philippines is not foreign country under the tariff laws. De Lima v. Bidwell, 182 U.S. 1, 197 , 21 S.Ct. 743, 753; Fourteen Diamond Rings v. United States, 183 U.S. 176 , 22 S.Ct. 59; Dooley v. United States, 182 U.S. 222, 234 , 21 S.Ct. 762, 767; Dooley v. United States, 183 U.S. 151 , 22 S.Ct. 62; American Steel & Wire Co. v. Speed, 192 U.S. 500, 520 , 24 S.Ct. 365, 370.

[Footnote 2] American Insurance Co. v. Canter, 1 Pet. 511, 542; Fleming v. Page, 9 How. 603, 614; Dooley v. United States, 182 U.S. 222, 233 , 21 S.Ct. 762, 766.

[Footnote 3] Philippine Independence Act of March 24, 1934, 48 Stat. 456; amending the Philippine Independence Act as to trade and financial relations and rights of Philippine citizens in the United States and all places subject to its jurisdiction, act of August 7, 1939, 53 Stat. 1226; suspending the export tax on Philippine products, act of December 22, 1941, 55 Stat. 852, 48 U.S.C.A. 1236b and note, 1236c; Filipino Rehabilitation Commission Act of June 29, 1944, 58 Stat. 625, 48 U.S.C.A . 1235a, 1240.

[Footnote 4] Address of President Sergio Osmena on the occasion of the Restablishment of the Commonwealth Government in Manila, February 27, 1945.

[Footnote 5] Article I, Section 8, Clause 1: 'The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; ....'

[Footnote 6] Treaty of Paris, December 10, 1898, 30 Stat. 1754:

'Article II. Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.
'Article III. Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line: ....'
[Footnote 1] Counsel for Maryland had argued that to permit state tax immunity in that case would result in granting immunity to 'an importer who may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.' In reply to this argument, Marshall rejected the assumption that the principles then announced would grant state tax exemptions to imports that had reached their ultimate destination and were being used or held for use by the importer. 'The tax,' he said, 'finds the article already incorporated with the mass of property, by the act of the importer. He has used the privilege (i.e., of sale) he has purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by

the importer.' 12 Wheat. at page 443.

[Footnote 2] To the same effect, see Woodruff v. Parham, 8 Wall. 123, 134-136.

[Footnote 3] See e.g. F. May & Co. v. New Orleans, 178 U.S. 496 , 20 S.Ct. 976; People of State of New York ex rel. Edward & John Burke v. Wells, 208 U.S. 14 , 28 S.Ct. 193; Sonneborn Bros. v. Cureton, 262 U.S. 506 , 43 S.Ct. 643; Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 , 48 S.Ct. 227; Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 526 , 55 S.Ct. 497, 502, 101 A.L. R. 55. See also Mexican Petroleum Corporation v. South Portland, 121 Me. 128, 115 A. 900, 26 A.L.R. 965, 971-980; Tres Ritos Ranch Co. v. Abbott, 44 N.M. 556, 105 P.2d 1070, 130 A.L.R. 963.

[Footnote 4] Note 3, supra.

U.S. Supreme Court

KLEPPE v. NEW MEXICO, 426 U.S. 529 (1976)

426 U.S. 529
KLEPPE, SECRETARY OF THE INTERIOR v. NEW MEXICO ET AL.
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 74-1488.

Argued March 23, 1976
Decided June 17, 1976

The Wild Free-roaming Horses and Burros Act (Act) was enacted to protect "all unbranded and unclaimed horses and burros on public lands of the United States" from "capture, branding, harassment, or death," to accomplish which "they are to be considered in the area where presently found, as an integral part of the natural system of the public lands." The Act provides that all such animals on the public lands administered by the Secretary of the Interior through the Bureau of Land Management (BLM) or by the Secretary of Agriculture through the Forest Service are committed to the jurisdiction of the respective Secretaries, who are "directed to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands," and if the animals stray from those lands onto privately owned land, the private landowners may inform federal officials, who shall arrange to have the animals removed. Appellees, the State of New Mexico, its Livestock Board and director, and the purchaser of three unbranded burros seized by the Board (pursuant to the New Mexico Estray Law) on federal lands and sold at public auction, and whose return to public lands had been demanded by the BLM, brought this suit for injunctive relief and for a declaratory judgment that the Act is unconstitutional. A three-judge District Court held the Act unconstitutional and enjoined its enforcement. Held: As applied to this case, the Act is a constitutional exercise of congressional power under the Property Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV, 3, cl. 2. Pp. 535-547.

(a) The Clause, in broad terms, empowers Congress to determine what are "needful" rules "respecting" the public lands, and there is no merit to appellees' narrow reading that the provision [426 U.S. 529, 530] grants Congress power only to dispose of, to make incidental rules regarding the use of, and to protect federal property. The Clause must be given an expansive reading, for "[t]he power over the public lands thus entrusted to Congress is without limitations," United States v. San Francisco, 310 U.S. 16, 29 , and Congress' complete authority over the public lands includes the power to regulate and protect the wildlife living there. Pp. 536-541.

(b) In arguing that the Act encroaches upon state sovereignty and that Congress can obtain exclusive legislative jurisdiction over the public lands in a State only by state consent (absent which it may not act contrary to state law), appellees have confused Congress' derivative legislative power from a State pursuant to Art. I, 8, cl. 17, with Congress' powers under the Property Clause. Federal legislation under that Clause necessarily, under the Supremacy Clause, overrides conflicting state laws. And here, though the Act does not establish exclusive federal jurisdiction over the public lands in New Mexico, it overrides the New Mexico Estray Law insofar as that statute attempts to regulate federally protected animals. Pp.

541-546.

(c) The question of the Act's permissible reach under the Property Clause over private lands to protect wild free-roaming horses and burros that have strayed from public land need not be, and is not, decided in the context of this case. Pp. 546-547.

406 F. Supp. 1237, reversed and remanded.
MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Randolph argued the cause for appellant. With him on the briefs were Solicitor General Bork, Assistant Attorney General Taft, Edmund B. Clark, and Dirk D. Snel.

George T. Harris, Jr., Special Assistant Attorney General of New Mexico, argued the cause and filed a brief for appellees. *

[Footnote *] Briefs of amici curiae urging reversal were filed by Murdaugh Stuart Madden for the Humane Society of the United States; by Paul A. Lenzini for the International Association of Game, Fish, [426 U.S. 529, 531] and Conservation Commissioners; and by Thomas H. Wakefield for Hope Ryden.

Ronald A. Zumbrun and John H. Findley filed a brief for the Pacific Legal Foundation as amicus curiae urging affirmance.

Briefs of amici curiae were filed by V. Frank Mendicino, Attorney General, and Sterling A. Case, Assistant Attorney General, for the State of Wyoming et al.; by Robert List, Attorney General, for the Nevada State Board of Agriculture; by Jack E. Hull and John C. Miller for the Central Committee of Nevada State Grazing Boards et al.; and by David R. Belding and William I. Althen for Wild Horse Organized Assistance, Inc. [426 U.S. 529, 531]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-roaming Horses and Burros Act.

I

The Wild Free-roaming Horses and Burros Act, 85 Stat. 649, 16 U.S.C. 1331-1340 (1970 ed., Supp. IV), was enacted in 1971 to protect "all unbranded and unclaimed horses and burros on public lands of the United States," 2 (b) of the Act, 16 U.S.C. 1332 (b) (1970 ed., Supp. IV), from "capture, branding, harassment, or death." 1, 16 U.S.C. 1331 (1970 ed., Supp. IV). The Act provides that all such horses and burros on the public lands administered by the Secretary of the Interior through the Bureau of Land Management (BLM) or by the Secretary of Agriculture through the Forest Service are committed to the jurisdiction of the respective Secretaries, who are "directed to protect and manage [the animals] as components of the public lands . . . in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." 3 (a), 16 U.S.C. 1333 (a) (1970 ed., Supp. IV). If protected horses or burros [426 U.S. 529, 532] "stray from public lands onto privately owned land, the owners of such land may inform the nearest federal marshal or agent of the Secretary, who shall arrange to have the animals removed." 1 4, 16 U.S.C. 1334 (1970 ed., Supp. IV).

Section 6, 16 U.S.C. 1336 (1970 ed., Supp. IV), authorizes the Secretaries to promulgate regulations, see 36 CFR 231.11 (1975) (Agriculture); 43 CFR pt. 4710 (1975) (Interior), and to enter into cooperative agreements with other landowners and with state and local governmental agencies in furtherance of the Act's purposes. On August 7, 1973, the Secretaries executed such an agreement with the New Mexico Livestock Board, the agency charged with enforcing the New Mexico Estray Law, N. M. Stat. Ann. 47-14-1 et seq. (1966). 2 The agreement acknowledged the authority of the Secretaries to manage and protect the wild free-roaming horses and burros on the public lands of the United States within the State and established a procedure for evaluating the claims of private parties to ownership of such animals. [426 U.S. 529, 533]

The Livestock Board terminated the agreement three months later. Asserting that the Federal Government lacked power to control wild horses and burros on the public lands of the United States unless the animals were moving in interstate commerce or damaging the public lands and that neither of these bases of regulation was available here, the Board notified the Secretaries of its intent

"to exercise all regulatory, impoundment and sale powers which it derives from the New Mexico Estray Law, over all estray horses, mules or asses found running at large upon public or private lands within New Mexico . . . . This includes the right to go upon Federal or State lands to take possession of said horses or burros, should the Livestock Board so desire." App. 67, 72.

The differences between the Livestock Board and the Secretaries came to a head in February 1974. On February 1, 1974, a New Mexico rancher, Kelley Stephenson, was informed by the BLM that several unbranded burros had been seen near Taylor Well, where Stephenson watered his cattle. Taylor Well is on federal property, and Stephenson had access to it and some 8,000 surrounding acres only through a grazing permit issued pursuant to 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b. After the BLM made it clear to Stephenson that it would not remove the burros and after he personally inspected the Taylor Well area, Stephenson complained to the Livestock Board that the burros were interfering with his livestock operation by molesting his cattle and eating their feed.
Thereupon the Board rounded up and removed 19 unbranded and unclaimed burros pursuant to the New Mexico Estray Law. Each burro was seized on the public [426 U.S. 529, 534] lands of the United States 3 and, as the director of the Board conceded, each burro fit the definition of a wild free-roaming burro under 2 (b) of the Act. App. 43. On February 18, 1974, the Livestock Board, pursuant to its usual practice, sold the burros at a public auction. After the sale, the BLM asserted jurisdiction under the Act and demanded that the Board recover the animals and return them to the public lands.

On March 4, 1974, appellees 4 filed a complaint in the United States District Court for the District of New Mexico seeking a declaratory judgment that the Wild Free-roaming Horses and Burros Act is unconstitutional and an injunction against its enforcement. A three-judge court was convened pursuant to 28 U.S.C. 2282.

Following an evidentiary hearing, the District Court held the Act unconstitutional and permanently enjoined the Secretary of the Interior (Secretary) from enforcing its provisions. 5 The court found that the Act "conflicts with . . . the traditional doctrines concerning wild animals," New Mexico v. Morton, 406 F. Supp. 1237, 1238 (1975), and is in excess of Congress' power under the Property Clause of the Constitution, Art. IV, 3, cl. 2. That Clause, the court found, enables Congress to regulate wild animals found on the public land only for the "protection of the public lands from damage of some kind." 406 F. Supp., at 1239 (emphasis in original). Accordingly, this power was exceeded in this [426 U.S. 529, 535] case because "[t]he statute is aimed at protecting the wild horses and burros, not at protecting the land they live on." Ibid. 6 We noted probable jurisdiction, 423 U.S. 818 (1975), and we now reverse.

II

The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, 3, cl. 2. In passing the Wild Free-roaming Horses and Burros Act, Congress deemed the regulated animals "an integral part of the natural system of the public lands" of the United States, 1, 16 U.S.C. 1331 (1970 ed., Supp. IV), and found that their management was necessary "for achievement of an ecological balance on the public lands." H. R. Conf. Rep. No. 92-681, p. 5 (1971). According to Congress, these animals, if preserved in their native habitats, "contribute to the diversity of life forms within the Nation and enrich the lives of the American people." 1, 16 U.S.C. 1331 (1970 ed., Supp. IV). See Hearing on Protection of Wild Horses and Burros on Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 69, 122, 128, 138, 169, 183 (1971). Indeed, Congress concluded, the wild free-roaming horses and burros "are living symbols of the historic [426 U.S. 529, 536] and pioneer spirit of the West." 1, 16 U.S.C. 1331 (1970 ed., Supp. IV). Despite their importance, the Senate committee found:

"[These animals] have been cruelly captured and slain and their carcasses used in the production of pet food and fertilizer. They have been used for target practice and harassed for `sport' and profit. In spite of public outrage, this bloody traffic continues unabated, and it is the firm belief of the committee that this senseless slaughter must be brought to an end." S. Rep. No. 92-242, pp. 1-2 (1971).

For these reasons, Congress determined to preserve and protect the wild free-roaming horses and burros on the public lands of the United States. The question under the Property Clause is whether this determination can be sustained as a "needful" regulation "respecting" the public lands. In answering this question, we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress. United States v. San

Francisco, 310 U.S. 16, 29 -30 (1940); Light v. United States, 220 U.S. 523, 537 (1911) United States v. Gratiot, 14 Pet. 526, 537-538 (1840).

Appellees argue that the Act cannot be supported by the Property Clause. They contend that the Clause grants Congress essentially two kinds of power: (1) the power to dispose of and make incidental rules regarding the use of federal property; and (2) the power to protect federal property. According to appellees, the first power is not broad enough to support legislation protecting wild animals that live on federal property; and the second power is not implicated since the Act is designed to protect the animals, which are not themselves [426 U.S. 529, 537] federal property, and not the public lands. As an initial matter, it is far from clear that the Act was not passed in part to protect the public lands of the United States 7 or that Congress cannot assert a property interest in the regulated horses and burros superior to that of the State. 8 But we need not consider whether the Act can be upheld on either of these grounds, for we reject appellees' narrow reading of the Property Clause.

Appellees ground their argument on a number of cases that, upon analysis, provide no support for their position. Like the District Court, appellees cite Hunt v. United States, 278 U.S. 96 (1928), for the proposition that the Property Clause gives Congress only the limited power to regulate wild animals in order to protect the public lands from damage. But Hunt, which upheld the Government's right to kill deer that were damaging foliage in the national forests, only holds that damage to the land is a sufficient basis for regulation; it contains no suggestion that it is a necessary one.

Next, appellees refer to Kansas v. Colorado, 206 U.S. 46, 89 (1907). The referenced passage in that case states that the Property Clause "clearly . . . does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." But this does no more than articulate the obvious: The Property Clause is a [426 U.S. 529, 538] grant of power only over federal property. It gives no indication of the kind of "authority" the Clause gives Congress over its property.

Camfield v. United States, 167 U.S. 518 (1897), is of even less help to appellees. Appellees rely upon the following language from Camfield:

"While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection." Id., at 525-526 (emphasis added).

Appellees mistakenly read this language to limit Congress' power to regulate activity on the public lands; in fact, the quoted passage refers to the scope of congressional power to regulate conduct on private land that affects the public lands. And Camfield holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property. Camfield contains no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.

Lastly, appellees point to dicta in two cases to the effect that, unless the State has agreed to the exercise of federal jurisdiction, Congress' rights in its land are "only the rights of an ordinary proprietor . . . ." Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525, 527 (1885). [426 U.S. 529, 539] See also Paul v. United States, 371 U.S. 245, 264 (1963). In neither case was the power of Congress under the Property Clause at issue or considered and, as we shall see, these dicta fail to account for the raft of cases in which the Clause has been given a broader construction. 9

In brief, beyond the Fort Leavenworth and Paul dicta, appellees have presented no support for their position that the Clause grants Congress only the power to dispose of, to make incidental rules regarding the use of, and to protect federal property. This failure is hardly surprising, for the Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. United States v. San Francisco, 310 U.S., at 29 -30; Light v. United States, 220 U.S., at 537 ; United States v. Gratiot, 14 Pet., at 537-538. And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations." United States v. San Francisco, supra, at 29. See Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294 -295 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); Gibson v. Chouteau, 13 Wall. 92, 99 (1872); United States v. Gratiot, supra, at 537.

The decided cases have supported this expansive reading. It is the Property Clause, for instance, that provides [426 U.S. 529, 540] the basis for governing the Territories of the United States. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673 -674 (1945); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922); Dorr v. United States, 195 U.S. 138, 149 (1904); United States v. Gratiot, supra, at 537; Sere v. Pitot, 6 Cranch 332, 336-337 (1810). See also Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948). And even over public land within the States, "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." Camfield v. United States, supra, at 525. We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them . . . ." Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917). And we have approved legislation respecting the public lands "[i]f it be found to be necessary for the protection of the public, or of intending settlers [on the public lands]." Camfield v. United States, supra, at 525. In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain. Alabama v. Texas, supra, at 273; Sinclair v. United States, 279 U.S. 263, 297 (1929); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). Although the Property Clause does not authorize "an exercise of a general control over public policy in a State," it does permit "an exercise of the complete power which Congress has over particular public property entrusted to it." United States v. San Francisco, supra, at 30 (footnote omitted). In our view, the "complete power" that [426 U.S. 529, 541] Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there. 10

III

Appellees argue that if we approve the Wild Free-roaming Horses and Burros Act as a valid exercise of Congress' power under the Property Clause, then we have sanctioned an impermissible intrusion on the sovereignty, legislative authority, and police power of the State and have wrongly infringed upon the State's traditional trustee powers over wild animals. The argument appears to be that Congress could obtain exclusive legislative jurisdiction over the public lands in the State only by state consent, and that in the absence of such consent Congress lacks the power to act contrary to state law. This argument is without merit.

Appellees' claim confuses Congress' derivative legislative [426 U.S. 529, 542] powers, which are not involved in this case, with its powers under the Property Clause. Congress may acquire derivative legislative power from a State pursuant to Art. I, 8, cl. 17, of the Constitution by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land. Paul v. United States, 371 U.S., at 264 ; Fort Leavenworth R. Co. v. Lowe, 114 U.S., at 541 -542. 11 In either case, the legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power, e. g., Pacific Coast Dairy v. Dept. of Agriculture of Cal., 318 U.S. 285 (1943), to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority. E. g., Paul v. United States, supra, at 265; Collins v. Yosemite Park Co., 304 U.S. 518, 528 -530 (1938); James v. Dravo Contracting Co., 302 U.S. 134, 147 -149 (1937).

But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the [426 U.S. 529, 543] Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. Mason Co. v. Tax Comm'n of Washington, 302 U.S. 186, 197 (1937); Utah Power & Light Co. v. United States, 243 U.S., at 403 -405; Ohio v. Thomas, 173 U.S. 276, 283 (1899). And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const., Art. VI, cl. 2. See Hunt v. United States, 278 U.S., at 100 ; McKelvey v. United States, 260 U.S. 353, 359 (1922). As we said in Camfield v. United States, 167 U.S., at 526 , in response to a somewhat different claim: "A different rule would place the public domain of the United States completely at the mercy of state legislation."

Thus, appellees' assertion that "[a]bsent state consent by complete cession of jurisdiction of lands to the United States, exclusive jurisdiction does not accrue to the federal landowner with regard to federal lands within the borders of the State," Brief for Appellees 24, is completely beside the point; and appellees' fear that the Secretary's position is that "the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the states," id., at 16, is totally unfounded. The Federal Government does not assert

exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws conflict with the Wild Free-roaming Horses and Burros Act, or with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede. McKelvey v. United States, supra, at 359. [426 U.S. 529, 544]

Again, none of the cases relied upon by appellees are to the contrary. Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930), merely states the rule outlined above that, "without more," federal ownership of lands within a State does not withdraw those lands from the jurisdiction of the State. Likewise, Wilson v. Cook, 327 U.S. 474, 487 -488 (1946), holds only that, in the absence of consent or cession, the Federal Government did not acquire exclusive jurisdiction over certain federal forest reserve lands in Arkansas and the State retained legislative jurisdiction over those lands. No question was raised regarding Congress' power to regulate the forest reserves under the Property Clause. And in Colorado v. Toll, 268 U.S. 228, 230 -231 (1925), the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause. 12 [426 U.S. 529, 545]

In short, these cases do not support appellees' claim that upholding the Act would sanction an impermissible intrusion upon state sovereignty. The Act does not establish exclusive federal jurisdiction over the public lands in New Mexico; it merely overrides the New Mexico Estray Law insofar as it attempts to regulate federally protected animals. And that is but the necessary consequence of valid legislation under the Property Clause.

Appellees' contention that the Act violates traditional state power over wild animals stands on no different footing. Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions. Toomer v. Witsell, 334 U.S. 385, 402 (1948); Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924); Geer v. Connecticut, 161 U.S. 519, 528 (1896). But, as Geer v. Connecticut cautions, those powers exist only "in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." Ibid. "No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of [wildlife], but it does not follow that its authority is exclusive of paramount powers." Missouri v. Holland, 252 U.S. 416, 434 (1920). Thus, the Privileges and Immunities Clause, U.S. Const., Art. IV, 2, cl. 1, precludes a State from imposing prohibitory licensing fees on non-residents shrimping in its waters, Toomer v. Witsell, supra; the Treaty Clause, U.S. Const., Art. II, 2, permits Congress to enter into and enforce a treaty to protect migratory birds despite state objections, Missouri v. Holland, supra; and the Property Clause gives Congress the power to thin overpopulated herds of deer on federal [426 U.S. 529, 546] lands contrary to state law. Hunt v. United States, 278 U.S. 96 (1928). We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding.

IV

In this case, the New Mexico Livestock Board entered upon the public lands of the United States and removed wild burros. These actions were contrary to the provisions of the Wild Free-roaming Horses and Burros Act. We find that, as applied to this case, the Act is a constitutional exercise of congressional power under the Property Clause. We need not, and do not, decide whether the Property Clause would sustain the Act in all of its conceivable applications.

Appellees are concerned that the Act's extension of protection to wild free-roaming horses and burros that stray from public land onto private land, 4, 16 U.S.C. 1334 (1970 ed., Supp. IV), will be read to provide federal jurisdiction over every wild horse or burro that at any time sets foot upon federal land. While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, Camfield v. United States, 167 U.S. 518 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act. We have often declined to decide important questions regarding "the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case," Longshoremen v. Boyd, 347 U.S. 222, 224 (1954), or in the absence of "an adequate and full-bodied record." Public Affairs Press v. Rickover, 369 U.S. 111, 113 (1962). Cf. Eccles v. Peoples Bank, 333 U.S. 426 [426 U.S. 529, 547] (1948). We follow that course in this case and leave open the question of the permissible reach of the Act over private lands under the Property Clause.

For the reasons stated, the judgment of the District Court is reversed, and the case is remanded for further

proceedings consistent with this opinion.

It is so ordered.

Footnotes

[Footnote 1] The landowner may elect to allow straying wild free-roaming horses and burros to remain on his property, in which case he must so notify the relevant Secretary. He may not destroy any such animals, however. 4 of the Act, 16 U.S.C. 1334 (1970 ed., Supp. IV).

[Footnote 2] Under the New Mexico law, an estray is defined as:

"Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty (50) miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico . . . ." N. M. Stat. Ann. 47-14-1 (1966).

It is not disputed that the animals regulated by the Wild Free-roaming Horses and Burros Act are estrays within the meaning of this law.

[Footnote 3] The record is somewhat unclear on this point, but appellees conceded at oral argument that all the burros were seized on the public lands of the United States. Tr. of Oral Arg. 35.

[Footnote 4] Appellees are the State of New Mexico, the New Mexico Livestock Board, the Board's director, and a purchaser of three of the burros seized at Taylor Well.

[Footnote 5] Since appellees did not file suit against the Secretary of Agriculture, the District Court's injunction was limited to the Secretary of the Interior, who is the appellant in this Court.

[Footnote 6] The court also held that the Act could not be sustained under the Commerce Clause because "all the evidence establishes that the wild burros in question here do not migrate across state lines" and "Congress made no findings to indicate that it was in any way relying on the Commerce Clause in enacting this statute." 406 F. Supp., at 1239. While the Secretary argues in this Court that the Act is sustainable under the Commerce Clause, we have no occasion to address this contention since we find the Act, as applied, to be a permissible exercise of congressional power under the Property Clause.

[Footnote 7] Congress expressly ordered that the animals were to be managed and protected in order "to achieve and maintain a thriving natural ecological balance on the public lands." 3 (a), 16 U.S.C. 1333 (a) (1970 ed., Supp. IV). Cf. Hunt v. United States, 278 U.S. 96 (1928).

[Footnote 8] See infra, at 545-546. The Secretary makes no claim here, however, that the United States owns the wild free-roaming horses and burros found on public land.

[Footnote 9] Indeed, Hunt v. United States, supra, and Camfield v. United States, 167 U.S. 518 (1897), both relied upon by appellees, are inconsistent with the notion that the United States has only the rights of an ordinary proprietor with respect to its land. An ordinary proprietor may not, contrary to state law, kill game that is damaging his land, as the Government did in Hunt; nor may he prohibit the fencing in of his property without the assistance of state law, as the Government was able to do in Camfield.

[Footnote 10] Appellees ask us to declare that the Act is unconstitutional because the animals are not, as Congress found, "fast disappearing from the American scene." 1, 16 U.S.C. 1331 (1970 ed., Supp. IV). At the outset, no reason suggests itself why Congress' power under the Property Clause to enact legislation to protect wild free-roaming horses and burros "from capture, branding, harassment, or death," ibid., must depend on a finding that the animals are decreasing in number. But responding directly to appellees' contention, we note that the evidence before Congress on this question was conflicting and that Congress weighed the evidence and made a judgment. See Hearing on Protection of Wild Horses and Burros on Public Lands before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 92d Cong., 1st Sess., 1-2, 7, 11-14, 17, 26-32, 80, 87-88, 101, 103, 134-136, 139-141 (1971). What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. This we must decline to do. United States v. San Francisco, 310 U.S. 16, 29 -30 (1940); Light v. United States, 220 U.S. 523, 537 (1911); United States v. Gratiot, 14 Pet. 526, 537-538 (1840). See also Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939). In any event, we note that Congress has provided for periodic review of the

administration of the Act. 10, 16 U.S.C. 1340 (1970 ed., Supp. IV).

[Footnote 11] Article I, 8, cl. 17, of the Constitution provides that Congress shall have the power:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . ."

The Clause has been broadly construed, and the acquisition by consent or cession of exclusive or partial jurisdiction over properties for any legitimate governmental purpose beyond those itemized is permissible. Collins v. Yosemite Park Co., 304 U.S. 518, 528 -530 (1938).

[Footnote 12] Referring to the Act creating the National Park, the Court said:

"There is no attempt to give exclusive jurisdiction to the United States, but on the contrary the rights of the State over the roads are left unaffected in terms. Apart from those terms the State denies the power of Congress to curtail its jurisdiction or rights without an act of cession from it and an acceptance by the national government. The statute establishing the park would not be construed to attempt such a result. As the [park superintendent] is undertaking to assert exclusive control and to establish a monopoly in a matter as to which, if the allegations of the bill are maintained, the State has not surrendered its legislative power, a cause of action is disclosed if we do not look beyond the bill, and it was wrongly dismissed." 268 U.S., at 231 (citations omitted).

While Colorado thus asserted that, absent cession, the Federal Government lacked power to regulate the highways within the park, and the Court held that the State was entitled to attempt to prove that it had not surrendered legislative jurisdiction to the United States, at most the case stands for the proposition that where [426 U.S. 529, 545] Congress does not purport to override state power over public lands under the Property Clause and where there has been no cession, a federal official lacks power to regulate contrary to state law. [426 U.S. 529, 548]

people. They welcomed the adoption of Resolution 1153 to expand humanitarian assistance and to alleviate the suffering of the Iraqi people.

The two sides reviewed with interest recent developments regarding Iranian policy and welcomed the emerging moderate tone in Iran's statements. They looked forward to seeing Iranian substantive policies consistent with these statements and conducive to the improvement of Iran's relations with neighboring states and with the international community. They agreed that Iran's continuing commitment to the principle of non-interference in the affairs of neighboring states will reflect on Tehran's interest in promoting peace and security in the region.

President Clinton and His Highness reviewed international economic developments and agreed to continue their close consultations on means to improve opportunities for trade and investment in the region. The United States recognized the potential of Bahrain's economy due to its highly developed infrastructure and suitable environment for investment opportunities. They agreed to capitalize on the opportunities presented by the United States Economic Dialogue with the Gulf Cooperation Council to advance progress and prosperity throughout the region.

The United States and Bahrain expressed their concern at the increased risk of a nuclear arms race escalating and urged India, Pakistan and other non-signatory countries to accede to the Comprehensive Nuclear Test Ban Treaty (CTBT) and the Non-Proliferation Treaty (NPT) without conditions. The United States and Bahrain also call on the Governments of India and Pakistan to announce a moratorium on future tests and experimentation on delivery systems. The Amir expressed his appreciation for the warm welcome and gracious hospitality accorded to him and to his accompanying delegation by President Clinton during the visit. The President conveyed the warm greetings and best wishes of the American people to the citizens of Bahrain and wished His Highness good health and long life. His Highness the Amir extended an invitation to President Clinton to pay an official visit to the State of Bahrain.

NOTE: An original was not available for verification of the content of this joint statement.

Memorandum on Plain Language in Government Writing

June 1, 1998

Memorandum for the Heads of Executive Departments and Agencies

Subject: Plain Language in Government Writing

The Vice President and I have made reinventing the Federal Government a top priority of my Administration. We are determined to make the Government more responsive, accessible, and understandable in its communications with the public.

The Federal Government's writing must be in plain language. By using plain language, we send a clear message about what the Government is doing, what it requires, and what services it offers. Plain language saves the Government and the private sector time, effort, and money.

Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:

- common, everyday words, except for necessary technical terms;
- "you" and other pronouns;
- the active voice; and
- short sentences.

To ensure the use of plain language, I direct you to do the following:

- By October 1, 1998, use plain language in all new documents, other than regulations, that explain how to obtain a benefit or service or how to comply with a requirement you administer or enforce. For example, these documents may include letters, forms, notices, and instructions. By January 1, 2002, all such documents created prior to October 1, 1998, must also be in plain language.
- By January 1, 1999, use plain language in all proposed and final rulemaking documents published in the *Federal Register*, unless you proposed the rule before that date. You should consider

rewriting existing regulations in plain language when you have the opportunity and resources to do so.

The National Partnership for Reinventing Government will issue guidance to help you comply with these directives and to explain more fully the elements of plain language. You should also use customer feedback and common sense to guide your plain language efforts.

I ask the independent agencies to comply with these directives.

This memorandum does not confer any right or benefit enforceable by law against the United States or its representatives. The Director of the Office of Management and Budget will publish this memorandum in the *Federal Register*.

William J. Clinton

Remarks in a Roundtable Discussion on the 2000 Census in Houston, Texas

June 2, 1998

The President. Thank you. Thank you for that wonderful welcome, and thank you, Marta, for the wonderful work you're doing here. I enjoyed my tour. I enjoyed shaking hands with all the folks who work here and the people who are taking advantage of all your services. And I'm glad to be here. Mr. Mayor, you can be proud, and I know you are proud of this center and the others like it in this city.

I'd like to thank all the Members of Congress who are here from the Texas delegation, and a special thanks to Representatives Maloney and Sawyer for coming from Washington with me today, and for their passionate concern to try to get an accurate census.

I thank the Texas land commissioner, Garry Mauro, for being here; and the members of the legislature, Senator Gallegos, Senator Ellis, Congressman—Representative Torres, and others, if they're here, the other city officials; Mr. Boney, the president of the city council; Mr. Eckels, the county executive judge; Rueben Guerrero, the SBA Regional Administrator. If there are others—I think our Deputy Secretary of Commerce, Mr. Mallett, is here, who is from Houston. I thank you all for being here.

Before I say what I want to say about the census, I think, since this is the first time I have been in Texas since the fires began to rage in Mexico, that have affected you, if you'll forgive me, I'd like to just say a word about that. The smoke and the haze from these fires has become a matter of serious concern for people in Texas and Louisiana, and other Gulf States. It has gotten even further up into our country. And of course, the greatest loss has been suffered by our friends and neighbors across the border in Mexico. Now, we are doing everything we know to do to help, both to help the people of Mexico and to stem the disadvantageous side effects of all the smoke and haze coming up here into the United States.

I had an extended talk with President Zedillo about it. And, of course, here we had the EPA and Health and Human Services and FEMA monitoring the air quality. We're working very hard with the Mexican Government to help them more effectively fight these fires. We provided more than $8 million in emergency assistance to Mexico since January, with 4 firefighting helicopters, an infrared imaging aircraft to detect fire hotspots, safety, communications, and other firefighting equipment for over 3,000 firefighters. Over 50 experts from our Federal agency have provided important technical advice, and tomorrow, our Agriculture Secretary, Dan Glickman, and our AID Administrator, Brian Atwood, are going to Mexico to see these fires firsthand and to see what else we can do in consultation with Mexican officials.

I think that we will be successful, but this has been a long and frustrating thing. As you probably know, we've had extended fires over the last year in Southeast Asia as well and in South America. This is a terrific problem that requires change in longstanding habits on the part of many people in rural areas in a lot of these countries, but it also is a function of the unusual weather conditions through which we have been living. And we'll continue to work on it.

Now, let's talk about the census. Since our Nation's founding, the taking of the census has been mandated by the Constitution. How we have met this responsibility has changed

WIKIPEDIA
The Free Encyclopedia

Plain Writing Act of 2010

On June 1, 1998, President Bill Clinton issued a Memorandum on Plain Language in Government Writing. (PDF (https://www.govinfo.gov/content/pkg/WCPD-1998-06-08/pdf/WCPD-1998-06-08-Pg1010.pdf)) The rationale for this memorandum was to "make the Government more responsive, accessible, and understandable in its communications with the public" and its goal is to save the Government and the private sector "time, effort and money." Accompanying guidance[1] was issued at the time the memorandum entered the record.

Signed into law on October 13, 2010, by President Obama, the **Plain Writing Act of 2010** (H.R. 946 (https://www.congress.gov/bill/111th-congress/house-bill/946); Pub. L. 111–274 (text) (https://www.govinfo.gov/link/plaw/111/public/274?link-type=html) (PDF) (https://www.govinfo.gov/link/plaw/111/public/274?link-type=pdf&.pdf)) is a United States federal law that requires that federal executive agencies:

- Use plain writing in every covered document that the agency issues or substantially revises[2]
- Train employees in "plain writing"
- Establish a process for overseeing the agency's compliance with this Act
- Create and maintain a plain writing section on the agency's website to inform the public of agency compliance with the requirements of this Act
- Provide a mechanism for the agency to receive and respond to public input on agency implementation and agency reports required under this Act, and be accessible from its homepage
- Designate one or more agency points-of-contact to receive and respond to public input on the implementation of this Act

Plain Writing Act of 2010

Long title	An act to enhance citizen access to Government information and services by establishing that Government documents issued to the public must be written clearly, and for other purposes.
Enacted by	the 111th United States Congress
Effective	October 13, 2010
Citations	
Public law	111-274 (https://www.gpo.gov/fdsys/pkg/PLAW-111publ274/pdf/PLAW-111publ274.pdf)
Statutes at Large	124 Stat. 2861

Example

Before:

> The amount of expenses reimbursed to a claimant under this subpart shall be reduced by any amount that the claimant receives from a collateral source. In cases in which a claimant receives reimbursement under this subpart for expenses that also will or may be reimbursed from another source, the claimant shall subrogate the United States to the claim for payment from the collateral source up to the amount for which the claimant was reimbursed under this subpart.

After:

> If you get a payment from a collateral source, we will reduce our payment by the amount you get. If you get payments from us and from a collateral source for the same expenses, you must pay us back the amount we paid you.[3]

Codification	
U.S.C. sections amended	5 USC 301 note

Legislative history

- **Introduced** in the House as H.R. 946 (https://www.congress.gov/bill/111th-congress/house-bill/946) by Bruce Braley (D–IA) on February 10, 2009
- **Committee consideration** by House Oversight and Government Reform
- **Passed the House** on March 17, 2010 (386–33 (https://clerk.house.gov/evs/2010/roll126.xml))
- **Passed the Senate** on September 27, 2010 (unanimous consent) with amendment
- **House agreed to Senate amendment** on September 29, 2010 (341–82 (https://clerk.house.gov/evs/2010/roll562.xml))
- **Signed into law** by President Barack Obama on October 13, 2010

See also

- Paperwork Reduction Act

References

1. "Guidelines for President Clinton's memo" (https://www.plainlanguage.gov/about/history/memo-guidelines/).
2. Pub. L. 111–274 (text) (https://www.govinfo.gov/link/plaw/111/public/274?link-type=html) (PDF) (https://www.govinfo.gov/link/plaw/111/public/274?link-type=pdf&.pdf)§4(b)
3. "New law bans use of confusing words and sentences in government documents" (http://hotword.dictionary.com/plain-words/) (blog). *The Hot Word*. dictionary.com. May 27, 2011. Retrieved May 29, 2011.

External links

- PlainLanguage.gov (https://www.plainlanguage.gov/)
- 2018 Report Card (https://centerforplainlanguage.org/reports/federal-report-card/2018-report-card/) by the independent Center for Plain Language, for each federal department

JOHNSON *v.* UNITED STATES (2015)

United States Supreme Court

JOHNSON *v.* UNITED STATES(2015)

No. 13-7120

Argued: November 05, 2014

Decided: June 26, 2015

After petitioner Johnson pleaded guilty to being a felon in possession of a firearm, see 18 U. S. C. §922(g), the Government sought an enhanced sentence under the Armed Career Criminal Act, which imposes an increased prison term upon a defendant with three prior convictions for a "violent felony," §924(e)(1), a term defined by §924(e)(2)(B)'s residual clause to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The Government argued that Johnson's prior conviction for unlawful possession of a short-barreled shotgun met this definition, making the third conviction of a violent felony. This Court had previously pronounced upon the meaning of the residual clause in *James* v. *United States*, 550 U. S. 192; *Begay* v. *United States*, 553 U. S. 137; *Chambers* v. *United States*, 555 U. S. 122; and *Sykes* v. *United States*, 564 U. S. 1, and had rejected suggestions by dissenting Justices in both *James* and *Sykes* that the clause is void for vagueness. Here, the District Court held that the residual clause does cover unlawful possession of a short-barreled shotgun, and imposed a 15-year sentence under ACCA. The Eighth Circuit affirmed.

Held: Imposing an increased sentence under ACCA's residual clause violates due process. Pp. 3-15.

(a) The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357-358. Courts must use the "categorical approach" when deciding whether an offense is a violent felony, looking "only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor* v. *United States*, 495 U. S. 575, 600. Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James, supra,* at 208. Pp. 3-5.

(b) Two features of the residual clause conspire to make it unconstitutionally vague. By tying the judicial assessment of risk to a judicially imagined "ordinary case" of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. See *James, supra,* at 211. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Taken together, these uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates. This Court's repeated failure to craft a principled standard out of the residual clause and the lower courts' persistent inability to apply the clause in a consistent way confirm its hopeless indeterminacy. Pp. 5-10.

(c) This Court's cases squarely contradict the theory that the residual clause is constitutional merely because some underlying crimes may clearly pose a serious potential risk of physical injury to another. See, *e.g., United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 89. Holding the residual clause void for vagueness does not put other criminal laws that use terms such as "substantial risk" in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime. Pp. 10-13.

(d) The doctrine of *stare decisis* does not require continued adherence to *James* and *Sykes.* Experience leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. *James* and *Sykes* opined about vagueness without full briefing or argument. And continued adherence to those decisions would undermine, rather than promote, the goals of evenhandedness, predictability, and consistency served by *stare decisis*. Pp. 13-15.

526 Fed. Appx. 708, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., and THOMAS, J., filed opinions concurring in the judgment. ALITO, J., filed a dissenting opinion.

Opinion of the Court

576 U. S. ____ (2015)

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2015]

JUSTICE SCALIA delivered the opinion of the Court.

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. §924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

I

Federal law forbids certain people--such as convicted felons, persons committed to mental institutions, and drug users--to ship, possess, and receive firearms. §922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. §924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. §924(e)(1); *Johnson* v. *United States*, 559 U. S. 133, 136 (2010). The Act defines "violent felony" as follows:

> "any crime punishable by imprisonment for a term exceeding one year . . . that--
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." §924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act's residual clause. Since 2007, this Court has decided four cases attempting to discern its meaning. We have held that the residual clause (1) covers Florida's offense of attempted burglary, *James* v. *United States*, 550 U. S. 192 (2007); (2) does *not* cover New Mexico's offense of driving under the influence, *Begay* v. *United States*, 553 U. S. 137 (2008); (3) does *not* cover Illinois' offense of failure to report to a penal institution, *Chambers* v. *United States*, 555 U. S. 122 (2009); and (4) does cover Indiana's offense of vehicular flight from a law-enforcement officer, *Sykes* v. *United States*, 564 U. S. 1 (2011). In both *James* and *Sykes*, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws. Compare *James*, 550 U. S., at 210, n. 6, with *id.,* at 230 (SCALIA, J., dissenting); compare *Sykes*, 564 U. S., at ___ (slip op., at 13-14), with *id.,* at ___ (SCALIA, J., dissenting) (slip op., at 6-8).

This case involves the application of the residual clause to another crime, Minnesota's offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson is a felon with a long criminal record. In 2010, the Federal Bureau of Investigation began to monitor him because of his involvement in a white-supremacist organization that the Bureau suspected was planning to commit acts of terrorism. During the investigation, Johnson disclosed to undercover agents that he had manufactured explosives and that he planned to attack "the Mexican consulate" in Minnesota, "progressive bookstores," and " 'liberals.' " Revised Presentence Investigation in No. 0:12CR00104-001 (D. Minn.), p. 15, ¶16. Johnson showed the agents his AK-47 rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition.

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of §922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses--including unlawful possession of a short-barreled shotgun, see Minn. Stat. §609.67 (2006)--qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15-year prison term under the Act. The Court of Appeals affirmed. 526 Fed. Appx. 708 (CA8 2013) (*per curiam*). We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. 572 U. S. ___ (2014). We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws. 574 U. S. ___ (2015).

II

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender* v. *Lawson*, 461 U. S. 352, 357-358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979).

In *Taylor* v. *United States*, 495 U. S. 575, 600 (1990), this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, *supra*, at 141.

Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James, supra,* at 208. The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime "has *as an element* the use . . . of physical force," the residual clause asks whether the crime "*involves conduct*" that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering.

We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

A

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *United States* v. *Mayer*, 560 F. 3d 948, 952 (CA9 2009) (Kozinski, C. J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner . . . may give chase, and a violent encounter may ensue." 550 U. S., at 211. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.*, at 226 (opinion of SCALIA, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes--burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay*, 553 U. S., at 143. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

This Court has acknowledged that the failure of "persistent efforts . . . to establish a standard" can provide evidence of vagueness. *United States* v. *L. Cohen Grocery Co.,* 255 U. S. 81, 91 (1921). Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. Three of the Court's previous four decisions about the clause concentrated on the level of risk posed by the crime in question, though in each case we found it necessary to resort to a different ad hoc test to guide our inquiry. In *James*, we asked whether "the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses," namely completed burglary; we concluded that it was. 550 U. S., at 203. That rule takes care of attempted burglary, but offers no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes. "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?" *Id.,* at 215 (SCALIA, J., dissenting).

Chambers, our next case to focus on risk, relied principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.' " 555 U. S., at 128-129. So much for failure to report to prison, but what about the tens of thousands of federal and state crimes for which no comparable reports exist? And even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves. See *Sykes*, 564 U. S., at ___-___ (SCALIA, J., dissenting) (slip op., at 4-6); *id.,* at ___, n. 4 (KAGAN, J., dissenting) (slip op., at 6, n. 4).

Our most recent case, *Sykes*, also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id*., at ___ (majority opinion) (slip op., at 8). But common sense is a much less useful criterion than it sounds--as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. See *id.,* at ___ (KAGAN, J., dissenting) (slip op., at 3-4). How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum? Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes. All in all, *James*, *Chambers*, and *Sykes* failed to establish any generally appli-cable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.

The remaining case, *Begay*, which preceded *Chambers* and *Sykes*, took an entirely different approach. The Court held that in order to qualify as a violent felony under the residual clause, a crime must resemble the enumerated offenses "in kind as well as in degree of risk posed." 553 U. S., at 143. The Court deemed drunk driving insufficiently similar to the listed crimes, because it typically does not involve "purposeful, violent, and aggressive conduct." *Id.,* at 144-145 (internal quotation marks omitted). Alas, *Begay* did not succeed in bringing clarity to the meaning of the residual clause. It did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime. In addition, the enumerated crimes are not much more similar to one another in kind than in degree of risk posed, and the concept of "aggressive conduct" is far from clear. *Sykes* criticized the "purposeful, violent, and aggressive" test as an "addition to the statu-tory text," explained that "levels of risk" would normally be dispositive, and confined *Begay* to "strict liability, negligence, and recklessness crimes." 564 U. S., at ___-___ (slip op., at 10-11).

The present case, our fifth about the meaning of the residual clause, opens a new front of uncertainty. When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers.

This Court is not the only one that has had trouble making sense of the residual clause. The clause has "created numerous splits among the lower federal courts," where it has proved "nearly impossible to apply consistently." *Chambers*, 555 U. S., at 133 (ALITO, J., concurring in judgment). The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider. Some judges have concluded that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the "simple act of agreeing [to commit a crime]," *United States* v. *Whitson*, 597 F. 3d 1218, 1222 (CA11 2010) (*per curiam*); others have also considered the probability that the agreement will be carried out, *United States* v. *White*, 571 F. 3d 365, 370-371 (CA4 2009). Some judges have assumed that the battery of a police officer (defined to include the slightest touching) could "explode into violence and result in physical injury," *United States* v. *Williams*, 559 F. 3d 1143, 1149 (CA10 2009); others have felt that it "do[es]

a great disservice to law enforcement officers" to assume that they would "explod[e] into violence" rather than "rely on their training and experience to determine the best method of responding," *United States* v. *Carthorne*, 726 F. 3d 503, 514 (CA4 2013). Some judges considering whether statutory rape qualifies as a violent felony have concentrated on cases involving a perpetrator much older than the victim, *United States* v. *Daye*, 571 F. 3d 225, 230-231 (CA2 2009); others have tried to account for the possibility that "the perpetrator and the victim [might be] close in age," *United States* v. *McDonald*, 592 F. 3d 808, 815 (CA7 2010). Disagreements like these go well beyond disputes over matters of degree.

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." *United States* v. *Evans*, 333 U. S. 483, 495 (1948). Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.

B

The Government and the dissent claim that there will be straightforward cases under the residual clause, because some crimes clearly pose a serious potential risk of physical injury to another. See *post,* at 14-15 (opinion of ALITO, J.). True enough, though we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of "rioting at a correctional institution." See *United States* v. *Johnson*, 616 F. 3d 85 (CA2 2010). That certainly sounds like a violent felony--until one realizes that Connecticut defines this offense to include taking part in "any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations" of the prison. Conn. Gen. Stat. §53a-179b(a) (2012). Who is to say which the ordinary "disorder" most closely resembles--a full-fledged prison riot, a food-fight in the prison cafeteria, or a "passive and nonviolent [act] such as disregarding an order to move," *Johnson*, 616 F. 3d, at 95 (Parker, J., dissenting)?

In all events, although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness--even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.*, 255 U. S., at 89. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"--even though spitting in someone's face would surely be annoying. *Coates* v. *Cincinnati*, 402 U. S. 611 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Resisting the force of these decisions, the dissent insists that "a statute is void for vagueness only if it is vague in all its applications." *Post,* at 1. It claims that the prohibition of unjust or unreasonable rates in *L. Cohen Grocery* was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. *Post,* at 16. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?

The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. See *post,* at 7-8. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *James*, 550 U. S., at 230, n. 7 (SCALIA, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree," *Nash* v. *United States*, 229 U. S. 373, 377 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *International Harvester Co. of America* v. *Kentucky*, 234 U. S. 216, 223 (1914).

Finally, the dissent urges us to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime. See *post,* at 9-13. In other words, the dissent suggests that we jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor*, see 495 U. S., at 599-602, and reaffirmed in each of our four residual-clause cases, see *James*, 550 U. S., at 202; *Begay*, 553 U. S., at 141; *Chambers*, 555 U. S., at 125; *Sykes*, 564 U. S., ___ (slip op., at 5). We decline the dissent's invitation. In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who . . . has three previous convictions' for--not a person who has committed--three previous violent felonies or drug offenses." 495 U. S., at 600. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid. Taylor*

also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. "[T]he only plausible interpretation" of the law, therefore, requires use of the categorical approach. *Id.,* at 602.

C

That brings us to *stare decisis*. This is the first case in which the Court has received briefing and heard argument from the parties about whether the residual clause is void for vagueness. In *James*, however, the Court stated in a footnote that it was "not persuaded by [the principal dissent's] suggestion . . . that the residual provision is unconstitutionally vague." 550 U. S., at 210, n. 6. In *Sykes*, the Court again rejected a dissenting opinion's claim of vagueness. 564 U. S., at ___-___ (slip op., at 13-14).

The doctrine of *stare decisis* allows us to revisit an ear-lier decision where experience with its application reveals that it is unworkable. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitu-tional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction." *United States* v. *Vann*, 660 F. 3d 771, 787 (CA4 2011) (Agee, J., concurring).

This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. See, *e.g., United States* v. *Dixon*, 509 U. S. 688, 711 (1993); *Payne*, 501 U. S., at 828-830 (1991). But *James* and *Sykes* opined about vagueness without full briefing or argument on that issue--a circumstance that leaves us "less constrained to follow precedent," *Hohn* v. *United States*, 524 U. S. 236, 251 (1998). The brief discussions of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase "serious potential risk"; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime. 550 U. S., at 210, n. 6; 564 U. S., at ___ (slip op., at 13-14). And departing from those decisions does not raise any concerns about upsetting private reliance interests.

Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne*, *supra,* at 827. Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.

* * *

We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

We reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

KENNEDY, J., concurring in judgment

576 U. S. ____ (2015)

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2015]

JUSTICE KENNEDY, concurring in the judgment.

In my view, and for the reasons well stated by JUSTICE ALITO in dissent, the residual clause of the Armed Career Criminal Act is not unconstitutionally vague under the categorical approach or a record-based approach. On the assumption that the categorical approach ought to still control, and for the reasons given by JUSTICE THOMAS in Part I of his opinion concurring in the judgment, Johnson's conviction for possession of a short-barreled shotgun does not qualify as a

violent felony.

For these reasons, I concur in the judgment.

THOMAS, J., concurring in judgment

576 U. S. ____ (2015)

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2015]

JUSTICE THOMAS, concurring in the judgment.

I agree with the Court that Johnson's sentence cannot stand. But rather than use the Fifth Amendment's Due Process Clause to nullify an Act of Congress, I would resolve this case on more ordinary grounds. Under conventional principles of interpretation and our precedents, the offense of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under the residual clause of the Armed Career Criminal Act (ACCA).

The majority wants more. Not content to engage in the usual business of interpreting statutes, it holds this clause to be unconstitutionally vague, notwithstanding the fact that on four previous occasions we found it determinate enough for judicial application. As JUSTICE ALITO explains, that decision cannot be reconciled with our precedents concerning the vagueness doctrine. See *post,* at 13-17 (dissenting opinion). But even if it were a closer case under those decisions, I would be wary of holding the residual clause to be unconstitutionally vague. Although I have joined the Court in applying our modern vagueness doctrine in the past, see *FCC* v. *Fox Television Stations, Inc.*, 567 U. S. ___, ___-___ (2012) (slip op., at 16-17), I have become increasingly concerned about its origins and application. Simply put, our vagueness doctrine shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution.

I

We could have easily disposed of this case without nullifying ACCA's residual clause. Under ordinary principles of statutory interpretation, the crime of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under ACCA. In relevant part, that Act defines a "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that either

> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. §924(e)(2)(B).

The offense of unlawfully possessing a short-barreled shotgun neither satisfies the first clause of this definition nor falls within the enumerated offenses in the second. It therefore can constitute a violent felony only if it falls within ACCA's so-called "residual clause"--*i.e.*, if it "involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii).

To determine whether an offense falls within the residual clause, we consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James* v. *United States*, 550 U. S. 192, 208 (2007). The specific crimes listed in §924(e)(2)(B)(ii)--arson, extortion, burglary, and an offense involving the use of explosives--offer a "baseline against which to measure the degree of risk" a crime must present to fall within that clause. *Id.,* at 208. Those offenses do not provide a high threshold, see *id.*, at 203, 207-208, but the crime in question must still present a " 'serious' "--a " 'significant' or 'important' "--risk of physical injury to be deemed a violent felony, *Begay* v. *United States*, 553 U. S. 137, 156 (2008) (ALITO, J., dissenting); accord, *Chambers* v. *United States*, 555 U. S. 122, 128 (2009).

To qualify as serious, the risk of injury generally must be closely related to the offense itself. Our precedents provide useful examples of the close relationship that must exist between the conduct of the offense and the risk presented. In *Sykes* v. *United States*, 564 U. S. 1 (2011), for instance, we held that the offense of intentional vehicular flight constitutes a violent felony because that conduct always triggers a dangerous confrontation, *id.*, at ___ (slip op., at 8). As we explained, vehicular flights "by definitional necessity occur when police are present" and are done "in defiance of their instructions . . . with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Ibid.* In *James*, we likewise held that attempted burglary offenses "requir[ing] an overt act directed toward the entry of a structure" are violent felonies because the underlying conduct often results in a dangerous confrontation. 550 U. S., at 204, 206. But we distinguished those crimes from "the more attenuated conduct encompassed by" attempt offenses "that c[an] be satisfied by preparatory conduct that does not pose the same risk of violent confrontation," such as " 'possessing burglary tools.' " *Id.,* at 205, 206, and n. 4. At some point, in other words, the risk of injury from the crime may be too attenuated for the conviction to fall within the residual clause, such as when an additional, voluntary act (*e.g.*, the *use* of burglary tools to enter a structure) is necessary to bring about the risk of physical injury to another.

In light of the elements of and reported convictions for the unlawful possession of a short-barreled shotgun, this crime does not "involv[e] conduct that presents a serious potential risk of physical injury to another," §924(e) (2)(B)(ii). The acts that form the basis of this offense are simply too remote from a risk of physical injury to fall within the residual clause.

Standing alone, the elements of this offense--(1) unlawfully (2) possessing (3) a short-barreled shotgun--do not describe inherently dangerous conduct. As a conceptual matter, "simple possession [of a firearm], even by a felon, takes place in a variety of ways (*e.g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *United States* v. *Doe*, 960 F. 2d 221, 225 (CA1 1992). These weapons also can be stored in a manner posing a danger to no one, such as unloaded, disassembled, or locked away. By themselves, the elements of this offense indicate that the ordinary commission of this crime is far less risky than ACCA's enumerated offenses.

Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others. A few examples suffice. In one case, officers found the sawed-off shotgun locked inside a gun cabinet in an empty home. *State* v. *Salyers*, 858 N. W. 2d 156, 157-158 (Minn. 2015). In another, the firearm was retrieved from the trunk of the defendant's car. *State* v. *Ellenberger*, 543 N. W. 2d 673, 674 (Minn. App. 1996). In still another, the weapon was found missing a firing pin. *State* v. *Johnson*, 171 Wis. 2d 175, 178, 491 N. W. 2d 110, 111 (App. 1992). In these instances and others, the offense threatened no one.

The Government's theory for why this crime should nonetheless qualify as a "violent felony" is unpersuasive. Although it does not dispute that the unlawful possession of a short-barreled shotgun can occur in a nondangerous manner, the Government contends that this offense poses a serious risk of physical injury due to the connection between short-barreled shotguns and other serious crimes. As the Government explains, these firearms are "weapons not typically possessed by law-abiding citizens for lawful purposes," *District of Columbia* v. *Heller*, 554 U. S. 570, 625 (2008), but are instead primarily intended for use in criminal activity. In light of that intended use, the Government reasons that the ordinary case of this possession offense will involve the *use* of a short-barreled shotgun in a serious crime, a scenario obviously posing a serious risk of physical injury.

But even assuming that those who unlawfully possess these weapons typically intend to use them in a serious crime, the risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it. Unlike attempted burglary (at least of the type at issue in *James*) or intentional vehicular flight--conduct that by itself often or always invites a dangerous confrontation--possession of a short-barreled shotgun poses a threat *only* when an offender decides to engage in additional, voluntary conduct that is not included in the elements of the crime. Until this weapon is assembled, loaded, or used, for example, it poses no risk of injury to others in and of itself. The risk of injury to others from mere possession of this firearm is too attenuated to treat this offense as a violent felony. I would reverse the Court of Appeals on that basis.

II

As the foregoing analysis demonstrates, ACCA's residual clause can be applied in a principled manner. One would have thought this proposition well established given that we have already decided four cases addressing this clause. The majority nonetheless concludes that the operation of this provision violates the Fifth Amendment's Due Process Clause.

JUSTICE ALITO shows why that analysis is wrong under our precedents. See *post,* at 13-17 (dissenting opinion). But I have some concerns about our modern vagueness doctrine itself. Whether that doctrine is defensible under the original meaning of "due process of law" is a difficult question I leave for the another day, but the doctrine's history should prompt us at least to examine its constitutional underpinnings more closely before we use it to nullify yet another duly enacted law.

A

We have become accustomed to using the Due Process Clauses to invalidate laws on the ground of "vagueness." The doctrine we have developed is quite sweeping: "A statute can be impermissibly vague . . . if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill* v. *Colorado*, 530 U. S. 703, 732 (2000). Using this framework,

we have nullified a wide range of enactments. We have struck down laws ranging from city ordinances, *Papachristou* v. *Jacksonville*, 405 U. S. 156, 165-171 (1972), to Acts of Congress, *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89-93 (1921). We have struck down laws whether they are penal, *Lanzetta* v. *New Jersey*, 306 U. S. 451, 452, 458 (1939), or not, *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 597-604 (1967).[1] We have struck down laws addressing subjects ranging from abortion, *Colautti* v. *Franklin*, 439 U. S. 379, 390 (1979), and obscenity, *Winters* v. *New York*, 333 U. S. 507, 517-520 (1948), to the minimum wage, *Connally* v. *General Constr. Co.*, 269 U. S. 385, 390-395 (1926), and antitrust, *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 453-465 (1927). We have even struck down a law using a term that has been used to describe criminal conduct in this country since before the Constitution was ratified. *Chicago* v. *Morales*, 527 U. S. 41, 51 (1999) (invalidating a "loitering" law); see *id.,* at 113, and n. 10 (THOMAS, J., dissenting) (discussing a 1764 Georgia law requiring the apprehension of "all able bodied persons . . . who shall be found loitering").

That we have repeatedly used a doctrine to invalidate laws does not make it legitimate. Cf., *e.g., Dred Scott* v. *Sandford*, 19 How. 393, 450-452 (1857) (stating that an Act of Congress prohibiting slavery in certain Federal Territories violated the substantive due process rights of slaveowners and was therefore void). This Court has a history of wielding doctrines purportedly rooted in "due process of law" to achieve its own policy goals, substantive due process being the poster child. See *McDonald* v. *Chicago*, 561 U. S. 742, 811 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not"). Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.

1

The problem of vague penal statutes is nothing new. The notion that such laws may be void under the Constitution's Due Process Clauses, however, is a more recent development.

Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law. This rule of construction--better known today as the rule of lenity--first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses, though it did not gain broad acceptance until the following century. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749-751 (1935); see also 1 L. Radzinowicz, A History of English Criminal Law and Its Administration From 1750, pp. 10-11 (1948) (noting that some of the following crimes triggered the death penalty: "marking the edges of any current coin of the kingdom," "maliciously cutting any hop-binds growing on poles in any plantation of hops," and "being in the company of gypsies"). Courts relied on this rule of construction in refusing to apply vague capital-offense statutes to prosecutions before them. As an example of this rule, William Blackstone described a notable instance in which an English statute imposing the death penalty on anyone convicted of "stealing sheep, *or other cattle*" was "held to extend to nothing but mere sheep" as "th[e] general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence." 1 Commentaries on the Laws of England 88 (1765).[2]

Vague statutes surfaced on this side of the Atlantic as well. Shortly after the First Congress proposed the Bill of Rights, for instance, it passed a law providing "[t]hat every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license," must forfeit the offending goods. Act of July 22, 1790, ch. 33, §3, 1 Stat. 137-138. At first glance, punishing the unlicensed possession of "merchandise . . . usually vended to the Indians," *ibid.*, would seem far more likely to "invit[e] arbitrary enforcement," *ante,* at 5, than does the residual clause.

But rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts--like their English predecessors--simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly. See, *e.g., United States* v. *Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815) (Washington, J.). In *Sharp*, for instance, several defendants charged with violating an Act rendering it a capital offense for "any seaman" to "make a revolt in [a] ship," Act of Apr. 30, 1790, §8, 1 Stat. 114, objected that "the offence of making a revolt, [wa]s not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon [them]." 27 F. Cas., at 1043. Justice Washington, riding circuit, apparently agreed, observing that the common definitions for the phrase "make a revolt" were "so multifarious, and so different" that he could not "avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature." *Ibid.* Remarking that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid," he refused to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*

Such analysis does not mean that federal courts believed they had the power to invalidate vague penal laws as unconstitutional. Indeed, there is good evidence that courts at the time understood judicial review to consist "of a refusal to give a statute effect as operative law in resolving a case," a notion quite distinct from our modern practice of " 'strik[ing] down' legislation." Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010). The process of refusing to apply such laws appeared to occur on a case-by-case basis. For instance, notwithstanding his doubts expressed in *Sharp*, Justice Washington, writing for this Court, later rejected the argument that lower courts could arrest a judgment under the same ship-revolt statute because it "does not define the offence of endeavouring to make a revolt." *United States* v. *Kelly*, 11 Wheat. 417, 418 (1826). The Court explained that "it is . . . competent to the Court to give a judicial definition" of "the offence of endeavouring to make a revolt," and that such definition "consists in the endeavour of the crew of a vessel, or any one or more of

them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person." *Id.,* at 418-419. In dealing with statutory indeterminacy, federal courts saw themselves engaged in construction, not judicial review as it is now understood. [3]

2

Although vagueness concerns played a role in the strict construction of penal statutes from early on, there is little indication that anyone before the late 19th century believed that courts had the power under the Due Process Clauses to nullify statutes on that ground. Instead, our modern vagueness doctrine materialized after the rise of substantive due process. Following the ratification of the Fourteenth Amendment, corporations began to use that Amendment's Due Process Clause to challenge state laws that attached penalties to unauthorized commercial conduct. In addition to claiming that these laws violated their substantive due process rights, these litigants began--with some success--to contend that such laws were unconstitutionally indefinite. In one case, a railroad company challenged a Tennessee law authorizing penalties against any railroad that demanded "more than a just and reasonable compensation" or engaged in "unjust and unreasonable discrimination" in setting its rates. *Louisville & Nashville R. Co.* v. *Railroad Comm'n of Tenn.*, 19 F. 679, 690 (CC MD Tenn. 1884) (internal quotation marks deleted). Without specifying the constitutional authority for its holding, the Circuit Court concluded that "[n]o citizen . . . can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, under and by force of such indefinite legislation." *Id.,* at 693 (emphasis deleted).

Justice Brewer--widely recognized as "a leading spokesman for 'substantized' due process," Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615, 627 (1965)--employed similar reasoning while riding circuit, though he did not identify the constitutional source of judicial authority to nullify vague laws. In reviewing an Iowa law authorizing fines against railroads for charging more than a "reasonable and just" rate, Justice Brewer mentioned in dictum that "no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Chicago & N. W. R. Co.* v. *Dey*, 35 F. 866, 876 (CC SD Iowa 1888).

Constitutional vagueness challenges in this Court initially met with some resistance. Although the Court appeared to acknowledge the possibility of unconstitutionally indefinite enactments, it repeatedly rejected vagueness challenges to penal laws addressing railroad rates, *Railroad Comm'n Cases*, 116 U. S. 307, 336-337 (1886), liquor sales, *Ohio ex rel. Lloyd* v. *Dollison*, 194 U. S. 445, 450-451 (1904), and anticompetitive conduct, *Nash* v. *United States*, 229 U. S. 373, 376-378 (1913); *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 108-111 (1909).

In 1914, however, the Court nullified a law on vagueness grounds under the Due Process Clause for the first time. In *International Harvester Co. of America* v. *Kentucky*, 234 U. S. 216 (1914), a tobacco company brought a Fourteenth Amendment challenge against several Kentucky antitrust laws that had been construed to render unlawful "any combination [made] . . . for the purpose or with the effect of fixing a price that was greater or less than the real value of the article," *id.,* at 221. The company argued that by referring to "real value," the laws provided "no standard of conduct that it is possible to know." *Ibid.* The Court agreed. *Id.,* at 223-224. Although it did not specify in that case which portion of the Fourteenth Amendment served as the basis for its holding, *ibid.*, it explained in a related case that the lack of a knowable standard of conduct in the Kentucky statutes "violated the fundamental principles of justice embraced in the conception of due process of law." *Collins* v. *Kentucky*, 234 U. S. 634, 638 (1914).

3

Since that time, the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process. During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, *e.g., Lochner* v. *New York*, 198 U. S. 45, 57 (1905), the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activity.[4] Among the penal laws it found to be impermissibly vague were a state law regulating the production of crude oil, *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U. S. 210, 242-243 (1932), a state antitrust law, *Cline*, 274 U. S., at 453-465, a state minimum-wage law, *Connally*, 269 U. S., at 390-395, and a federal price-control statute, *L. Cohen Grocery Co.*, 255 U. S., at 89-93.[5]

Around the time the Court began shifting the focus of its substantive due process (and equal protection) jurisprudence from economic interests to "discrete and insular minorities," see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153, n. 4 (1938), the target of its vagueness doctrine changed as well. The Court began to use the vagueness doctrine to invalidate noneconomic regulations, such as state statutes penalizing obscenity, *Winters*, 333 U. S., at 517-520, and membership in a gang, *Lanzetta*, 306 U. S., at 458.

Successful vagueness challenges to regulations penalizing commercial conduct, by contrast, largely fell by the wayside. The Court, for instance, upheld a federal regulation punishing the knowing violation of an order instructing drivers transporting dangerous chemicals to " 'avoid, so far as practicable . . . driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,' " *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 338-339, 343 (1952). And notwithstanding its earlier conclusion that an Oklahoma law requiring state employees and contractors to be paid " 'not less than the current rate of per diem wages in the locality where the work is performed' " was unconstitutionally vague, *Connally,*

supra, at 393, the Court found sufficiently definite a federal law forbidding radio broadcasting companies from attempting to compel by threat or duress a licensee to hire " 'persons in excess of the number of employees needed by such licensee to perform actual services,' " *United States* v. *Petrillo*, 332 U. S. 1, 3, 6-7 (1947).

In more recent times, the Court's substantive due process jurisprudence has focused on abortions, and our vagueness doctrine has played a correspondingly significant role. In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe* v. *Wade*, 410 U. S. 113 (1973), on the theory that laws prohibiting all abortions save for those done "for the purpose of saving the life of the mother" forced abortionists to guess when this exception would apply on penalty of conviction. See B. Schwartz, The Unpublished Opinions of the Burger Court 116-118 (1988) (reprinting first draft of *Roe*). *Roe*, of course, turned out as a substantive due process opinion. See 410 U. S., at 164. But since then, the Court has repeatedly deployed the vagueness doctrine to nullify even mild regulations of the abortion industry. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 451-452 (1983) (nullifying law requiring " 'that the remains of the unborn child [be] disposed of in a humane and sanitary manner' "); *Colautti*, 439 U. S., at 381 (nullifying law mandating abortionists adhere to a prescribed standard of care if " there is 'sufficient reason to believe that the fetus may be viable' ").[6]

In one of our most recent decisions nullifying a law on vagueness grounds, substantive due process was again lurking in the background. In *Morales*, a plurality of this Court insisted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," 527 U. S., at 53, a conclusion that colored its analysis that an ordinance prohibiting loitering was unconstitutionally indeterminate, see *id.,* at 55 ("When vagueness permeates the text of" a penal law "infring[ing] on constitutionally protected rights," "it is subject to facial attack").

I find this history unsettling. It has long been understood that one of the problems with holding a statute "void for 'indefiniteness' " is that " 'indefiniteness' . . . is itself an indefinite concept," *Winters*, *supra*, at 524 (Frankfurter, J., dissenting), and we as a Court have a bad habit of using indefinite concepts--especially ones rooted in "due process"--to invalidate democratically enacted laws.

B

It is also not clear that our vagueness doctrine can be reconciled with the original understanding of the term "due process of law." Our traditional justification for this doctrine has been the need for notice: "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U. S. 285, 304 (2008); accord, *ante,* at 3. Presumably, that justification rests on the view expressed in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856), that "due process of law" constrains the legislative branch by guaranteeing "usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," *id.,* at 277. That justification assumes further that providing "a person of ordinary intelligence [with] fair notice of what is prohibited," *Williams*, *supra,* at 304, is one such usage or mode.[7]

To accept the vagueness doctrine as founded in our Constitution, then, one must reject the possibility "that the Due Process Clause requires only that our Government must proceed according to the 'law of the land'--that is, according to written constitutional and statutory provisions," which may be all that the original meaning of this provision demands. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 589 (2004) (THOMAS, J., dissenting) (some internal quotation marks omitted); accord, *Turner* v. *Rogers*, 564 U. S. ___, ___ (2011) (THOMAS, J., dissenting) (slip op., at 2). Although *Murray's Lessee* stated the contrary, 18 How., at 276, a number of scholars and jurists have concluded that "considerable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888, p. 272 (1985); see also, *e.g., In re Winship*, 397 U. S. 358, 378-382 (1970) (Black, J., dissenting). Others have disagreed. See, *e.g.,* Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1679 (2012) (arguing that, as originally understood, "the principle of due process" required, among other things, that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review").

I need not choose between these two understandings of "due process of law" in this case. JUSTICE ALITO explains why the majority's decision is wrong even under our precedents. See *post,* at 13-17 (dissenting opinion). And more generally, I adhere to the view that " '[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face,' " *Morales*, *supra*, at 112 (THOMAS, J., dissenting), and there is no question that ACCA's residual clause meets that description, see *ante,* at 10 (agreeing with the Government that "there will be straightforward cases under the residual clause").

* * *

I have no love for our residual clause jurisprudence: As I observed when we first got into this business, the Sixth Amendment problem with allowing district courts to conduct factfinding to determine whether an offense is a "violent felony" made our attempt to construe the residual clause " 'an unnecessary exercise.' " *James*, 550 U. S., at 231 (THOMAS, J., dissenting). But the Court rejected my argument, choosing instead to begin that unnecessary exercise. I see no

principled way that, four cases later, the Court can now declare that the residual clause has become too indeterminate to apply. Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one. I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct, and I concur only in its judgment.

ALITO, J., dissenting

576 U. S. ____ (2015)

No. 13-7120

SAMUEL JAMES JOHNSON, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 26, 2015]

JUSTICE ALITO, dissenting.

The Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive.

I

A

Petitioner Samuel Johnson (unlike his famous namesake) has led a life of crime and violence. His presentence investigation report sets out a résumé of petty and serious crimes, beginning when he was 12 years old. Johnson's adult record includes convictions for, among other things, robbery, attempted robbery, illegal possession of a sawed-off shotgun, and a drug offense.

In 2010, the Federal Bureau of Investigation (FBI) began monitoring Johnson because of his involvement with the National Socialist Movement, a white-supremacist organization suspected of plotting acts of terrorism. In June of that year, Johnson left the group and formed his own radical organization, the Aryan Liberation Movement, which he planned to finance by counterfeiting United States currency. In the course of the Government's investigation, Johnson "disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives for" his new organization. 526 Fed. Appx. 708, 709 (CA8 2013) (*per curiam*). He also showed the agents an AK-47 rifle, a semiautomatic rifle, a semiautomatic pistol, and a cache of approximately 1,100 rounds of ammunition. Later, Johnson told an undercover agent: "You know I'd love to assassinate some . . . hoodrats as much as the next guy, but I think we really got to stick with high priority targets." Revised Presentence Investigation Report (PSR) ¶15. Among the top targets that he mentioned were "the Mexican consulate," "progressive bookstores," and individuals he viewed as "liberals." PSR ¶16.

In April 2012, Johnson was arrested, and he was subsequently indicted on four counts of possession of a firearm by a felon and two counts of possession of ammunition by a felon, in violation of 18 U. S. C. §§922(g) and §924(e). He pleaded guilty to one of the firearms counts, and the District Court sentenced him to the statutory minimum of 15 years' imprisonment under ACCA, based on his prior felony convictions for robbery, attempted robbery, and illegal possession of a sawed-off shotgun.

B

ACCA provides a mandatory minimum sentence for certain violations of §922(g), which prohibits the shipment, transportation, or possession of firearms or ammunition by convicted felons, persons previously committed to a mental institution, and certain others. Federal law normally provides a maximum sentence of 10 years' imprisonment for such crimes. See §924(a)(2). Under ACCA, however, if a defendant convicted under §922(g) has three prior convictions "for a violent felony or a serious drug offense," the sentencing court must impose a sentence of at least 15 years' imprisonment. §924(e)(1).

ACCA's definition of a "violent felony" has three parts. First, a felony qualifies if it "has as an element the use, attempted use, or threatened use of physical force against the person of another." §924(e)(2)(B)(i). Second, the Act specifically names four categories of qualifying felonies: burglary, arson, extortion, and offenses involving the use of explosives. See §924(e)(2)(B)(ii). Third, the Act contains what we have called a "residual clause," which reaches any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.*

The present case concerns the residual clause. The sole question raised in Johnson's certiorari petition was whether possession of a sawed-off shotgun under Minnesota law qualifies as a violent felony under that clause. Although Johnson argued in the lower courts that the residual clause is unconstitutionally vague, he did not renew that argument here. Nevertheless, after oral argument, the Court raised the question of vagueness on its own. The Court now holds that the residual clause is unconstitutionally vague in all its applications. I cannot agree.

II

I begin with *stare decisis*. Eight years ago in *James* v. *United States*, 550 U. S. 192 (2007), JUSTICE SCALIA, the author of today's opinion for the Court, fired an opening shot at the residual clause. In dissent, he suggested that the residual clause is void for vagueness. *Id.*, at 230. The Court held otherwise, explaining that the standard in the residual clause "is not so indefinite as to prevent an ordinary person from understanding" its scope. *Id.*, at 210, n. 6.

Four years later, in *Sykes* v. *United States*, 564 U. S. 1 (2011), JUSTICE SCALIA fired another round. Dissenting once again, he argued that the residual clause is void for vagueness and rehearsed the same basic arguments that the Court now adopts. See *id.,* at ___-___ (slip op., at 7-8); see also *Derby* v. *United States*, 564 U. S. ___, ___-___ (2011) (SCALIA, J., dissenting from denial of certiorari) (slip op., at 4-5). As in *James*, the Court rejected his arguments. See *Sykes*, 564 U. S., at ___ (slip op., at 13-14). In fact, JUSTICE SCALIA was the *only* Member of the *Sykes* Court who took the position that the residual clause could not be intelligibly applied to the offense at issue. The opinion of the Court, which five Justices joined, expressly held that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.' " *Id.*, at ___-___ (slip op., at 13-14) (quoting *Chicago* v. *Morales*, 527 U. S. 41, 58 (1999) (plurality opinion)). JUSTICE THOMAS's concurrence, while disagreeing in part with the Court's interpretation of the residual clause, did not question its constitutionality. See *Sykes*, 564 U. S., at ___ (opinion concurring in judgment). And JUSTICE KAGAN's dissent, which JUSTICE GINSBURG joined, argued that a proper application of the provision required a different result. See *id.,* at ___. Thus, eight Members of the Court found the statute capable of principled application.

It is, of course, true that "[*s*]*tare decisis* is not an inexorable command." *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991). But neither is it an empty Latin phrase. There must be good reasons for overruling a precedent, and there is none here. Nothing has changed since our decisions in *James* and *Sykes*--nothing, that is, except the Court's weariness with ACCA cases.

Reprising an argument that JUSTICE SCALIA made to no avail in *Sykes*, *supra*, at ___ (dissenting opinion) (slip op., at 7), the Court reasons that the residual clause must be unconstitutionally vague because we have had trouble settling on an interpretation. See *ante,* at 7. But disagreement about the meaning and application of the clause is not new. We were divided in *James* and in *Sykes* and in our intervening decisions in *Begay* v. *United States*, 553 U. S. 137 (2008), and *Chambers* v. *United States,* 555 U. S. 122 (2009). And that pattern is not unique to ACCA; we have been unable to come to an agreement on many recurring legal questions. The Confrontation Clause is one example that comes readily to mind. See, *e.g., Williams* v. *Illinois*, 567 U. S. ___ (2012); *Bullcoming* v. *New Mexico*, 564 U. S. ___ (2011); *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305 (2009). Our disagreements about the meaning of that provision do not prove that the Confrontation Clause has no ascertainable meaning. Likewise, our disagreements on the residual clause do not prove that it is unconstitutionally vague.

The Court also points to conflicts in the decisions of the lower courts as proof that the statute is unconstitutional. See *ante,* at 9-10. The Court overstates the degree of disagreement below. For many crimes, there is no dispute that the residual clause applies. And our certiorari docket provides a skewed picture because the decisions that we are asked to review are usually those involving issues on which there is at least an arguable circuit conflict. But in any event, it has never been thought that conflicting interpretations of a statute justify judicial elimination of the statute. One of our chief responsibilities is to resolve those disagreements, see Supreme Court Rule 10, not to strike down the laws that create this work.

The Court may not relish the task of resolving residual clause questions on which the Circuits disagree, but the provision has not placed a crushing burden on our docket. In the eight years since *James*, we have decided all of three cases involving the residual clause. See *Begay*, *supra*; *Chambers*, *supra*; *Sykes*, *supra*. Nevertheless, faced with the unappealing prospect of resolving more circuit splits on various residual clause issues, see *ante,* at 9, six Members of the Court have thrown in the towel. That is not responsible.

III

Even if we put *stare decisis* aside, the Court's decision remains indefensible. The residual clause is not unconstitutionally vague.

A

The Fifth Amendment prohibits the enforcement of vague criminal laws, but the threshold for declaring a law void for vagueness is high. "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 32 (1963). Rather, it is sufficient if a statute sets out an "ascertainable standard." *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). A statute is thus void for vagueness only if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U. S. 285, 304 (2008).

The bar is even higher for sentencing provisions. The fair notice concerns that inform our vagueness doctrine are aimed at ensuring that a " 'person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498 (1982) (quoting *Grayned* v. *City of Rockford*, 408 U. S. 104, 108 (1972)). The fear is that vague laws will " 'trap the innocent.' " 455 U. S., at 498. These concerns have less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question. Due process does not require, as Johnson oddly suggests, that a "prospective criminal" be able to calculate the precise penalty that a conviction would bring. Supp. Brief for Petitioner 5; see *Chapman* v. *United States*, 500 U. S. 453, 467-468 (1991) (concluding that a vagueness challenge was "particularly" weak "since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct").

B

ACCA's residual clause unquestionably provides an ascertainable standard. It defines "violent felony" to include any offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. §924(e)(2)(B)(ii). That language is by no means incomprehensible. Nor is it unusual. There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99-page appendix setting out some of these laws. See App. to Supp. Brief for United States; see also *James*, *supra*, at 210, n. 6. If all these laws are unconstitutionally vague, today's decision is not a blast from a sawed-off shotgun; it is a nuclear explosion.

Attempting to avoid such devastation, the Court distinguishes these laws primarily on the ground that almost all of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Ante*, at 12 (emphasis in original). The Court thus admits that, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Ibid.* Its complaint is that the residual clause "requires application of the 'serious potential risk' standard to an *idealized ordinary case of the crime*." *Ibid.* (emphasis added). Thus, according to the Court, ACCA's residual clause is unconstitutionally vague because its standard must be applied to "an idealized ordinary case of the crime" and not, like the vast majority of the laws in the Solicitor General's appendix, to "real-world conduct."

ACCA, however, makes no reference to "an idealized ordinary case of the crime." That requirement was the handiwork of this Court in *Taylor* v. *United States,* 495 U. S. 575 (1990). And as I will show, the residual clause can reasonably be interpreted to refer to "real-world conduct."[1]

C

When a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem. See, *e.g., Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). As one treatise puts it, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts §38, p. 247 (2012). This canon applies fully when considering vagueness challenges. In cases like this one, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n* v. *Letter Carriers,* 413 U. S. 548, 571 (1973); see also *Skilling* v. *United States*, 561 U. S. 358, 403 (2010). Indeed, " '[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Id.,* at 406 (quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895); emphasis deleted); see also *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11,558) (CC Va. 1833) (Marshall, C. J.).

The Court all but concedes that the residual clause would be constitutional if it applied to "real-world conduct." Whether that is the *best* interpretation of the residual clause is beside the point. What matters is whether it is a reasonable interpretation of the statute. And it surely is that.

First, this interpretation heeds the pointed distinction that ACCA draws between the "element[s]" of an offense and "conduct." Under §924(e)(2)(B)(i), a crime qualifies as a "violent felony" if one of its "element[s]" involves "the use, attempted use, or threatened use of physical force against the person of another." But the residual clause, which appears in the very next subsection, §924(e)(2)(B)(ii), focuses on "conduct"--specifically, "conduct that presents a serious potential risk of physical injury to another." The use of these two different terms in §924(e) indicates that "conduct" refers to things done during the commission of an offense that are not part of the elements needed for conviction. Because those extra actions vary from case to case, it is natural to interpret "conduct" to mean real-world conduct, not the conduct involved in some Platonic ideal of the offense.

Second, as the Court points out, standards like the one in the residual clause almost always appear in laws that call for application by a trier of fact. This strongly suggests that the residual clause calls for the same sort of application.

Third, if the Court is correct that the residual clause is nearly incomprehensible when interpreted as applying to an "idealized ordinary case of the crime," then that is telling evidence that this is not what Congress intended. When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible--or even, exceedingly difficult--to apply?

D

Not only does the "real-world conduct" interpretation fit the terms of the residual clause, but the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases.

In *Taylor*, the question before the Court concerned the meaning of "burglary," one of ACCA's enumerated offenses. The Court gave three reasons for holding that a judge making an ACCA determination should generally look only at the elements of the offense of conviction and not to other things that the defendant did during the commission of the offense. First, the Court thought that ACCA's use of the term "convictions" pointed to the categorical approach. The Court wrote: "Section 924(e)(1) refers to 'a person who . . . has three previous convictions' for--not a person who has committed--three previous violent felonies or drug offenses." 495 U. S., at 600. Second, the Court relied on legislative history, noting that ACCA had previously contained a generic definition of burglary and that "the deletion of [this] definition . . . may have been an inadvertent casualty of a complex drafting process." *Id.*, at 589-590, 601. Third, the Court felt that "the practical difficulties and potential unfairness of a factual approach [were] daunting." *Id.*, at 601.

None of these three grounds dictates that the categorical approach must be used in residual clause cases. The second ground, which concerned the deletion of a generic definition of burglary, obviously has no application to the residual clause. And the first ground has much less force in residual clause cases. In *Taylor*, the Court reasoned that a defendant has a "conviction" for burglary only if burglary is the offense set out in the judgment of conviction. For instance, if a defendant commits a burglary but pleads guilty, under a plea bargain, to possession of burglar's tools, the *Taylor* Court thought that it would be unnatural to say that the defendant had a *conviction* for burglary. Now consider a case in which a gang member is convicted of illegal possession of a sawed-off shotgun and the evidence shows that he concealed the weapon under his coat, while searching for a rival gang member who had just killed his brother. In that situation, it is not at all unnatural to say that the defendant had a conviction for a crime that "involve[d] *conduct* that present[ed] a serious potential risk of physical injury to another." §924(e)(2)(B)(ii) (emphasis added). At the very least, it would be a reasonable way to describe the defendant's conviction.

The *Taylor* Court's remaining reasons for adopting the categorical approach cannot justify an interpretation that renders the residual clause unconstitutional. While the *Taylor* Court feared that a conduct-specific approach would unduly burden the courts, experience has shown that application of the categorical approach has not always been easy. Indeed, the Court's main argument for overturning the statute is that this approach is unmanageable in residual clause cases.

As for the notion that the categorical approach is more forgiving to defendants, there is a strong argument that the opposite is true, at least with respect to the residual clause. Consider two criminal laws: Injury occurs in 10% of cases involving the violation of statute A, but in 90% of cases involving the violation of statute B. Under the categorical approach, a truly dangerous crime under statute A might not qualify as a violent felony, while a crime with no measurable risk of harm under statute B would count against the defendant. Under a conduct-specific inquiry, on the other hand, a defendant's actual conduct would determine whether ACCA's mandatory penalty applies.

It is also significant that the allocation of the burden of proof protects defendants. The prosecution bears the burden of proving that a defendant has convictions that qualify for sentencing under ACCA. If evidentiary deficiencies, poor recordkeeping, or anything else prevents the prosecution from discharging that burden under the conduct-specific approach, a defendant would not receive an ACCA sentence.

Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. See *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct.

The Court's only reason for refusing to consider this interpretation is that "the Government has not asked us to abandon the categorical approach in residual-clause cases." *Ante,* at 13. But the Court cites no case in which we have suggested that a saving interpretation may be adopted only if it is proposed by one of the parties. Nor does the Court cite any secondary authorities advocating this rule. Cf. Scalia, Reading Law §38 (stating the canon with no such limitation). On the contrary, we have long recognized that it is "our plain duty to adopt that construction which will save [a] statute from constitutional infirmity," where fairly possible. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909). It would be strange if we could fulfill that "plain duty" only when a party asks us to do so. And the Court's refusal to consider a saving interpretation not advocated by the Government is hard to square with the Court's adoption of an argument that petitioner chose not to raise. As noted, Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument. The Court's refusal to look beyond the arguments of the parties apparently applies only to arguments that the Court does not want to hear.

E

Even if the categorical approach is used in residual clause cases, however, the clause is still not void for vagueness. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on an as-applied basis. *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard* v. *Cartwright*, 486 U. S. 356, 361 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid "only if the enactment is impermissibly vague in *all* of its applications." *Hoffman Estates*, 455 U. S., at 494-495 (emphasis added); see also *Chapman*, 500 U. S., at 467.[2]

In concluding that the residual clause is facially void for vagueness, the Court flatly contravenes this rule. The Court admits "that there will be straightforward cases under the residual clause." *Ante,* at 10. But rather than exercising the restraint that our vagueness cases prescribe, the Court holds that the residual clause is unconstitutionally vague even when its application is clear.

The Court's treatment of this issue is startling. Its facial invalidation precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court previously found to fall within the residual clause. See *James*, 550 U. S., at 203-209 (attempted burglary); *Sykes*, 564 U. S., at ___-___ (slip op., at 5-9) (flight from law enforcement in a vehicle). Still worse, the Court holds that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned. Attempted rape is an example. See, *e.g., Dawson* v. *United States*, 702 F. 3d 347, 351-352 (CA6 2012). Can there be any doubt that "an idealized ordinary case of th[is] crime" "involves conduct that presents a serious potential risk of physical injury to another"? How about attempted arson,[3] attempted kidnapping,[4] solicitation to commit aggravated assault,[5] possession of a loaded weapon with the intent to use it unlawfully against another person,[6] possession of a weapon in prison,[7] or compelling a person to act as a prostitute?[8] Is there much doubt that those offenses "involve conduct that presents a serious potential risk of physical injury to another"?

Transforming vagueness doctrine, the Court claims that we have never actually *held* that a statue may be voided for vagueness only when it is vague in all its applications. But that is simply wrong. In *Hoffman Estates*, we reversed a Seventh Circuit decision that voided an ordinance prohibiting the sale of certain items. See 455 U. S., at 491. The Seventh Circuit struck down the ordinance because it was "unclear in *some* of its applications," but we reversed and emphasized that a law is void for vagueness "only if [it] is impermissibly vague in all of its applications." *Id.,* at 494-495; see also *id.,* at 495, n. 7 (collecting cases). Applying that principle, we held that the "facial challenge [wa]s unavailing" because "at least some of the items sold . . . [we]re covered" by the ordinance. *Id.,* at 500. These statements were not dicta. They were the holding of the case. Yet the Court does not even mention this binding precedent.

Instead, the Court says that the facts of two *earlier* cases support a broader application of the vagueness doctrine. See *ante,* at 11. That, too, is incorrect. Neither case remotely suggested that mere overbreadth is enough for facial invalidation under the Fifth Amendment.

In *Coates* v. *Cincinnati*, 402 U. S. 611, 612 (1971), we addressed an ordinance that restricted free assembly and association rights by prohibiting "annoying" conduct. Our analysis turned in large part on those First Amendment concerns. In fact, we specifically explained that the "vice of the ordinance lies not alone in its violation of the due process standard of vagueness." *Id.,* at 615. In the present case, by contrast, no First Amendment rights are at issue. Thus, *Coates* cannot support the Court's rejection of our repeated statements that "vagueness challenges to statutes which *do not involve First Amendment freedoms* must be examined in light of the facts . . . at hand." *Mazurie*, *supra*, at 550 (emphasis added).

Likewise, *L. Cohen Grocery Co.*, 255 U. S. 81, proves precisely the opposite of what the Court claims. In that case, we struck down a statute prohibiting " 'unjust or unreasonable rate[s]' " because it provided no "ascertainable standard of guilt" and left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.,* at 89. The clear import of this language is that the law at issue was impermissibly vague in all applications. And in the years since, we have never adopted the majority's contradictory interpretation. On the contrary, we have characterized the case as involving a statute that could "not constitutionally be applied to any set of facts." *United States* v. *Powell*, 423 U. S. 87, 92 (1975). Thus, our holdings and our dicta prohibit the Court's expansion of the vagueness doctrine. The Constitution does not allow us to hold a statute void for vagueness unless it is vague in all its applications.

IV

Because I would not strike down ACCA's residual clause, it is necessary for me to address whether Johnson's conviction for possessing a sawed-off shotgun qualifies as a violent felony. Under either the categorical approach or a conduct-specific inquiry, it does.

A

The categorical approach requires us to determine whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James*, 550 U. S., at 208. This is an "inherently probabilistic" determination that considers the circumstances and conduct that ordinarily attend the offense. *Id.,* at 207. The mere fact that a crime *could* be committed without a risk of physical harm does not exclude it from the statute's reach. See *id.,* at 207-208. Instead, the residual clause speaks of "potential risk[s]," §924(e)(2)(B)(ii), a term suggesting "that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty." *James*, *supra*, at 207-208.

Under these principles, unlawful possession of a sawed-off shotgun qualifies as a violent felony. As we recognized in *District of Columbia* v. *Heller*, 554 U. S. 570, 625 (2008), sawed-off shotguns are "not typically possessed by law-abiding citizens for lawful purposes." Instead, they are uniquely attractive to violent criminals. Much easier to conceal than long-barreled shotguns used for hunting and other lawful purposes, short-barreled shotguns can be hidden under a coat, tucked into a bag, or stowed under a car seat. And like a handgun, they can be fired with one hand--except to more lethal effect. These weapons thus combine the deadly characteristics of conventional shotguns with the more convenient handling of handguns. Unlike those common firearms, however, they are not typically possessed for lawful purposes. And when a person illegally possesses a sawed-off shotgun during the commission of a crime, the risk of violence is seriously increased. The ordinary case of unlawful possession of a sawed-off shotgun therefore "presents a serious potential risk of physical injury to another." §922(e)(2)(B)(ii).

Congress' treatment of sawed-off shotguns confirms this judgment. As the Government's initial brief colorfully recounts, sawed-off shotguns were a weapon of choice for gangsters and bank robbers during the Prohibition Era. See Brief for United States 4.[9] In response, Congress enacted the National Firearms Act of 1934, which required individuals possessing certain especially dangerous weapons--including sawed-off shotguns--to register with the Federal Government and pay a special tax. 26 U. S. C. §§5845(a)(1)-(2). The Act was passed on the understanding that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a . . . sawed-off shotgun." H. R. Rep. No. 1780, 73d Cong., 2d Sess., 1 (1934). As amended, the Act imposes strict registration requirements for any individual wishing to possess a covered shotgun, see, *e.g.,* §§5822, 5841(b), and illegal possession of such a weapon is punishable by imprisonment for up to 10 years. See §§5861(b)-(d), 5871. It is telling that this penalty exceeds that prescribed by federal law for quintessential violent felonies.[10] It thus seems perfectly clear that Congress has long regarded the illegal possession of a sawed-off shotgun as a crime that poses a serious risk of harm to others.

The majority of States agree. The Government informs the Court, and Johnson does not dispute, that 28 States have followed Congress' lead by making it a crime to possess an unregistered sawed-off shotgun, and 11 other States and the District of Columbia prohibit private possession of sawed-off shotguns entirely. See Brief for United States 8-9 (collecting statutes). Minnesota, where petitioner was convicted, has adopted a blanket ban, based on its judgment that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever." *State* v. *Ellenberger*, 543 N. W. 2d 673, 676 (Minn. App. 1996) (internal quotation marks and citation omitted). Possession of a sawed-off shotgun in Minnesota is thus an inherently criminal act. It is fanciful to assume that a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is unlikely to use that weapon in violent ways.

B

If we were to abandon the categorical approach, the facts of Johnson's offense would satisfy the residual clause as well. According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs. When police responded to reports of drug activity in a parking lot, they were told by two people that "Johnson and another individual had approached them and offered to sell drugs." PSR ¶45. The police then searched the vehicle where Johnson was seated as a passenger, and they found a sawed-off shotgun and five bags of marijuana. Johnson admitted that the gun was his.

Understood in this context, Johnson's conduct posed an acute risk of physical injury to another. Drugs and guns are never a safe combination. If one of his drug deals had gone bad or if a rival dealer had arrived on the scene, Johnson's deadly weapon was close at hand. The sawed-off nature of the gun elevated the risk of collateral damage beyond any intended targets. And the location of the crime--a public parking lot--significantly increased the chance that innocent bystanders might be caught up in the carnage. This is not a case of "mere possession" as Johnson suggests. Brief for Petitioner i. He was not storing the gun in a safe, nor was it a family heirloom or collector's item. He illegally possessed the weapon in case he needed to use it during another crime. A judge or jury could thus conclude that Johnson's offense qualified as a violent felony.

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

FOOTNOTES

Footnote 1

By "penal," I mean laws "authoriz[ing] criminal punishment" as well as those "authorizing fines or forfeitures . . . [that] are enforced through civil rather than criminal process." Cf. C. Nelson, Statutory Interpretation 108 (2011) (discussing definition of "penal" for purposes of rule of lenity). A law requiring termination of employment from public institutions, for instance, is not penal. See *Keyishian*, 385 U. S., at 597-604. Nor is a law creating an "obligation to pay taxes."

Milwaukee County v. *M. E. White Co.*, 296 U. S. 268, 271 (1935). Conversely, a law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal. See *National Federation of Independent Business* v. *Sebelius*, 567 U. S. ___, ___-___ (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) (slip op., at 16-26).

Footnote 2

At the time, the ordinary meaning of the word "cattle" was not limited to cows, but instead encompassed all "[b]easts of pasture; not wild nor domestick." 1 S. Johnson, A Dictionary of the English Language (4th ed. 1773). Parliament responded to the judicial refusal to apply the provision to "cattle" by passing "another statute, 15 Geo. II. c. 34, extending the [law] to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." 1 Blackstone, Commentaries on the Laws of England, at 88.

Footnote 3

Early American state courts also sometimes refused to apply a law they found completely unintelligible, even outside of the penal context. In one antebellum decision, the Pennsylvania Supreme Court did not even attempt to apply a statute that gave the Pennsylvania state treasurer " 'as many votes' " in state bank elections as " 'were held by *individuals*' " without providing guidance as to which individuals it was referring. *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (1842). Concluding that it had "seldom, if ever, found the language of legislation so devoid of certainty," the court withdrew the case. *Ibid.*; see also *Drake* v. *Drake*, 15 N. C. 110, 115 (1833) ("Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative"). This practice is distinct from our modern vagueness doctrine, which applies to laws that are intelligible but vague.

Footnote 4

During this time, the Court would apply its new vagueness doctrine outside of the penal context as well. In *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233 (1925), a sugar dealer raised a defense to a breach-of-contract suit that the contracts themselves were unlawful under several provisions of the Lever Act, including one making it " 'unlawful for any person . . . to make any unjust or unreasonable . . . charge in . . . dealing in or with any necessaries,' or to agree with another 'to exact excessive prices for any necessaries,' " *id.,* at 238. Applying *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921), which had held that provision to be unconstitutionally vague, the Court rejected the dealer's argument. 267 U. S., at 238-239. The Court explained that "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Id.,* at 239. That doctrine thus applied to penalties as well as "[a]ny other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it." *Ibid.*

Footnote 5

Vagueness challenges to laws regulating speech during this period were less successful. Among the laws the Court found to be sufficiently definite included a state law making it a misdemeanor to publish, among other things, materials " 'which shall tend to encourage or advocate disrespect for law or for any court or courts of justice,' " *Fox* v. *Washington*, 236 U. S. 273, 275-277 (1915), a federal statute criminalizing candidate solicitation of contributions for " 'any political purpose whatever,' " *United States* v. *Wurzbach*, 280 U. S. 396, 398-399 (1930), and a state prohibition on becoming a member of any organization that advocates using unlawful violence to effect " 'any political change,' " *Whitney* v. *California*, 274 U. S. 357, 359-360, 368-369 (1927). But see *Stromberg* v. *California*, 283 U. S. 359, 369-370 (1931) (holding state statute punishing the use of any symbol " 'of opposition to organized government' " to be impermissibly vague).

Footnote 6

All the while, however, the Court has rejected vagueness challenges to laws punishing those on the other side of the abortion debate. When it comes to restricting the speech of abortion opponents, the Court has dismissed concerns about vagueness with the observation that " 'we can never expect mathematical certainty from our language,' " *Hill* v. *Colorado*, 530 U. S. 703, 733 (2000), even though such restrictions are arguably "at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades," *id.,* at 774 (KENNEDY, J., dissenting).

Footnote 7

As a general matter, we should be cautious about relying on general theories of "fair notice" in our due process jurisprudence, as they have been exploited to achieve particular ends. In *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), for instance, the Court held that the Due Process Clause imposed limits on punitive damages because the Clause guaranteed "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *id.,* at 574. That was true even though "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts," and "no particular procedures were deemed necessary to circumscribe a jury's

discretion regarding the award of such damages, or their amount." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 26-27 (1991) (SCALIA, J., concurring in judgment). Even under the view of the Due Process Clause articulated in *Murray's Lessee*, then, we should not allow nebulous principles to supplant more specific, historically grounded rules. See 499 U. S., at 37-38 (opinion of SCALIA, J.).

FOOTNOTES

Footnote 1

The Court also says that the residual clause's reference to the enumerated offenses is "confusing." *Ante*, at 12. But this is another argument we rejected in *James* v. *United States*, 550 U. S. 192 (2007), and *Sykes* v. *United States*, 564 U. S. 1 (2011), and it is no more persuasive now. Although the risk level varies among the enumerated offenses, all four categories of offenses involve conduct that presents a serious potential risk of harm to others. If the Court's concern is that some of the enumerated offenses do not seem especially risky, all that means is that the statute "sets a low baseline level for risk." *Id.*, at ___ (THOMAS, J., concurring in judgment) (slip op., at 2).

Footnote 2

This rule is simply an application of the broader rule that, except in First Amendment cases, we will hold that a statute is facially unconstitutional only if "no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987). A void-for-vagueness challenge is a facial challenge. See *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc*., 455 U. S. 489, 494-495, and nn. 5, 6, 7 (1982); *Chicago* v. *Morales*, 527 U. S. 41, 79 (1999) (SCALIA, J., dissenting). Consequently, there is no reason why the no-set-of-circumstances rule should not apply in this context. I assume that the Court does not mean to abrogate the no-set-of-circumstances rule in its entirety, but the Court provides no justification for its refusal to apply that rule here. Perhaps the Court has concluded, for some undisclosed reason, that void-for-vagueness claims are different from all other facial challenges not based on the First Amendment. Or perhaps the Court has simply created an ACCA exception.

Footnote 3

United States v. *Rainey*, 362 F. 3d 733, 735-736 (CA11) (*per curiam*), cert. denied, 541 U. S. 1081 (2004).

Footnote 4

United States v. *Kaplansky*, 42 F. 3d 320, 323-324 (CA6 1994) (en banc).

Footnote 5

United States v. *Benton*, 639 F. 3d 723, 731-732 (CA6), cert. denied, 565 U. S. ___ (2011).

Footnote 6

United States v. *Lynch*, 518 F. 3d 164, 172-173 (CA2 2008), cert. denied, 555 U. S. 1177 (2009).

Footnote 7

United States v. *Boyce*, 633 F. 3d 708, 711-712 (CA8 2011), cert. denied, 565 U. S. ___ (2012).

Footnote 8

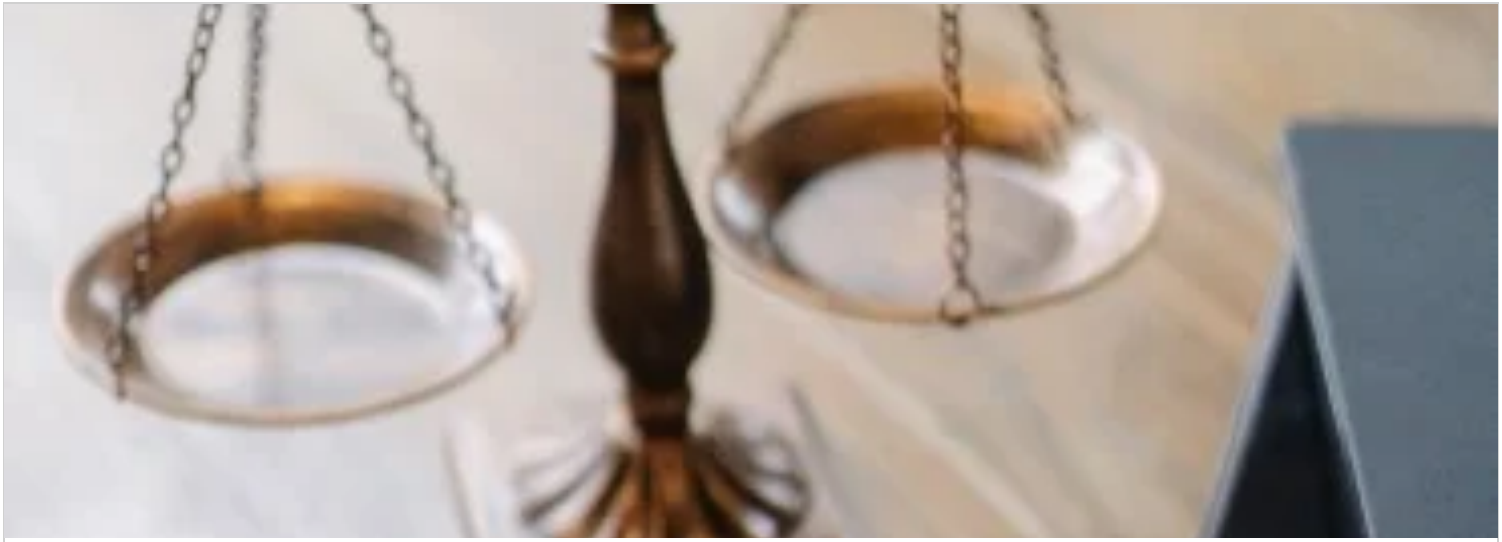
United States v. *Brown*, 273 F. 3d 747, 749-751 (CA7 2001).

Footnote 9

Al Capone's south-side Chicago henchmen used sawed-off shotguns when they executed their rivals from Bugs Moran's north-side gang during the infamous Saint Valentine's Day Massacre of 1929. See 7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms, N. Y. Times, Feb. 15, 1929, p. A1. Wild Bill Rooney was gunned down in Chicago by a "sawed-off shotgun [that] was pointed through a rear window" of a passing automobile. Union Boss Slain by Gang in Chicago, N. Y. Times, Mar. 20, 1931, p. 52. And when the infamous outlaws Bonnie and Clyde were killed by the police in 1934, Clyde was found "clutching a sawed-off shotgun in one hand." Barrow and Woman are Slain by Police in Louisiana Trap, N. Y. Times, May 24, 1934, p. A1.

Footnote 10

See, *e.g.,* 18 U. S. C. §111(a) (physical assault on federal officer punishable by not more than eight years' imprisonment); §113(a)(7) (assault within maritime or territorial jurisdiction resulting in substantial bodily injury to an individual under the age of 16 punishable by up to five years' imprisonment); §117(a) ("assault, sexual abuse, or serious violent felony against a spouse or intimate partner" by a habitual offender within maritime or territorial jurisdiction punishable by up to five years' imprisonment, except in cases of "substantial bodily injury").



JOHNSON *v.* UNITED STATES (2015)

Docket No: No. 13-7120

Argued: November 05, 2014

Decided: June 26, 2015

Court: United States Supreme Court

Enter your email address to subscribe

* Required

Learn more about FindLaw's newsletters (https://newsletters.findlaw.com/), including our terms of use and privacy policy. This site is protected by reCAPTCHA and the Google Privacy Policy (https://policies.google.com/privacy) and Terms of Service (https://policies.google.com/terms) apply.

Learn About the Law

Get help with your legal needs

FindLaw's Learn About the Law features thousands of informational articles to help you understand your options. And if you're ready to hire an attorney, find one in your area (https://lawyers.findlaw.com/) who can help.

Go to Learn About the Law >(https://www.findlaw.com/law.html)

Need to find an attorney?

Search our directory by legal issue

Enter information in one or both fields (Required)

Legal issue **I need help near** (city, ZIP code or country)

Kalispell, Montana **Find a lawyer** ›

BACK TO TOP

FindLaw

Questions?

At FindLaw.com, we pride ourselves on being the number one source of free legal information and resources on the web. Contact us. (https://www.findlaw.com/company/contact-us/contacts.html)

Stay up-to-date with how the law affects your life. Sign up for our consumer newsletter.

ENTER YOUR EMAIL ADDRESS

›

(https://www.youtube.com/watch?v=WQiNbzazOhw)

ABOUT US › (https://www.findlaw.com/company.html)

Our Team (https://www.findlaw.com/company/our-team.html)

Accessibility (https://www.findlaw.com/company/our-commitment-to-accessibility.html)

Contact Us (https://www.findlaw.com/company/contact-us/contacts.html)

FIND A LAWYER › (https://lawyers.findlaw

By Location (https://lawyers.findlaw.com/#brow

By Legal Issue (https://lawyers.findlaw.com/lega

By Lawyer Profiles (https://lawyers.findlaw.com/profile/profiles/law

By Name (https://lawyers.findlaw.com/lawyer/lawyer_dir/

SELF-HELP RESOURCES

Legal Forms & Services (https://www.findlaw.com/forms.html)

Johnson v. United States (2015)

From Wikipedia, the free encyclopedia

Johnson v. United States, 576 U.S. 591 (2015), was a United States Supreme Court case in which the Court ruled the Residual Clause of the Armed Career Criminal Act was unconstitutionally vague and in violation of due process.

Background [edit]

Armed Career Criminal Act [edit]

The Armed Career Criminal Act (ACCA) was a part of the Comprehensive Crime Control Act of 1984 that was enacted to impose tougher sentences in illegal firearms cases on defendants who have previously been convicted three or more times for "violent" felonies. 18 U.S.C. § 924(e)(2)(B) defined a "violent felony" as an act that threatens "use of physical force against the person of another," "is burglary, arson, or extortion," "involves use of explosives," or "otherwise involves conduct that presents a serious potential risk of physical injury to another." The last part of this definition became known as the "residual clause".[*citation needed*]

Case History [edit]

Samuel James Johnson was a lifelong criminal and active white supremacist who, starting in 2010, was monitored by the FBI due to his involvement in suspected terrorist groups. Over the years, he revealed to undercover agents his plans to carry out terrorist attacks, as well as his illegal supply of weapons. In 2012, he was indicted on multiple counts of being a felon in possession of firearms and ammunition. Johnson pleaded guilty to the weapons charges and was sentenced under the ACCA's residual clause to a statutory minimum of 15 years for having three prior "violent felony" convictions, one of which was possession of a sawed-off shotgun.[1]

Arguments [edit]

Johnson's lawyers argued that mere possession of a sawed-off shotgun does not qualify as a "violent felony" as described under the residual clause. In 2013, an appeal to the Eighth Circuit upheld the decision by the District Court to sentence Johnson to 15 years in accordance to the ACCA.[2] The Supreme Court of the United States originally granted the case certiorari to decide if the state law banning possession of a sawed-off shot gun qualified as a "violent felony" under the residual clause. The case was initially argued on November 5, 2014, but the Court asked the parties to reconvene and directly address the question of whether or not the residual clause was unconstitutionally vague. The case was reargued on April 20, 2015.[1]

Opinions [edit]

Majority [edit]

Justice Scalia wrote the opinion of the Court, which determined the residual clause to be in violation of the Fifth Amendment. Scalia described the statute as a "failed enterprise" that invited "arbitrary enforcement." He declared that individuals are unconstitutionally deprived of due process when they are convicted under "a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes."[1]

The Court had raised the specter of unconstitutional vagueness in two prior cases regarding the residual clause—*James v. United States* and *Sykes v. United States*—that "honed in on the imprecision of the phrase 'serious potential risk'".[1]:14 However, "neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime."[1]:14

Noting that "[d]ecisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent",[1]:15 the Court decided that "[s]tanding by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve."[1]:15 The Court held that the residual clause was unconstitutionally vague, overruling the contrary holdings in *James* and *Sykes*.[1]:15

Concurrences [edit]

Justices Kennedy and Thomas wrote separate opinions concurring in judgment, but disagreeing that the residual clause of ACCA is unconstitutionally vague.[1]

Dissent [edit]

Justice Alito dissented, arguing that the court could and therefore should interpret the residual clause in a narrower way that meets constitutional standards. He also found the circumstances of Johnson's sawed-off shotgun conviction, it being in his possession during a drug deal in a public parking lot, could have met even a narrow interpretation of the clause.[1]

Johnson v. United States	
Supreme Court of the United States	
Argued November 5, 2014 Reargued April 20, 2015 Decided June 26, 2015	
Full case name	*Samuel James Johnson, Petitioner v. United States*
Docket no.	13-7120
Citations	576 U.S. 591 (*more*) 135 S. Ct. 2551; 192 L. Ed. 2d 569
Argument	Oral argument
Opinion announcement	Opinion announcement
Case history	
Prior	*United States v. Johnson*, 526 F. App'x 708 (8th Cir. 2013); cert. granted, 572 U.S. 1059 (2014).
Holding	
The Residual Clause of the Armed Career Criminal Act is unconstitutionally vague and as a result one's due process rights are violated.	
Court membership	
Chief Justice John Roberts **Associate Justices** Antonin Scalia · Anthony Kennedy Clarence Thomas · Ruth Bader Ginsburg Stephen Breyer · Samuel Alito Sonia Sotomayor · Elena Kagan	
Case opinions	
Majority	Scalia, joined by Roberts, Ginsburg, Breyer, Sotomayor, Kagan
Concurrence	Kennedy (in judgment)
Concurrence	Thomas (in judgment)
Dissent	Alito
Laws applied	
Armed Career Criminal Act 18 U.S.C. § 924(e)(1), U.S. Const. amend. V	
This case overturned a previous ruling or rulings	
James v. United States (2007) (in part) & *Sykes v. United States* (2011) (in part)	

Initial oral arguments

54:47

The Court first considered whether the state law banning possession of a sawed-off shot gun qualified as a "violent felony" under the residual clause.

Reargument five months later

1:00:29

The case was reargued to address the question of whether or not the residual clause was unconstitutionally vague.

Problems playing these files? See media help.

See also [edit]

- List of United States Supreme Court cases, volume 576
- Armed Career Criminal Act
- *Sessions v. Dimaya* (2018) - constitutionality of similar clause in civil context (specifically, deportation), in which a plurality found straightforward application of *Johnson* to be dispositive
- *Stokeling v. United States* (2019) - touches on the same section of the Armed Career Criminal Act and references this decision often

Previous Supreme Court decisions about the "residual clause" of the Armed Career Criminal Act:

- *James v. United States* (2007) - overruled in part by *Johnson*
- *Begay v. United States* (2008)
- *Chambers v. United States* (2009)
- *Sykes v. United States* (2011) - overruled in part by *Johnson*

References [edit]

1. ^ a b c d e f g h i j *Johnson v. United States*, No. 13-7120, 576 U.S. ___ (2015).
2. ^ *United States v. Johnson*, 526 F. App'x 708 (8th Cir. 2013).

External links [edit]

- Text of *Johnson v. United States*, 576 U.S. ___ (2015) is available from: Justia Oyez (oral argument audio) Supreme Court (slip opinion) (archived)
- Johnson v. United States, overview (SCOTUSblog)

Categories: United States Supreme Court cases | United States Supreme Court cases of the Roberts Court | 2015 in United States case law | Armed Career Criminal Act case law

SESSIONS, ATTORNEY GENERAL *v. DIMAYA* (2018)

United States Supreme Court

SESSIONS, ATTORNEY GENERAL *v. DIMAYA*(2018)

No. 15-1498

Argued: January 17, 2017

Decided: April 17, 2018

The Immigration and Nationality Act (INA) virtually guarantees that any alien convicted of an "aggravated felony" after entering the United States will be deported. See 8 U. S. C. §§1227(a)(2)(A)(iii), 1229b(a)(3), (b)(1)(C). An aggravated felony includes "a crime of violence (as defined in [18 U. S. C. §16] . . .) for which the term of imprisonment [is] at least one year." §1101(a)(43)(f). Section 16's definition of a crime of violence is divided into two clauses--often referred to as the elements clause, §16(a), and the residual clause, §16(b). The residual clause, the provision at issue here, defines a "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." To decide whether a person's conviction falls within the scope of that clause, courts apply the categorical approach. This approach has courts ask not whether "the particular facts" underlying a conviction created a substantial risk, *Leocal* v. *Ashcroft,* 543 U. S. 1, 7, nor whether the statutory elements of a crime require the creation of such a risk in each and every case, but whether "the ordinary case" of an offense poses the requisite risk, *James* v. *United States,* 550 U. S. 192, 208.

Respondent James Dimaya is a lawful permanent resident of the United States with two convictions for first-degree burglary under California law. After his second offense, the Government sought to deport him as an aggravated felon. An Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a "crime of violence" under §16(b). While Dimaya's appeal was pending in the Ninth Circuit, this Court held that a similar residual clause in the Armed Career Criminal Act (ACCA)--defining "violent felony" as any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U. S. C. §924(e)(2)(B)--was unconstitutionally "void for vagueness" under the Fifth Amendment's Due Process Clause. *Johnson* v. *United States*, 576 U. S. ___, ___. Relying on *Johnson*, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague.

Held: The judgment is affirmed.

803 F. 3d 1110, affirmed.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, III, IV-B, and V, concluding that §16's residual clause is unconstitutionally vague. Pp. 6-11, 16-25.

(a) A straightforward application of *Johnson* effectively resolves this case. Section 16(b) has the same two features as ACCA's residual clause--an ordinary-case requirement and an ill-defined risk threshold--combined in the same constitutionally problematic way. To begin, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a speculative hypothesis about the crime's "ordinary case," but provided no guidance on how to figure out what that ordinary case was. 576 U. S., at ___. Compounding that uncertainty, ACCA's residual clause layered an imprecise "serious potential risk" standard on top of the requisite "ordinary case" inquiry. The combination of "indeterminacy about how to measure the risk posed by a crime [and] indeterminacy about how much risk it takes for the crime to qualify as a violent felony," *id.*, at ___, resulted in "more unpredictability and arbitrariness than the Due Process Clause tolerates," *id.*, at ___. Section 16(b) suffers from those same two flaws. Like ACCA's residual

clause, §16(b) calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk but "offers no reliable way" to discern what the ordinary version of any offense looks like. *Id.*, at ___. And its "substantial risk" threshold is no more determinate than ACCA's "serious potential risk" standard. Thus, the same "[t]wo features" that "conspire[d] to make" ACCA's residual clause unconstitutionally vague also exist in §16(b), with the same result. *Id.,* at ___. Pp. 6-11.

(b) The Government identifies three textual discrepancies between ACCA's residual clause and §16(b) that it claims make §16(b) easier to apply and thus cure the constitutional infirmity. None, however, relates to the pair of features that *Johnson* found to produce impermissible vagueness or otherwise makes the statutory inquiry more determinate. Pp. 16-24.

(1) First, the Government argues that §16(b)'s express requirement (absent from ACCA) that the risk arise from acts taken "in the course of committing the offense," serves as a "temporal restriction"--in other words, a court applying §16(b) may not "consider risks arising *after*" the offense's commission is over. Brief for Petitioner 31. But this is not a meaningful limitation: In the ordinary case of any offense, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without the temporal language, a court applying the ordinary case approach, whether in §16's or ACCA's residual clause, would do the same thing--ask what usually happens when a crime is committed. The phrase "in the course of" makes no difference as to either outcome or clarity and cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government says that the §16(b) inquiry, which focuses on the risk of "physical force," "trains solely" on the conduct typically involved in a crime. Brief for Petitioner 36. In contrast, ACCA's residual clause asked about the risk of "physical injury," requiring a second inquiry into a speculative "chain of causation that could possibly result in a victim's injury." *Ibid.* However, this Court has made clear that "physical force" means "force capable of causing physical pain or injury." *Johnson* v. *United States,* 559 U. S. 133, 140. So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Thus, the force/injury distinction does not clarify a court's analysis of whether a crime qualifies as violent.

Third, the Government notes that §16(b) avoids the vagueness of ACCA's residual clause because it is not preceded by a "confusing list of exemplar crimes." Brief for Petitioner 38. Those enumerated crimes were in fact too varied to assist this Court in giving ACCA's residual clause meaning. But to say that they failed to resolve the clause's vagueness is hardly to say they caused the problem. Pp. 16-21.

(2) The Government also relies on judicial experience with §16(b), arguing that because it has divided lower courts less often and resulted in only one certiorari grant, it must be clearer than its ACCA counterpart. But in fact, a host of issues respecting §16(b)'s application to specific crimes divide the federal appellate courts. And while this Court has only heard oral arguments in two §16(b) cases, this Court vacated the judgments in a number of other §16(b) cases, remanding them for further consideration in light of ACCA decisions. Pp. 21-24.

JUSTICE KAGAN, joined by JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR, concluded in Parts II and IV-A:

(a) The Government argues that a more permissive form of the void-for-vagueness doctrine applies than the one *Johnson* employed because the removal of an alien is a civil matter rather than a criminal case. This Court's precedent forecloses that argument. In *Jordan* v. *De George*, 341 U. S. 223, the Court considered what vagueness standard applied in removal cases and concluded that, "in view of the grave nature of deportation," the most exacting vagueness standard must apply. *Id.,* at 231. Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien than "any potential jail sentence." *Jae Lee* v. *United States*, 582 U. S. ___, ___. Pp. 4-6.

(b) Section 16(b) demands a categorical, ordinary-case approach. For reasons expressed in *Johnson*, that approach cannot be abandoned in favor of a conduct-based approach, which asks about the specific way in which a defendant committed a crime. To begin, the Government once again "has not asked [the Court] to abandon the categorical approach in residual-clause cases," suggesting the fact-based approach is an untenable interpretation of §16(b). 576 U. S., at ___. Moreover, a fact-based approach would generate constitutional questions. In any event, §16(b)'s text demands a categorical approach. This Court's decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." *Taylor* v. *United States,* 495 U. S. 575, 601. And the words "by its nature" in §16(b) even more clearly compel an inquiry into an offense's normal and characteristic quality--that is, what the offense ordinarily entails. Finally, given the daunting difficulties of accurately "reconstruct[ing]," often many years later, "the conduct underlying [a] conviction," the conduct-based approach's "utter impracticability"--and associated inequities--is as great in §16(b) as in ACCA. *Johnson,* 576 U. S., at ___. Pp. 12-15.

JUSTICE GORSUCH, agreeing that the Immigration and Nationality Act provision at hand is unconstitutionally vague for the reasons identified in *Johnson* v. *United States*, 576 U. S. ___, concluded that the void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the Framers recognized as vital to ordered liberty under the Constitution. The Government's argument that a less-than-fair-notice standard should apply where (as here) a person faces only civil, not criminal, consequences from a statute's operation is unavailing. In the criminal context, the law generally must afford "ordinary people . . . fair notice of the conduct it punishes," *id.*, at ___, and it is hard to see how the Due Process Clause might often require any less than that in the civil context. Nor is there any good reason to single out civil deportation for assessment under the fair notice standard because of the special gravity of its penalty when so many civil laws impose so many similarly severe sanctions. Alternative approaches that do not concede the propriety of the categorical ordinary case analysis are more properly addressed in another case, involving either the Immigration and Nationality Act or another statute, where the parties have a chance to be heard. Pp. 1-19.

KAGAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV-B, and V, in which GINSBURG, BREYER, SOTOMAYOR, and GORSUCH, JJ., joined, and an opinion with respect to Parts II and IV-A, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. GORSUCH, J., filed an opinion concurring in part and concurring in the judgment. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined as to Parts I-C-2, II-A-1, and II-B.

Opinion of the Court

584 U. S. ____ (2018)

No. 15-1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER *v.* JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

JUSTICE KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, IV-B, and V, and an opinion with respect to Parts II and IV-A, in which JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join.

Three Terms ago, in *Johnson* v. *United States*, this Court held that part of a federal law's definition of "violent felony" was impermissibly vague. See 576 U. S. ___ (2015). The question in this case is whether a similarly worded clause in a statute's definition of "crime of violence" suffers from the same constitutional defect. Adhering to our analysis in *Johnson*, we hold that it does.

I

The Immigration and Nationality Act (INA) renders deportable any alien convicted of an "aggravated felony" after entering the United States. 8 U. S. C. §1227(a)(2)(A)(iii). Such an alien is also ineligible for cancellation of removal, a form of discretionary relief allowing some deportable aliens to remain in the country. See §§1229b(a)(3), (b)(1)(C). Accordingly, removal is a virtual certainty for an alien found to have an aggravated felony conviction, no matter how long he has previously resided here.

The INA defines "aggravated felony" by listing numerous offenses and types of offenses, often with cross-references to federal criminal statutes. §1101(a)(43); see *Luna Torres* v. *Lynch*, 578 U. S. ___, ___ (2016) (slip op., at 2). According to one item on that long list, an aggravated felony includes "a crime of violence (as defined in section 16 of title 18 . . .) for which the term of imprisonment [is] at least one year." §1101(a)(43)(F). The specified statute, 18 U. S. C. §16, provides the federal criminal code's definition of "crime of violence." Its two parts, often known as the elements clause and the residual clause, cover:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

Section 16(b), the residual clause, is the part of the statute at issue in this case.

To decide whether a person's conviction "falls within the ambit" of that clause, courts use a distinctive form of what we have called the categorical approach. *Leocal* v. *Ashcroft*, 543 U. S. 1, 7 (2004). The question, we have explained, is not whether "the particular facts" underlying a conviction posed the substantial risk that §16(b) demands. *Ibid.* Neither is the question whether the statutory elements of a crime require (or entail) the creation of such a risk in

each case that the crime covers.[1] The §16(b) inquiry instead turns on the "nature of the offense" generally speaking. *Ibid.* (referring to §16(b)'s "by its nature" language). More precisely, §16(b) requires a court to ask whether "the ordinary case" of an offense poses the requisite risk. *James* v. *United States*, 550 U. S. 192, 208 (2007); see *infra*, at 7.

In the case before us, Immigration Judges employed that analysis to conclude that respondent James Dimaya is deportable as an aggravated felon. A native of the Philippines, Dimaya has resided lawfully in the United States since 1992. But he has not always acted lawfully during that time. Twice, Dimaya was convicted of first-degree burglary under California law. See Cal. Penal Code Ann. §§459, 460(a). Following his second offense, the Government initiated a removal proceeding against him. Both an Immigration Judge and the Board of Immigration Appeals held that California first-degree burglary is a "crime of violence" under §16(b). "[B]y its nature," the Board reasoned, the offense "carries a substantial risk of the use of force." App. to Pet. for Cert. 46a. Dimaya sought review in the Court of Appeals for the Ninth Circuit.

While his appeal was pending, this Court held unconstitutional part of the definition of "violent felony" in the Armed Career Criminal Act (ACCA), 18 U. S. C. §924(e). ACCA prescribes a 15-year mandatory minimum sentence if a person convicted of being a felon in possession of a firearm has three prior convictions for a "violent felony." §924(e)(1). The definition of that statutory term goes as follows:

> "any crime punishable by imprisonment for a term exceeding one year . . . that--
>
> "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> "(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." §924(e)(2)(B) (emphasis added).

The italicized portion of that definition (like the similar language of §16(b)) came to be known as the statute's residual clause. In *Johnson* v. *United States*, the Court declared that clause "void for vagueness" under the Fifth Amendment's Due Process Clause. 576 U. S., at ___-___ (slip op., at 13-14).

Relying on *Johnson*, the Ninth Circuit held that §16(b), as incorporated into the INA, was also unconstitutionally vague, and accordingly ruled in Dimaya's favor. See *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1120 (2015). Two other Circuits reached the same conclusion, but a third distinguished ACCA's residual clause from §16's.[2] We granted certiorari to resolve the conflict. *Lynch* v. *Dimaya*, 579 U. S. ___ (2016).

II

"The prohibition of vagueness in criminal statutes," our decision in *Johnson* explained, is an "essential" of due process, required by both "ordinary notions of fair play and the settled rules of law." 576 U. S., at ___ (slip op., at 4) (quoting *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926)). The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have "fair notice" of the conduct a statute proscribes. *Papachristou* v. *Jacksonville*, 405 U. S. 156, 162 (1972). And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. See *Kolender* v. *Lawson*, 461 U. S. 352, 357-358 (1983). In that sense, the doctrine is a corollary of the separation of powers--requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not. Cf. *id.,* at 358, n. 7 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)).

The Government argues that a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case. See Brief for Petitioner 13-15. As the Government notes, this Court has stated that "[t]he degree of vagueness that the Constitution [allows] depends in part on the nature of the enactment": In particular, the Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498-499 (1982). The removal of an alien is a civil matter. See *Arizona* v. *United States*, 567 U. S. 387, 396 (2012). Hence, the Government claims, the need for clarity is not so strong; even a law too vague to support a conviction or sentence may be good enough to sustain a deportation order. See Brief for Petitioner 25-26.

But this Court's precedent forecloses that argument, because we long ago held that the most exacting vagueness standard should apply in removal cases. In *Jordan* v. *De George*, we considered whether a provision of immigration law making an alien deportable if convicted of a "crime involving moral turpitude" was "sufficiently definite." 341 U. S. 223, 229 (1951). That provision, we noted, "is not a criminal statute" (as §16(b) actually is). *Id.,* at 231; *supra,* at 1-2. Still, we

chose to test (and ultimately uphold) it "under the established criteria of the 'void for vagueness' doctrine" applicable to criminal laws. 341 U. S., at 231. That approach was demanded, we explained, "in view of the grave nature of deportation," *ibid.*--a "drastic measure," often amounting to lifelong "banishment or exile," *ibid.* (quoting *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948)).

Nothing in the ensuing years calls that reasoning into question. To the contrary, this Court has reiterated that deportation is "a particularly severe penalty," which may be of greater concern to a convicted alien than "any potential jail sentence." *Jae Lee* v. *United States*, 582 U. S. ___, ___ (2017) (slip op., at 11) (quoting *Padilla* v. *Kentucky*, 559 U. S. 356, 365, 368 (2010)). And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more "intimately related to the criminal process." *Chaidez* v. *United States*, 568 U. S. 342, 352 (2013) (quoting *Padilla*, 559 U. S., at 365). What follows, as *Jordan* recognized, is the use of the same standard in the two settings.

For that reason, the Government cannot take refuge in a more permissive form of the void-for-vagueness doctrine than the one *Johnson* employed. To salvage §16's residual clause, even for use in immigration hearings, the Government must instead persuade us that it is materially clearer than its now-invalidated ACCA counterpart. That is the issue we next address, as guided by *Johnson*'s analysis.

III

Johnson is a straightforward decision, with equally straightforward application here. Its principal section begins as follows: "Two features of [ACCA's] residual clause conspire to make it unconstitutionally vague." 576 U. S., at ___ (slip op., at 5). The opinion then identifies each of those features and explains how their joinder produced "hopeless indeterminacy," inconsistent with due process. *Id.,* at ___ (slip op., at 7). And with that reasoning, *Johnson* effectively resolved the case now before us. For §16's residual clause has the same two features as ACCA's, combined in the same constitutionally problematic way. Consider those two, just as *Johnson* described them:

"In the first place," *Johnson* explained, ACCA's residual clause created "grave uncertainty about how to estimate the risk posed by a crime" because it "tie[d] the judicial assessment of risk" to a hypothesis about the crime's "ordinary case." *Id.,* at ___ (slip op., at 5). Under the clause, a court focused on neither the "real-world facts" nor the bare "statutory elements" of an offense. *Ibid.* Instead, a court was supposed to "imagine" an "idealized ordinary case of the crime"--or otherwise put, the court had to identify the "kind of conduct the 'ordinary case' of a crime involves." *Ibid.* But how, *Johnson* asked, should a court figure that out? By using a "statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Ibid.* (internal quotation marks omitted). ACCA provided no guidance, rendering judicial accounts of the "ordinary case" wholly "speculative." *Ibid. Johnson* gave as its prime example the crime of attempted burglary. One judge, contemplating the "ordinary case," would imagine the "violent encounter" apt to ensue when a "would-be burglar [was] spotted by a police officer [or] private security guard." *Id.,* at ___-___ (slip op., at 5-6). Another judge would conclude that "any confrontation" was more "likely to consist of [an observer's] yelling 'Who's there?' . . . and the burglar's running away." *Id.,* at ___ (slip op., at 6). But how could either judge really know? "The residual clause," *Johnson* summarized, "offer[ed] no reliable way" to discern what the ordinary version of any offense looked like. *Ibid.* And without that, no one could tell how much risk the offense generally posed.

Compounding that first uncertainty, *Johnson* continued, was a second: ACCA's residual clause left unclear what threshold level of risk made any given crime a "violent felony." See *ibid.* The Court emphasized that this feature alone would not have violated the void-for-vagueness doctrine: Many perfectly constitutional statutes use imprecise terms like "serious potential risk" (as in ACCA's residual clause) or "substantial risk" (as in §16's). The problem came from layering such a standard on top of the requisite "ordinary case" inquiry. As the Court explained:

> "[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree[.] The residual clause, however, requires application of the 'serious potential risk' standard to an idealized ordinary case of the crime. Because the elements necessary to determine the imaginary ideal are uncertain[,] this abstract inquiry offers significantly less predictability than one that deals with the actual . . . facts." *Id.*, at ___ (slip op., at 12) (some internal quotation marks, citations, and alterations omitted).

So much less predictability, in fact, that ACCA's residual clause could not pass constitutional muster. As the Court again put the point, in the punch line of its decision: "By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause" violates the guarantee of due process. *Id.,* at ___ (slip op., at 6).[3]

Section 16's residual clause violates that promise in just the same way. To begin where *Johnson* did, §16(b) also calls for a court to identify a crime's "ordinary case" in order to measure the crime's risk. The Government explicitly acknowledges that point here. See Brief for Petitioner 11 ("Section 16(b), like [ACCA's] residual clause, requires a court to assess the risk posed by the ordinary case of a particular offense"). And indeed, the Government's briefing in *Johnson* warned us about that likeness, observing that §16(b) would be "equally susceptible to [an] objection" that focused on the problems of positing a crime's ordinary case. Supp. Brief for Respondent, O. T. 2014, No. 13-7120, pp. 22-23. Nothing in §16(b) helps courts to perform that task, just as nothing in ACCA did. We can as well repeat here what we asked in *Johnson*: How does one go about divining the conduct entailed in a crime's ordinary case? Statistical

analyses? Surveys? Experts? Google? Gut instinct? See *Johnson*, 576 U. S., at ___ (slip op., at 5); *supra,* at 7; *post,* at 16-17 (GORSUCH, J., concurring in part and concurring in judgment). And we can as well reiterate *Johnson*'s example: In the ordinary case of attempted burglary, is the would-be culprit spotted and confronted, or scared off by a yell? See *post,* at 16 (opinion of GORSUCH, J.) (offering other knotty examples). Once again, the questions have no good answers; the "ordinary case" remains, as *Johnson* described it, an excessively "speculative," essentially inscrutable thing. 576 U. S., at ___ (slip op., at 5); accord *post*, at 27 (THOMAS, J., dissenting).[4]

And §16(b) also possesses the second fatal feature of ACCA's residual clause: uncertainty about the level of risk that makes a crime "violent." In ACCA, that threshold was "serious potential risk"; in §16(b), it is "substantial risk." See *supra,* at 2, 4. But the Government does not argue that the latter formulation is any more determinate than the former, and for good reason. As THE CHIEF JUSTICE's valiant attempt to do so shows, that would be slicing the baloney mighty thin. See *post,* at 5-6 (dissenting opinion). And indeed, *Johnson* as much as equated the two phrases: Return to the block quote above, and note how *Johnson*--as though anticipating this case--refers to them interchangeably, as alike examples of imprecise "qualitative standard[s]." See *supra,* at 8; 576 U. S., at ___ (slip op., at 12). Once again, the point is not that such a non-numeric standard is alone problematic: In *Johnson*'s words, "we do not doubt" the constitutionality of applying §16(b)'s "substantial risk [standard] to real-world conduct." *Id.,* at ___ (slip op., at 12) (internal quotation marks omitted). The difficulty comes, in §16's residual clause just as in ACCA's, from applying such a standard to "a judge-imagined abstraction"--*i.e.,* "an idealized ordinary case of the crime." *Id.,* at ___, ___ (slip op., at 6, 12). It is then that the standard ceases to work in a way consistent with due process.

In sum, §16(b) has the same "[t]wo features" that "conspire[d] to make [ACCA's residual clause] unconstitutionally vague." *Id.*, at ___ (slip op., at 5). It too "requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents" some not-well-specified-yet-sufficiently-large degree of risk. *Id.*, at ___ (slip op., at 4). The result is that §16(b) produces, just as ACCA's residual clause did, "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.,* at ___ (slip op., at 6).

IV

The Government and dissents offer two fundamentally different accounts of how §16(b) can escape unscathed from our decision in *Johnson*. JUSTICE THOMAS accepts that the ordinary-case inquiry makes §16(b) "impossible to apply." *Post,* at 27. His solution is to overthrow our historic understanding of the statute: We should now read §16(b), he says, to ask about the risk posed by a particular defendant's particular conduct. In contrast, the Government, joined by THE CHIEF JUSTICE, accepts that §16(b), as long interpreted, demands a categorical approach, rather than a case-specific one. They argue only that "distinctive textual features" of §16's residual clause make applying it "more predictable" than its ACCA counterpart. Brief for Petitioner 28, 29. We disagree with both arguments.

A

The essentials of JUSTICE THOMAS's position go as follows. Section 16(b), he says, cannot have one meaning, but could have one of two others. See *post,* at 27. The provision cannot demand an inquiry merely into the elements of a crime, because that is the province of §16(a). See *supra,* at 2 (setting out §16(a)'s text). But that still leaves a pair of options: the categorical, ordinary-case approach and the "underlying-conduct approach," which asks about the specific way in which a defendant committed a crime. *Post,* at 25. According to JUSTICE THOMAS, each option is textually viable (although he gives a slight nod to the latter based on §16(b)'s use of the word "involves"). See *post,* at 24-26. What tips the scales is that only one--the conduct approach--is at all "workable." *Post,* at 27. The difficulties of the ordinary-case inquiry, JUSTICE THOMAS rightly observes, underlie this Court's view that §16(b) is too vague. So abandon that inquiry, JUSTICE THOMAS urges. After all, he reasons, it is the Court's "plain duty," under the constitutional avoidance canon, to adopt any reasonable construction of a statute that escapes constitutional problems. *Post,* at 28-29 (quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909)).

For anyone who has read *Johnson*, that argument will ring a bell. The dissent there issued the same invitation, based on much the same reasoning, to jettison the categorical approach in residual-clause cases. 576 U. S., at ___-___ (slip op., at 9-13) (opinion of ALITO, J.). The Court declined to do so. It first noted that the Government had not asked us to switch to a fact-based inquiry. It then observed that the Court "had good reasons" for originally adopting the categorical approach, based partly on ACCA's text (which, by the way, uses the word "involves" identically) and partly on the "utter impracticability" of the alternative. *Id.,* at ___ (slip op., at 13) (majority opinion). "The only plausible interpretation" of ACCA's residual clause, we concluded, "requires use of the categorical approach"--even if that approach could not in the end satisfy constitutional standards. *Ibid.* (internal quotation marks and alteration omitted).

The same is true here--except more so. To begin where *Johnson* did, the Government once again "has not asked us to abandon the categorical approach in residual-clause cases." *Ibid.* To the contrary, and as already noted, the Government has conceded at every step the correctness of that statutory construction. See *supra,* at 9. And this time, the Government's decision is even more noteworthy than before--precisely because the *Johnson* dissent laid out the opposite view, presenting it in prepackaged form for the Government to take off the shelf and use in the §16(b) context. Of course, we are not foreclosed from going down JUSTICE THOMAS's path just because the Government has not done so. But we find it significant that the Government cannot bring itself to say that the fact-based approach JUSTICE THOMAS proposes is a tenable interpretation of §16's residual clause.

Perhaps one reason for the Government's reluctance is that such an approach would generate its own constitutional questions. As JUSTICE THOMAS relates, *post,* at 22, 28, this Court adopted the categorical approach in part to "avoid[ ] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Descamps* v. *United States*, 570 U. S. 254, 267 (2013). JUSTICE THOMAS thinks that issue need not detain us here because "the right of trial by jury ha[s] no application in a removal proceeding." *Post,* at 28 (internal quotation marks omitted). But although this particular case involves removal, §16(b) is a criminal statute, with criminal sentencing consequences. See *supra,* at 2. And this Court has held (it could hardly have done otherwise) that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U. S., at 12, n. 8. So JUSTICE THOMAS's suggestion would merely ping-pong us from one constitutional issue to another. And that means the avoidance canon cannot serve, as he would like, as the interpretive tie breaker.

In any event, §16(b)'s text creates no draw: Best read, it demands a categorical approach. Our decisions have consistently understood language in the residual clauses of both ACCA and §16 to refer to "the statute of conviction, not to the facts of each defendant's conduct." *Taylor* v. *United States*, 495 U. S. 575, 601 (1990); see *Leocal*, 543 U. S., at 7 (Section 16 "directs our focus to the 'offense' of conviction . . . rather than to the particular facts"). Simple references to a "conviction," "felony," or "offense," we have stated, are "read naturally" to denote the "crime as *generally* committed." *Nijhawan* v. *Holder*, 557 U. S. 29, 34 (2009); see *Leocal*, 543 U. S., at 7; *Johnson*, 576 U. S., at ___ (slip op., at 13). And the words "by its nature" in §16(b) make that meaning all the clearer. The statute, recall, directs courts to consider whether an offense, *by its nature*, poses the requisite risk of force. An offense's "nature" means its "normal and characteristic quality." Webster's Third New International Dictionary 1507 (2002). So §16(b) tells courts to figure out what an offense normally--or, as we have repeatedly said, "ordinarily"--entails, not what happened to occur on one occasion. And the same conclusion follows if we pay attention to language that is *missing* from §16(b). As we have observed in the ACCA context, the absence of terms alluding to a crime's circumstances, or its commission, makes a fact-based interpretation an uncomfortable fit. See *Descamps*, 570 U. S., at 267. If Congress had wanted judges to look into a felon's actual conduct, "it presumably would have said so; other statutes, in other contexts, speak in just that way." *Id.,* at 267-268.[5] The upshot of all this textual evidence is that §16's residual clause--like ACCA's, except still more plainly--has no "plausible" fact-based reading. *Johnson,* 576 U. S., at ___ (slip op., at 13).

And finally, the "utter impracticability"--and associated inequities--of such an interpretation is as great in the one statute as in the other. *Ibid.* This Court has often described the daunting difficulties of accurately "reconstruct[ing]," often many years later, "the conduct underlying [a] conviction." *Ibid.*; *Descamps*, 570 U. S., at 270; *Taylor*, 495 U. S., at 601-602. According to JUSTICE THOMAS, we need not worry here because immigration judges have some special factfinding talent, or at least experience, that would mitigate the risk of error attaching to that endeavor in federal courts. See *post,* at 30. But we cannot see putting so much weight on the superior factfinding prowess of (notoriously overburdened) immigration judges. And as we have said before, §16(b) is a criminal statute with applications outside the immigration context. See *supra,* at 2, 13. Once again, then, we have no ground for discovering a novel interpretation of §16(b) that would remove us from the dictates of *Johnson*.

B

Agreeing that is so, the Government (joined by THE CHIEF JUSTICE) takes a narrower path to the same desired result. It points to three textual discrepancies between ACCA's residual clause and §16(b), and argues that they make §16(b) significantly easier to apply. But each turns out to be the proverbial distinction without a difference. None relates to the pair of features--the ordinary-case inquiry and a hazy risk threshold--that *Johnson* found to produce impermissible vagueness. And none otherwise affects the determinacy of the statutory inquiry into whether a prior conviction is for a violent crime. That is why, contrary to the Government's final argument, the experience of applying *both* statutes has generated confusion and division among lower courts.

1

The Government first--and foremost--relies on §16(b)'s express requirement (absent from ACCA) that the risk arise from acts taken "in the course of committing the offense." Brief for Petitioner 31. (THE CHIEF JUSTICE's dissent echoes much of this argument. See *post,* at 6-7.) Because of that "temporal restriction," a court applying §16(b) may not "consider risks arising *after*" the offense's commission is over. *Ibid.* In the Government's view, §16(b)'s text thereby demands a "significantly more focused inquiry" than did ACCA's residual clause. *Id.,* at 32.

To assess that claim, start with the meaning of §16(b)'s "in the course of" language. That phrase, understood in the normal way, includes the conduct occurring throughout a crime's commission--not just the conduct sufficient to satisfy the offense's formal elements. The Government agrees with that construction, explaining that the words "in the course of" sweep in everything that happens while a crime continues. See Tr. of Oral Arg. 57-58 (Oct. 2, 2017) (illustrating that idea with reference to conspiracy, burglary, kidnapping, and escape from prison). So, for example, conspiracy may be a crime of violence under §16(b) because of the risk of force while the conspiracy is ongoing (*i.e.,* "in the course of" the conspiracy); it is irrelevant that conspiracy's elements are met as soon as the participants have made an agreement. See *ibid.*; *United States* v. *Doe*, 49 F. 3d 859, 866 (CA2 1995). Similarly, and closer to home, burglary may be a crime of violence under §16(b) because of the prospects of an encounter while the burglar remains in a building (*i.e.,* "in the course of" the burglary); it does not matter that the elements of the crime are met at the precise moment of his entry. See Tr. of Oral Arg. 57-58 (Oct. 2, 2017); *James*, 550 U. S., at 203. In other words, a court applying §16(b) gets to consider everything that is likely to take place for as long as a crime is being committed.

Because that is so, §16(b)'s "in the course of" language does little to narrow or focus the statutory inquiry. All that the phrase excludes is a court's ability to consider the risk that force will be used after the crime has entirely concluded--so, for example, after the conspiracy has dissolved or the burglar has left the building. We can construct law-school-type hypotheticals fitting that fact pattern--say, a burglar who constructs a booby trap that later knocks out the homeowner. But such imaginative forays cannot realistically affect a court's view of the *ordinary case* of a crime, which is all that matters under the statute. See *supra,* at 2-3, 7. In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later. So with or without §16(b)'s explicit temporal language, a court applying the section would do the same thing--ask what usually happens when a crime goes down.

And that is just what courts did when applying ACCA's residual clause--and for the same reason. True, that clause lacked an express temporal limit. But not a single one of this Court's ACCA decisions turned on conduct that might occur after a crime's commission; instead, each hinged on the risk arising from events that could happen while the crime was ongoing. See, *e.g., Sykes* v. *United States*, 564 U. S. 1, 10 (2011) (assessing the risks attached to the "confrontations that initiate and terminate" vehicle flight, along with "intervening" events); *Chambers* v. *United States*, 555 U. S. 122, 128 (2009) (rejecting the Government's argument that violent incidents "occur[ring] long after" a person unlawfully failed to report to prison rendered that crime a violent felony). Nor could those decisions have done otherwise, given the statute's concern with the ordinary (rather than the outlandish) case. Once again, the riskiness of a crime in the ordinary case depends on the acts taken during--not after--its commission. Thus, the analyses under ACCA's residual clause and §16(b) coincide.

The upshot is that the phrase "in the course of" makes no difference as to either outcome or clarity. Every offense that could have fallen within ACCA's residual clause might equally fall within §16(b). And the difficulty of deciding whether it does so remains just as intractable. Indeed, we cannot think of a single federal crime whose treatment becomes more obvious under §16(b) than under ACCA because of the words "in the course of."[6] The phrase, then, cannot cure the statutory indeterminacy *Johnson* described.

Second, the Government (and again, THE CHIEF JUSTICE's dissent, see *post,* at 6) observes that §16(b) focuses on the risk of "physical force" whereas ACCA's residual clause asked about the risk of "physical injury." The §16(b) inquiry, the Government says, "trains solely" on the conduct typically involved in a crime. Brief for Petitioner 36. By contrast, the Government continues, ACCA's residual clause required a second inquiry: After describing the ordinary criminal's conduct, a court had to "speculate about a chain of causation that could possibly result in a victim's injury." *Ibid.* The Government's conclusion is that the §16(b) inquiry is "more specific." *Ibid.*

But once more, we struggle to see how that statutory distinction would matter. To begin with, the first of the Government's two steps--defining the conduct in the ordinary case--is almost always the difficult part. Once that is accomplished, the assessment of consequences tends to follow as a matter of course. So, for example, if a crime is likely enough to lead to a shooting, it will also be likely enough to lead to an injury. And still more important, §16(b) involves two steps as well--and essentially the same ones. In interpreting statutes like §16(b), this Court has made clear that "physical force" means "force capable of causing physical pain or injury." *Johnson* v. *United States*, 559 U. S. 133, 140 (2010) (defining the term for purposes of deciding what counts as a "violent" crime). So under §16(b) too, a court must not only identify the conduct typically involved in a crime, but also gauge its potential consequences. Or said a bit differently, evaluating the risk of "physical force" itself entails considering the risk of "physical injury." For those reasons, the force/injury distinction is unlikely to affect a court's analysis of whether a crime qualifies as violent. All the same crimes might--or, then again, might not--satisfy both requirements. Accordingly, this variance in wording cannot make ACCA's residual clause vague and §16(b) not.

Third, the Government briefly notes that §16(b), unlike ACCA's residual clause, is not preceded by a "confusing list of exemplar crimes." Brief for Petitioner 38. (THE CHIEF JUSTICE's dissent reiterates this argument, with some additional references to our caselaw. See *post,* at 10-12.) Here, the Government is referring to the offenses ACCA designated as violent felonies independently of the residual clause (*i.e.*, burglary, arson, extortion, and use of explosives). See *supra,* at 4. According to the Government, those crimes provided "contradictory and opaque indications" of what non-specified offenses should also count as violent. Brief for Petitioner 38. Because §16(b) lacks any such enumerated crimes, the Government concludes, it avoids the vagueness of ACCA's residual clause.

We readily accept a part of that argument. This Court for several years looked to ACCA's listed crimes for help in giving the residual clause meaning. See, *e.g., Begay* v. *United States*, 553 U. S. 137, 142 (2008); *James*, 550 U. S., at 203. But to no avail. As the Government relates (and *Johnson* explained), the enumerated crimes were themselves too varied to provide such assistance. See Brief for Petitioner 38-40; 576 U. S., at ___ (slip op., at 12). Trying to reconcile them with each other, and then compare them to whatever unlisted crime was at issue, drove many a judge a little batty. And more to the point, the endeavor failed to bring any certainty to the residual clause's application. See Brief for Petitioner 38-40.

But the Government's conclusion does not follow. To say that ACCA's listed crimes failed to resolve the residual clause's vagueness is hardly to say they caused the problem. Had they done so, *Johnson* would not have needed to strike down the clause. It could simply have instructed courts to give up on trying to interpret the clause by reference to the enumerated offenses. (Contrary to THE CHIEF JUSTICE's suggestion, see *post,* at 12, discarding an interpretive tool once it is found not to actually aid in interpretation hardly "expand[s]" the scope of a statute.) That *Johnson* went so much further--invalidating a statutory provision rather than construing it independently of another--demonstrates that the list of crimes was not the culprit. And indeed, *Johnson* explicitly said as much. As described earlier, *Johnson* found the residual clause's vagueness to reside in just "two" of its features: the ordinary-case requirement and a fuzzy risk standard. See 576 U. S., at ___-___ (slip op., at 5-6); *supra,* at 7-8. Strip away the enumerated crimes--as Congress did in §16(b)--and those dual flaws yet remain. And ditto the textual indeterminacy that flows from them.

Faced with the two clauses' linguistic similarity, the Government relies significantly on an argument rooted in judicial experience. Our opinion in *Johnson*, the Government notes, spoke of the longstanding "trouble" that this Court and others had in "making sense of [ACCA's] residual clause." 576 U. S., at ___ (slip op., at 9); see Brief for Petitioner 45. According to the Government, §16(b) has not produced "comparable difficulties." *Id.,* at 46. Lower courts, the Government claims, have divided less often about the provision's meaning, and as a result this Court granted certiorari on "only a single Section 16(b) case" before this one. *Ibid.*[7] "The most likely explanation," the Government concludes, is that "Section 16(b) is clearer" than its ACCA counterpart. *Id.,* at 47.

But in fact, a host of issues respecting §16(b)'s application to specific crimes divide the federal appellate courts. Does car burglary qualify as a violent felony under §16(b)? Some courts say yes, another says no.[8] What of statutory rape? Once again, the Circuits part ways.[9] How about evading arrest? The decisions point in different directions.[10] Residential trespass? The same is true.[11] Those examples do not exhaust the current catalogue of Circuit conflicts concerning §16(b)'s application. See Brief for National Immigration Project of the National Lawyers Guild et al. as *Amici Curiae* 7-18 (citing divided appellate decisions as to the unauthorized use of a vehicle, firearms possession, and abduction). And that roster would just expand with time, mainly because, as *Johnson* explained, precious few crimes (of the thousands that fill the statute books) have an obvious, non-speculative--and therefore undisputed--"ordinary case." See 576 U. S., at ___-___ (slip op., at 5-6).

Nor does this Court's prior handling of §16(b) cases support the Government's argument. To be sure, we have heard oral argument in only two cases arising from §16(b) (including this one), as compared with five involving ACCA's residual clause (including *Johnson*).[12] But while some of those ACCA suits were pending before us, we received a number of petitions for certiorari presenting related issues in the §16(b) context. And after issuing the relevant ACCA decisions, we vacated the judgments in those §16(b) cases and remanded them for further consideration.[13] That we disposed of the ACCA and §16(b) petitions in that order, rather than its opposite, provides no reason to disregard the indeterminacy that §16(b) shares with ACCA's residual clause.

And of course, this Court's experience in deciding ACCA cases only supports the conclusion that §16(b) is too vague. For that record reveals that a statute with all the same hallmarks as §16(b) could not be applied with the predictability the Constitution demands. See *id.,* at ___-___ (slip op., at 6-9); *supra,* at 6-9. The Government would condemn us to repeat the past--to rerun the old ACCA tape, as though we remembered nothing from its first showing. But why should we disregard a lesson so hard learned? "Insanity," Justice Scalia wrote in the last ACCA residual clause case before *Johnson*, "is doing the same thing over and over again, but expecting different results." *Sykes*, 564 U. S., at 28 (dissenting opinion). We abandoned that lunatic practice in *Johnson* and see no reason to start it again.

V

Johnson tells us how to resolve this case. That decision held that "[t]wo features of [ACCA's] residual clause conspire[d] to make it unconstitutionally vague." 576 U. S., at ___ (slip op., at 5). Because the clause had both an ordinary-case requirement and an ill-defined risk threshold, it necessarily "devolv[ed] into guesswork and intuition," invited arbitrary enforcement, and failed to provide fair notice. *Id.,* at ___ (slip op., at 8). Section 16(b) possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA's residual clause, §16(b) "produces more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.,* at ___ (slip op., at 6). We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

Opinion of GORSUCH, J.

584 U. S. ____ (2018)

No. 15-1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER *v.* JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

JUSTICE GORSUCH, concurring in part and concurring in the judgment.

Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of "pretended" crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same--by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

The law before us today is such a law. Before holding a lawful permanent resident alien like James Dimaya subject to removal for having committed a crime, the Immigration and Nationality Act requires a judge to determine that the ordinary case of the alien's crime of conviction involves a substantial risk that physical force may be used. But what does that mean? Just take the crime at issue in this case, California burglary, which applies to everyone from armed home intruders to door-to-door salesmen peddling shady products. How, on that vast spectrum, is anyone supposed to locate the ordinary case and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.

*

I begin with a foundational question. Writing for the Court in *Johnson* v. *United States*, 576 U. S. ___ (2015), Justice Scalia held the residual clause of the Armed Career Criminal Act void for vagueness because it invited "more unpredictability and arbitrariness" than the Constitution allows. *Id.*, at ___ (slip op., at 6). Because the residual clause in the statute now before us uses almost exactly the same language as the residual clause in *Johnson*, respect for precedent alone would seem to suggest that both clauses should suffer the same judgment.

But first in *Johnson* and now again today JUSTICE THOMAS has questioned whether our vagueness doctrine can fairly claim roots in the Constitution as originally understood. See, *e.g., post*, at 2-6 (dissenting opinion); *Johnson*, *supra,* at ___-___ (opinion concurring in judgment) (slip op., at 6-18). For its part, the Court has yet to offer a reply. I believe our colleague's challenge is a serious and thoughtful one that merits careful attention. At day's end, though, it is a challenge to which I find myself unable to subscribe. Respectfully, I am persuaded instead that void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and separation of powers principles the framers recognized as vital to ordered liberty under our Constitution.

Consider first the doctrine's due process underpinnings. The Fifth and Fourteenth Amendments guarantee that "life, liberty, or property" may not be taken "without due process of law." That means the government generally may not deprive a person of those rights without affording him the benefit of (at least) those "customary procedures to which freemen were entitled by the old law of England." *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28 (1991) (Scalia, J., concurring in judgment) (internal quotation marks omitted). Admittedly, some have suggested that the Due Process Clause does less work than this, allowing the government to deprive people of their liberty through whatever procedures (or lack of them) the government's current laws may tolerate. *Post*, at 3, n. 1 (opinion of THOMAS, J.) (collecting authorities). But in my view the weight of the historical evidence shows that the clause sought to ensure that the people's rights are never any less secure against governmental invasion than they were at common law. Lord Coke took this view of the English due process guarantee. 1 E. Coke, The Second Part of the Institutes of the Laws of England 50 (1797). John Rutledge, our second Chief Justice, explained that Coke's teachings were carefully studied and widely adopted by the framers, becoming " 'almost the foundations of our law.' " *Klopfer* v. *North Carolina*, 386 U. S. 213, 225 (1967). And many more students of the Constitution besides--from Justice Story to Justice Scalia--have agreed that this view best represents the original understanding of our own Due Process Clause. See, *e.g., Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856); 3 J. Story, Commentaries on the Constitution of the United States §1783, p. 661 (1833); *Pacific Mut.*, *supra,* at 28-29 (opinion of Scalia, J.); Eberle, Procedural Due Process: The Original Understanding, 4 Const. Comment. 339, 341 (1987).

Perhaps the most basic of due process's customary protections is the demand of fair notice. See *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926); see also Note, Textualism as Fair Notice, 123 Harv. L. Rev. 542, 543 (2009) ("From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law"). Criminal indictments at common law had to provide "precise and sufficient certainty" about the charges involved. 4 W. Blackstone, Commentaries on the Laws of England 301 (1769) (Blackstone). Unless an "offence [was] set forth with clearness and certainty," the indictment risked being held void in court. *Id.,* at 302 (emphasis deleted); 2 W. Hawkins, Pleas of the Crown, ch. 25, §§99, 100, pp. 244-245 (2d ed. 1726) ("[I]t seems to have been anciently the common practice, where an indictment appeared to be [in]sufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it").

The same held true in civil cases affecting a person's life, liberty, or property. A civil suit began by obtaining a writ--a detailed and specific form of action asking for particular relief. Bellia, Article III and the Cause of Action, 89 Iowa L. Rev. 777, 784-786 (2004); Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 914-915 (1987). Because the various civil writs were clearly defined, English subjects served with one would know with particularity what legal requirement they were alleged to have violated and, accordingly, what would be at issue in court. *Id.*, at 917; Moffitt, Pleadings in the Age of Settlement, 80 Ind. L. J. 727, 731 (2005). And a writ risked being held defective if it didn't provide fair notice. *Goldington* v. *Bassingburn*, Y. B. Trin. 3 Edw. II, f. 27b (1310) (explaining that it was "the law of the land" that "no one [could] be taken by surprise" by having to "answer in court for what [one] has not been warned to answer").

The requirement of fair notice applied to statutes too. Blackstone illustrated the point with a case involving a statute that made "stealing sheep, or other cattle" a felony. 1 Blackstone 88 (emphasis deleted). Because the term "cattle" embraced a good deal more then than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover--and so the court treated the term "cattle" as a nullity. *Ibid.* All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to "bulls, cows, oxen," and more "by name." *Ibid.*

This tradition of courts refusing to apply vague statutes finds parallels in early American practice as well. In *The Enterprise*, 8 F. Cas. 732 (No. 4,499) (CC NY 1810), for example, Justice Livingston found that a statute setting the circumstances in which a ship may enter a port during an embargo was too vague to be applied, concluding that "the court had better pass" the statutory terms by "as unintelligible and useless" rather than "put on them, at great uncertainty, a very harsh signification, and one which the legislature may never have designed." *Id.,* at 735. In *United States* v. *Sharp*, 27 F. Cas. 1041 (No. 16,264) (CC Pa. 1815), Justice Washington confronted a statute which prohibited seamen from making a "revolt." *Id.*, at 1043. But he was unable to determine the meaning of this provision "by any authority . . . either in the common, admiralty, or civil law." *Ibid.* As a result, he declined to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*[1]

Nor was the concern with vague laws confined to the most serious offenses like capital crimes. Courts refused to apply vague laws in criminal cases involving relatively modest penalties. See, *e.g., McJunkins* v. *State*, 10 Ind. 140, 145 (1858). They applied the doctrine in civil cases too. See, *e.g., Drake* v. *Drake*, 15 N. C. 110, 115 (1833); *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842). As one court put it, "all laws" "ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate." *McConvill* v. *Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 42 (1876). " 'It is impossible . . . to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters.' " *Id.*, at 42-43.

These early cases, admittedly, often spoke in terms of construing vague laws strictly rather than declaring them void. See, *e.g., post,* at 4-5 (opinion of THOMAS, J.); *Johnson*, 576 U. S., at ___-___ (opinion of THOMAS, J.) (slip op., at 8-10). But in substance void the law is often exactly what these courts did: rather than try to construe or interpret the statute before them, judges frequently held the law simply too vague to apply. Blackstone, for example, did not suggest the court in his illustration should have given a narrowing construction to the term "cattle," but argued against giving it any effect *at all*. 1 Blackstone 88; see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 582 (1989) ("I doubt . . . that any modern court would go to the lengths described by Blackstone in its application of the rule that penal statutes are to be strictly construed"); Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, n. 3 (1931) (explaining that "since strict construction, in effect, nullified ambiguous provisions, it was but a short step to declaring them void *ab initio*"); *supra,* at 5, n. 1 (state courts holding vague statutory terms "void" or "null").

What history suggests, the structure of the Constitution confirms. Many of the Constitution's other provisions presuppose and depend on the existence of reasonably clear laws. Take the Fourth Amendment's requirement that arrest warrants must be supported by probable cause, and consider what would be left of that requirement if the alleged crime had no meaningful boundaries. Or take the Sixth Amendment's mandate that a defendant must be informed of the accusations against him and allowed to bring witnesses in his defense, and consider what use those rights would be if the charged crime was so vague the defendant couldn't tell what he's alleged to have done and what sort of witnesses he might need to rebut that charge. Without an assurance that the laws supply fair notice, so much else of the Constitution risks becoming only a "parchment barrie[r]" against arbitrary power. The Federalist No. 48, p. 308 (C. Rossiter ed. 1961) (J. Madison).

Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers. The Constitution assigns "[a]ll legislative Powers" in our federal government to Congress. Art. I, §1. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See The Federalist No. 78, at 465 (A. Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated"). Meanwhile, the Constitution assigns to judges the "judicial Power" to decide "Cases" and "Controversies." Art. III, §2. That power does not license judges to craft new laws to govern future conduct, but only to "discer[n] the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between the people over past events. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 866 (1824).

From this division of duties, it comes clear that legislators may not "abdicate their responsibilities for setting the standards of the criminal law," *Smith* v. *Goguen*, 415 U. S. 566, 575 (1974), by leaving to judges the power to decide "the various crimes includable in [a] vague phrase," *Jordan* v. *De George*, 341 U. S. 223, 242 (1951) (Jackson, J., dissenting). For "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] [t]his would, to some extent, substitute the judicial for the legislative department of government." *Kolender* v. *Lawson*, 461 U. S. 352, 358, n. 7 (1983) (internal quotation marks omitted). Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis").

These structural worries are more than just formal ones. Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to "condem[n] all that [they] personally disapprove and for no better reason than [they] disapprove it." *Jordan*, *supra,* at 242 (Jackson, J., dissenting). Nor do judges and prosecutors act in the open and accountable forum of a legislature, but in the comparatively obscure confines of cases and controversies. See, *e.g.,* A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 151 (1962) ("A vague statute delegates to administrators, prosecutors, juries, and judges the authority of *ad hoc* decision, which is in its nature difficult if not impossible to hold to account, because of its narrow impact"). For just these reasons, Hamilton warned, while "liberty can have nothing to fear from the judiciary alone," it has "every thing to fear from" the union of the judicial and

legislative powers. The Federalist No. 78, at 466. No doubt, too, for reasons like these this Court has held "that the *more important* aspect of vagueness doctrine 'is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement' " and keep the separate branches within their proper spheres. *Kolender*, *supra*, at 358 (quoting *Goguen*, *supra,* at 575 (emphasis added)).

*

Persuaded that vagueness doctrine enjoys a secure footing in the original understanding of the Constitution, the next question I confront concerns the standard of review. What degree of imprecision should this Court tolerate in a statute before declaring it unconstitutionally vague? For its part, the government argues that where (as here) a person faces only civil, not criminal, consequences from a statute's operation, we should declare the law unconstitutional only if it is "unintelligible." But in the criminal context this Court has generally insisted that the law must afford "ordinary people . . . fair notice of the conduct it punishes." *Johnson*, 576 U. S., at ___ (slip op., at 3). And I cannot see how the Due Process Clause might often require any less than that in the civil context either. Fair notice of the law's demands, as we've seen, is "the first essential of due process." *Connally*, 269 U. S., at 391. And as we've seen, too, the Constitution sought to preserve a common law tradition that usually aimed to ensure fair notice before any deprivation of life, liberty, or property could take place, whether under the banner of the criminal or the civil law. See *supra,* at 2-7.

First principles aside, the government suggests that at least this Court's precedents support adopting a less-than-fair-notice standard for civil cases. But even that much I do not see. This Court has already expressly held that a "stringent vagueness test" should apply to at least some civil laws--those abridging basic First Amendment freedoms. *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982). This Court has made clear, too, that due process protections against vague laws are "not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 402 (1966). So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive. To be sure, this Court has also said that what qualifies as fair notice depends "in part on the nature of the enactment." *Hoffman Estates*, 455 U. S., at 498. And the Court has sometimes "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.,* at 498-499. But to acknowledge these truisms does nothing to prove that civil laws must always be subject to the government's emaciated form of review.

In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes--and often harsher than the punishment for felonies. And not only are "punitive civil sanctions . . . rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*." Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L. J. 1795, 1798 (1992) (emphasis added). Given all this, any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.

Retreating to a more modest line of argument, the government emphasizes that this case arises in the immigration context and so implicates matters of foreign relations where the Executive enjoys considerable constitutional authority. But to acknowledge that the *President* has broad authority to act in this general area supplies no justification for allowing *judges* to give content to an impermissibly vague law.

Alternatively still, JUSTICE THOMAS suggests that, at least at the time of the founding, aliens present in this country may not have been understood as possessing any rights under the Due Process Clause. For support, he points to the Alien Friends Act of 1798. An Act Concerning Aliens §1, 1 Stat. 571; *post*, at 6-12 (opinion of THOMAS, J.). But the Alien Friends Act--better known as the "Alien" part of the Alien and Sedition Acts--is one of the most notorious laws in our country's history. It was understood as a temporary war measure, not one that the legislature would endorse in a time of tranquility. See, *e.g.,* Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 70-71 (2002). Yet even then it was widely condemned as unconstitutional by Madison and many others. It also went unenforced, may have cost the Federalist Party its existence, and lapsed a mere two years after its enactment. With this fuller view, it seems doubtful the Act tells us a great deal about aliens' due process rights at the founding.[2]

Besides, none of this much matters. Whether Madison or his adversaries had the better of the debate over the constitutionality of the Alien Friends Act, Congress is surely free to extend existing forms of liberty to new classes of persons--liberty that the government may then take only after affording due process. See, *e.g.*, *Sandin* v. *Conner*, 515 U. S. 472, 477-478 (1995); Easterbrook, Substance and Due Process, 1982 S. Ct. Rev. 85, 88 ("If . . . the constitution, statute, or regulation creates a liberty or property interest, then the second step--determining 'what process is due'--comes into play"). Madison made this very point, suggesting an alien's admission in this country could in some circumstances be analogous to "the grant of land to an individual," which "may be of favor not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away." Madison's Report 319. And, of course, that's exactly what Congress eventually chose to do here. Decades ago, it enacted a law affording Mr. Dimaya lawful permanent residency in this country, extending to him a statutory liberty interest others traditionally have enjoyed to remain in and move about the country free from physical imprisonment and restraint. See *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1111 (CA9 2015); 8 U. S. C. §§1101(20), 1255. No one suggests Congress *had* to enact statutes of this

sort. And exactly what processes must attend the deprivation of a statutorily afforded liberty interest like this may pose serious and debatable questions. Cf. *Murray's Lessee*, 18 How., at 277 (approving summary procedures in another context). But however summary those procedures might be, it's hard to fathom why fair notice of the law--the most venerable of due process's requirements--would not be among them. *Connally,* 269 U. S., at 391.[3]

Today, a plurality of the Court agrees that we should reject the government's plea for a feeble standard of review, but for a different reason. *Ante,* at 5-6. My colleagues suggest the law before us should be assessed under the fair notice standard because of the special gravity of its civil deportation penalty. But, grave as that penalty may be, I cannot see why we would single it out for special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home? I can think of no good answer.

*

With the fair notice standard now in hand, all that remains is to ask how it applies to the case before us. And here at least the answer comes readily for me: to the extent it requires an "ordinary case" analysis, the portion of the Immigration and Nationality Act before us fails the fair notice test for the reasons Justice Scalia identified in *Johnson* and the Court recounts today.

Just like the statute in *Johnson*, the statute here instructs courts to impose special penalties on individuals previously "convicted of" a "crime of violence." 8 U. S. C. §§1227(a)(2)(A)(iii), 1101(a)(43)(F). Just like the statute in *Johnson*, the statute here fails to specify which crimes qualify for that label. Instead, and again like the statute in *Johnson*, the statute here seems to require a judge to guess about the ordinary case of the crime of conviction and then guess whether a "substantial risk" of "physical force" attends its commission. 18 U. S. C. §16(b); *Johnson*, 576 U. S., at ___-___ (slip op., at 4-5). *Johnson* held that a law that asks so much of courts while offering them so little by way of guidance is unconstitutionally vague. And I do not see how we might reach a different judgment here.

Any lingering doubt is resolved for me by taking account of just some of the questions judges trying to apply the statute using an ordinary case analysis would have to confront. Does a conviction for witness tampering ordinarily involve a threat to the kneecaps or just the promise of a bribe? Does a conviction for kidnapping ordinarily involve throwing someone into a car trunk or a noncustodial parent picking up a child from daycare? These questions do not suggest obvious answers. Is the court supposed to hold evidentiary hearings to sort them out, entertaining experts with competing narratives and statistics, before deciding what the ordinary case of a given crime looks like and how much risk of violence it poses? What is the judge to do if there aren't any reliable statistics available? Should (or must) the judge predict the effects of new technology on what qualifies as the ordinary case? After all, surely the risk of injury calculus for crimes like larceny can be expected to change as more thefts are committed by computer rather than by gunpoint. Or instead of requiring real evidence, does the statute mean to just leave it all to a judicial hunch? And on top of all that may be the most difficult question yet: at what level of generality is the inquiry supposed to take place? Is a court supposed to pass on the ordinary case of burglary in the relevant neighborhood or county, or should it focus on statewide or even national experience? How is a judge to know? How are the people to know?

The implacable fact is that this isn't your everyday ambiguous statute. It leaves the people to guess about what the law demands--and leaves judges to make it up. You cannot discern answers to any of the questions this law begets by resorting to the traditional canons of statutory interpretation. No amount of staring at the statute's text, structure, or history will yield a clue. Nor does the statute call for the application of some preexisting body of law familiar to the judicial power. The statute doesn't even ask for application of common experience. Choice, pure and raw, is required. Will, not judgment, dictates the result.

*

Having said this much, it is important to acknowledge some limits on today's holding too. I have proceeded on the premise that the Immigration and Nationality Act, as it incorporates §16(b) of the criminal code, commands courts to determine the risk of violence attending the ordinary case of conviction for a particular crime. I have done so because no party before us has argued for a different way to read these statutes in combination; because our precedent seemingly requires this approach; and because the government itself has conceded (repeatedly) that the law compels it. *Johnson*, *supra*, at ___ (slip op., at 13); *Taylor* v. *United States*, 495 U. S. 575, 600 (1990); Brief for Petitioner 11, 30, 32, 36, 40, 47 (conceding that an ordinary case analysis is required).

But any more than that I would not venture. In response to the problems engendered by the ordinary case analysis, JUSTICE THOMAS suggests that we should overlook the government's concession about the propriety of that approach; reconsider our precedents endorsing it; and read the statute as requiring us to focus on the facts of the alien's crime as committed rather than as the facts appear in the ordinary case of conviction. *Post,* at 20-32. But normally courts do not rescue parties from their concessions, maybe least of all concessions from a party as able to protect its interests as the federal government. And normally, too, the crucible of adversarial testing is crucial to sound judicial decisionmaking. We rely on it to "yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." *Maslenjak* v. *United States*, 582 U. S. ___, ___ (2017) (GORSUCH, J., concurring in part and concurring in judgment) (slip op., at 2).

While sometimes we may or even must forgo the adversarial process, I do not see the case for doing so today. Maybe especially because I am not sure JUSTICE THOMAS's is the only available alternative reading of the statute we would have to consider, even if we did reject the government's concession and wipe the precedential slate clean. We might also have to consider an interpretation that would have courts ask not whether the alien's crime of conviction ordinarily involves a risk of physical force, or whether the defendant's particular crime involved such a risk, but whether the defendant's crime of conviction *always* does so. After all, the language before us requires a conviction for an "offense . . . that, *by its nature*, involves a substantial risk of physical force." 18 U. S. C. §16(b) (emphasis added). Plausibly, anyway, the word "nature" might refer to an inevitable characteristic of the offense; one that would present itself automatically, whenever the statute is violated. See 10 Oxford English Dictionary 247 (2d ed. 1989). While I remain open to different arguments about our precedent and the proper reading of language like this, I would address them in another case, whether involving the INA or a different statute, where the parties have a chance to be heard and we might benefit from their learning.

It's important to note the narrowness of our decision today in another respect too. Vagueness doctrine represents a procedural, not a substantive, demand. It does not forbid the legislature from acting toward any end it wishes, but only requires it to act with enough clarity that reasonable people can know what is required of them and judges can apply the law consistent with their limited office. Our history surely bears examples of the judicial misuse of the so-called "substantive component" of due process to dictate policy on matters that belonged to the people to decide. But concerns with substantive due process should not lead us to react by withdrawing an ancient procedural protection compelled by the original meaning of the Constitution.

Today's decision sweeps narrowly in yet one more way. By any fair estimate, Congress has largely satisfied the procedural demand of fair notice even in the INA provision before us. The statute lists a number of specific crimes that can lead to a lawful resident's removal--for example, murder, rape, and sexual abuse of a minor. 8 U. S. C. §1101(a)(43)(A). Our ruling today does not touch this list. We address only the statute's "residual clause" where Congress ended its own list and asked us to begin writing our own. Just as Blackstone's legislature passed a revised statute clarifying that "cattle" covers bulls and oxen, Congress remains free at any time to add more crimes to its list. It remains free, as well, to write a new residual clause that affords the fair notice lacking here. Congress might, for example, say that a conviction for any felony carrying a prison sentence of a specified length opens an alien to removal. Congress has done almost exactly this in other laws. See, *e.g.,* 18 U. S. C. §922(g). What was done there could be done here.

But those laws are not this law. And while the statute before us doesn't rise to the level of threatening death for "pretended offences" of treason, no one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power. And, in my judgment, that foundational principle dictates today's result. Because I understand them to be consistent with what I have said here, I join Parts I, III, IV-B, and V of the Court's opinion and concur in the judgment.

ROBERTS, C. J., dissenting

584 U. S. ____ (2018)

No. 15-1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER *v.* JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

CHIEF JUSTICE ROBERTS, with whom JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

In *Johnson* v. *United States*, we concluded that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, given the "indeterminacy of the wide-ranging inquiry" it required. 576 U. S. ___, ___ (2015) (slip op., at 5). Today, the Court relies wholly on *Johnson*--but only some of *Johnson*--to strike down another provision, 18 U. S. C. §16(b). Because §16(b) does not give rise to the concerns that drove the Court's decision in *Johnson*, I respectfully dissent.

I

The term "crime of violence" appears repeatedly throughout the Federal Criminal Code. Section 16 of Title 18 defines it to mean:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

This definition of "crime of violence" is also incorporated in the definition of "aggravated felony" in the Immigration and Nationality Act. 8 U. S. C. §1101(a)(43)(F) ("aggravated felony" includes "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year" (footnote omitted)). A conviction for an aggravated felony carries serious consequences under the immigration laws. It can serve as the basis for an alien's removal from the United States, and can preclude cancellation of removal by the Attorney General. §§1227(a)(2)(A)(iii), 1229b(a)(3).

Those consequences came to pass in respondent James Dimaya's case. An Immigration Judge and the Board of Immigration Appeals interpreted §16(b) to cover Dimaya's two prior convictions for first-degree residential burglary under California law, subjecting him to removal. To stave off that result, Dimaya argued that the language of §16(b) was void for vagueness under the Due Process Clause of the Fifth Amendment.

The parties begin by disputing whether a criminal or more relaxed civil vagueness standard should apply in resolving Dimaya's challenge. A plurality of the Court rejects the Government's argument in favor of a civil standard, because of the "grave nature of deportation," *Jordan* v. *De George*, 341 U. S. 223, 231 (1951); see *ante,* at 6 (plurality opinion); JUSTICE GORSUCH does so for broader reasons, see *ante,* at 10-15 (GORSUCH, J., concurring in part and concurring in judgment). I see no need to resolve which standard applies, because I would hold that §16(b) is not unconstitutionally vague even under the standard applicable to criminal laws.

II

This is not our first encounter with §16(b). In *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), we were asked to decide whether either subsection of §16 covers a particular category of state crimes, specifically DUI offenses involving no more than negligent conduct. 543 U. S., at 6. Far from finding §16(b) "hopeless[ly] indetermina[te]," *Johnson*, 576 U. S., at ___ (slip op., at 7), we considered the provision clear and unremarkable: "while §16(b) is broader than §16(a) in the sense that physical force need not actually be applied," the provision "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense," *Leocal*, 543 U. S., at 10-11. Applying that standard to the state offense at issue, we concluded--unanimously--that §16(b) "cannot be read to include [a] conviction for DUI causing serious bodily injury under Florida law." *Id.,* at 11.

Leocal thus provides a model for how courts should assess whether a particular crime "by its nature" involves a risk of the use of physical force. At the outset, our opinion set forth the elements of the Florida DUI statute, which made it a felony "for a person to operate a vehicle while under the influence and, 'by reason of such operation, caus[e] . . . [s]erious bodily injury to another.' " 543 U. S., at 7. Our §16(b) analysis, in turn, focused on those specific elements in concluding that a Florida offender's acts would not naturally give rise to the requisite risk of force "in the course of committing the offense." *Id.,* at 11. "In no 'ordinary or natural' sense," we explained, "can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Ibid.*

The Court holds that the same provision we had no trouble applying in *Leocal* is in fact incapable of reasoned application. The sole justification for this turnabout is the resemblance between the language of §16(b) and the language of the residual clause of the Armed Career Criminal Act (ACCA) that was at issue in *Johnson*. The latter provision defined a "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." 18 U. S. C. §924(e)(2)(B)(ii) (emphasis added).

In *Johnson*, we concluded that the ACCA residual clause (the "or otherwise" language) gave rise to two forms of intractable uncertainty, which "conspire[d]" to render the provision unconstitutionally vague. 576 U. S., at ___ (slip op., at 5). First, the residual clause asked courts to gauge the "potential risk" of "physical injury" posed by the conduct involved in the crime. *Ibid.* That inquiry, we determined, entailed not only an evaluation of the "criminal's behavior," but also required courts to consider "how the idealized ordinary case of the crime subsequently plays out." *Ibid.* Second, the residual clause obligated courts to compare that risk to an indeterminate standard--one that was inextricably linked to the provision's four enumerated crimes, which presented differing kinds and degrees of risk. *Id.,* at ___ (slip op., at 6). This murky confluence of features, each of which "may [have been] tolerable in isolation," together "ma[de] a task for us which at best could be only guesswork." *Id.,* at ___ (slip op., at 10).

Section 16(b) does not present the same ambiguities. The two provisions do correspond to some extent. Under our decisions, both ask the sentencing court to consider whether a particular offense, defined without regard to the facts of the conviction, poses a specified risk. And, relevant to both statutes, we have explained that in deciding whether statutory elements inherently produce a risk, a court must take into account how those elements will ordinarily be fulfilled. See *James* v. *United States*, 550 U. S. 192, 208 (2007) (this categorical inquiry asks "whether the conduct encompassed by the elements of the offense, in the

ordinary case, presents" the requisite risk).[1] In the Court's view, that effectively resolves this case. But the Court too readily dismisses the significant textual distinctions between §16(b) and the ACCA residual clause. See also *ante,* at 2 (opinion of GORSUCH, J.). Those differences undermine the conclusion that §16(b) shares each of the "dual flaws" of that clause. *Ante,* at 21 (majority opinion).

To begin, §16(b) yields far less uncertainty "about how to estimate the risk posed by a crime." *Johnson*, 576 U. S., at ___ (slip op., at 5). There are three material differences between §16(b) and the ACCA residual clause in this respect. First, the ACCA clause directed the reader to consider whether the offender's conduct presented a "*potential* risk" of injury. Forced to give meaning to that befuddling choice of phrase--which layered one indeterminate term on top of another--we understood the word "potential" to signify that "Congress intended to encompass possibilities even more contingent or remote than "a simple 'risk.' " *James*, 550 U. S., at 207-208. As we explained in *Johnson*, that made for a "speculative" inquiry "detached from statutory elements." 576 U. S., at ___ (slip op., at 5). In other words, the offense elements could not constrain the risk inquiry in the manner they do here. See *Leocal*, 543 U. S., at 11. The "serious potential risk" standard also forced courts to assess in an expansive way the "collateral consequences" of the perpetrator's acts. For example, courts had to take into account the concern that *others* might cause injury in attempting to apprehend the offender. See *Sykes* v. *United States*, 564 U. S. 1, 8-9 (2011). Section 16(b), on the other hand, asks about "risk" alone, a familiar concept of everyday life. It therefore calls for a commonsense inquiry that does not compel a court to venture beyond the offense elements to consider contingent and remote possibilities.

Second, §16(b) focuses exclusively on the risk that the offender will "use[ ]" "physical force" "against" another person or another person's property. Thus, unlike the ACCA residual clause, "§16(b) plainly does not encompass all offenses which create a 'substantial risk' that *injury will result from* a person's conduct." *Leocal,* 543 U. S., at 10, n. 7 (emphasis added). The point is not that an inquiry into the risk of "physical force" is markedly more determinate than an inquiry into the risk of "physical injury." But see *ante,* at 19-20. The difference is that §16(b) asks about the risk that the offender himself will *actively employ* force against person or property. That language does not sweep in all instances in which the offender's acts, or another person's reaction, might result in unintended or negligent harm.

Third, §16(b) has a temporal limit that the ACCA residual clause lacked: The "substantial risk" of force must arise "in the course of committing the offense." Properly interpreted, this means the statute requires a substantial risk that the perpetrator will use force while carrying out the crime. See *Leocal*, 543 U. S., at 10 ("The reckless disregard in §16 relates . . . to the risk that the use of physical force against another might be required in committing a crime."). The provision thereby excludes more attenuated harms that might arise following the completion of the crime. The ACCA residual clause, by contrast, contained no similar language restricting its scope. And the absence of such a limit, coupled with the reference to "potential" risks, gave courts free rein to classify an offense as a violent felony based on injuries that might occur after the offense was over and done. See, *e.g., United States* v. *Benton*, 639 F. 3d 723, 732 (CA6 2011) (finding that "solicitation to commit aggravated assault" qualified under the ACCA residual clause on the theory that the solicited individual might subsequently carry out the requested act).

Why does any of this matter? Because it mattered in *Johnson*. More precisely, the expansive language in the ACCA residual clause contributed to our determination that the clause gave rise to "grave uncertainty about how to estimate the risk posed by a crime." 576 U. S., at ___ (slip op., at 5). "Critically," we said--a word that tends to mean something--"*picturing the criminal's behavior is not enough*." *Ibid.* (emphasis added). Instead, measuring "potential risk" "seemingly require[d] the judge to imagine how the idealized ordinary case of the crime *subsequently plays out*." *Ibid.* (emphasis added). Not so here. In applying §16(b), considering "the criminal's behavior" *is* enough.

Those three distinctions--the unadorned reference to "risk," the focus on the offender's own active employment of force, and the "in the course of committing" limitation--also mean that many hard cases under ACCA are easier under §16(b). Take the firearm possession crime from *Johnson* itself, which had as its constituent elements (1) unlawfully (2) possessing (3) a short-barreled shotgun. None of those elements, "by its nature," carries "a substantial risk" that the possessor will use force against another "in the course of committing the offense." Nothing inherent in the act of firearm possession, even when it is unlawful, gives rise to a substantial risk that the owner will then shoot someone. See *United States* v. *Serafin*, 562 F. 3d 1105, 1113 (CA10 2009) (recognizing that "*Leocal* instructs [a court] to focus not on whether possession will likely *result* in violence, but instead whether one possessing an unregistered weapon necessarily risks the need to employ force to commit possession").[2] Yet short-barreled shotgun possession presented a closer question under the ACCA residual clause, because the "serious potential risk" language seemingly directed us to consider "the circumstances and conduct that ordinarily attend the offense," in addition to the offense itself. *Johnson*, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 17); see *id.,* at ___-___ (slip op., at 19-20) (reasoning that the crime must qualify because "a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is [likely] to use that weapon in violent ways").

Failure to report to a penal institution, the subject of *Chambers* v. *United States*, 555 U. S. 122 (2009), is another crime "whose treatment becomes more obvious under §16(b) than under ACCA," *ante,* at 18. In *Chambers*, the Government argued that the requisite risk of injury arises not necessarily at the time the offender fails to report to prison, but instead later, when an officer attempts to recapture the fugitive. 555 U. S., at 128. The majority is correct that we ultimately "reject[ed]" the Government's contention. *Ante,* at 18. But we did so after "assum[ing] for argument's sake" its premise--that is, "the relevance of violence that may occur long after an offender fails to report." 555 U. S., at 128; see *id.,* at 129 (looking at 160 cases of "failure to report" and observing that "none at all involved violence . . . during the commission of the offense itself, [nor] during the offender's later apprehension"). The "in the course of committing the offense" language in §16(b) helpfully forecloses that debate.

DUI offenses are yet another example. Because §16(b) asks about the risk that the offender will "use[ ]" "physical force," we readily concluded in *Leocal* that the subsection does not cover offenses where the danger arises from the offender's negligent or accidental conduct, including drunk driving. 543 U. S., at 11. Applying the ACCA residual clause proved more trying. When asked to decide whether the clause covered drunk driving offenses, a majority of the Court concluded that the answer was no. *Begay* v. *United States*, 553 U. S. 137 (2008). Our decision was based, however, on the inference that the clause must cover only "purposeful, 'violent,' and 'aggressive' conduct"--a test derived not from the "conduct that presents a serious potential risk of physical injury" language, but instead by reference to (what we guessed to be) the unifying characteristics of the enumerated offenses. *Id.,* at 144-145. Four Members of the Court criticized that test, see *id.,* at 150-153 (Scalia, J., concurring in judgment); *id.,* at 158-160, 162-163 (ALITO, J., dissenting), though they themselves disagreed about whether DUIs were covered, see *id.,* at 153-154 (opinion of Scalia, J.); *id.,* at 156-158 (opinion of ALITO, J.). And the Court distanced itself from the *Begay* requirement only a few years later when confronting the crime of vehicular flight. See *Sykes*, 564 U. S., at 12-13; *Johnson*, 576 U. S., at ___-___ (slip op., at 8-9).

Which brings me to the second part of the Court's analysis: its objection that §16(b), like the ACCA residual clause, leaves "uncertainty about the level of risk that makes a crime 'violent.' " *Ante,* at 10. The "substantial risk" standard in §16(b) is significantly less confusing because it is not tied to a disjointed list of paradigm offenses. Recall that the ACCA provision defined a "violent felony" to include a crime that "is burglary, arson, or extortion, involves use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another." 18 U. S. C. §924(e)(2)(B)(ii) (emphasis added). As our Court recognized early on, that "otherwise" told the reader to understand the "serious potential risk of physical injury" standard by way of the four enumerated crimes. *James*, 550 U. S., at 203. But how, exactly? That question dogged our residual clause cases for years, until we said *no más* in *Johnson*.

In our first foray, *James*, we resolved the case by asking whether the risk posed by the crime of attempted burglary was "comparable to that posed by its closest analog among the enumerated offenses," which was completed burglary. 550 U. S., at 203. While that rule "[took] care of attempted burglary," it "offer[ed] no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes." *Johnson*, 576 U. S., at ___ (slip op., at 7). The *James* dissent, for its part, would have determined the requisite degree of risk from the least dangerous of the enumerated crimes, and compared the offense to that. 550 U. S*.,* at 218-219 (opinion of Scalia, J.). But that approach also proved to be harder than it sounded. See *id.,* at 219-227.

After *James* came *Begay*, in which we concluded that the enumerated offenses served as an independent limitation on the *kind* of crime that could qualify. 553 U. S., at 142; see *Chambers*, 555 U. S., at 128 (applying the *Begay* standard). As discussed, that test was short lived (though we did not purport to wholly repudiate it). See *Sykes*, 564 U. S., at 13. Finally, in *Sykes*--our penultimate residual clause case--we acknowledged the prior use of the closest-analog test in *James*, but instead focused on whether the risk posed by vehicular flight was "similar in degree of danger" to the listed offenses of arson and burglary. 564 U. S., at 8-10. As a result, Justice Scalia's dissent characterized the *Sykes* majority as applying the test from his prior dissent in *James*, not *James* itself. See 564 U. S., at 29-30, 33. This series of precedents laid bare our "repeated inability to craft a principled test out of the statutory text," *id.*, at 34 (opinion of Scalia, J.), as the Court ultimately acknowledged in *Johnson*, 576 U. S., at ___ (slip op., at 7).

The enumerated offenses, and our Court's failed attempts to make sense of them, were essential to *Johnson*'s conclusion that the residual clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.,* at ___ (slip op., at 6). As *Johnson* explained, the issue was not that the statute employed a fuzzy standard. That kind of thing appears in the statute books all the time. *Id.,* at ___, ___ (slip op., at 6, 12). In the majority's retelling today, the difficulty inhered solely in the fact that the statute paired such a standard with the ordinary case inquiry. See *ante,* at 8, 10-11, 21. But that account sidesteps much of *Johnson*'s reasoning. See 576 U. S*.,* at ___-___, ___, ___-___, ___ (slip op., at 4-5, 6, 7-9, 12). Our opinion emphasized that the word "otherwise" "force[d]" courts to interpret the amorphous standard "in light of" the four enumerated crimes, which are "not much more similar to one another in kind than in degree of risk posed." *Id.,* at ___, ___ (slip op., at 6, 8). Or, as *Johnson* put it more vividly, "[t]he phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *Id.,* at ___ (slip op., at 12). Indeed, the author of *Johnson* had previously, and repeatedly, described this feature of the residual clause as the "crucial . . . respect" in which the law was problematic. See *James*, 550 U. S., at 230, n. 7 (opinion of Scalia, J.); *Sykes*, 564 U. S., at 35 (opinion of Scalia, J.).

With §16(b), by contrast, a court need simply consider the meaning of the word "substantial"--a word our Court has interpreted and applied innumerable times across a wide variety of contexts.[3] The court does not need to give that familiar word content by reference to four different offenses with varying amounts and kinds of risk.

In its effort to recast a considerable portion of *Johnson* as dicta, the majority speculates that if the enumerated offenses had truly mattered to the outcome, the Court would have told lower courts to "give up on trying to interpret the clause by reference to" those offenses, rather than striking down the provision entirely. *Ante,* at 21. No litigant in *Johnson* suggested that solution, which is not surprising. Such judicial redrafting could have expanded the reach of the criminal provision--surely a job for Congress alone.

In any event, I doubt the majority's proposal would have done the trick. And that is because the result in *Johnson* did not follow from the presence of one frustrating textual feature or another. Quite the opposite: The decision emphasized that it was the "sum" of the "uncertainties" in the ACCA residual clause, confirmed by years of experience, that "convince[d]" us the provision was beyond salvage. *Johnson*, 576 U. S., at ___ (slip op., at 10). Those failings do not characterize the provision at issue here.

III

The more constrained inquiry required under §16(b)--which asks only whether the offense elements naturally carry with them a risk that the offender will use force in committing the offense--does not itself engender "grave uncertainty about how to estimate the risk posed by a crime." And the provision's use of a commonplace substantial risk standard--one not tied to a list of crimes that lack a unifying feature--does not give rise to intolerable "uncertainty about how much risk it takes for a crime to qualify." That should be enough to reject Dimaya's facial vagueness challenge.[4]

Because I would rely on those distinctions to uphold §16(b), the Court reproaches me for not giving sufficient weight to a "core insight" of *Johnson*. *Ante,* at 10, n. 4; see *ante,* at 15 (opinion of GORSUCH, J.) (arguing that §16(b) runs afoul of *Johnson* "to the extent [§16(b)] requires an 'ordinary case' analysis"). But the fact that the ACCA residual clause required the ordinary case approach was not itself sufficient to doom the law. We instead took pains to clarify that our opinion should not be read to impart such an absolute rule. See *Johnson*, 576 U. S., at ___ (slip op., at 10). I would adhere to that careful holding and not reflexively extend the decision to a different statute whose reach is, on the whole, far more clear.

The Court does the opposite, and the ramifications of that decision are significant. First, of course, today's holding invalidates a provision of the Immigration and Nationality Act--part of the definition of "aggravated felony"--on which the Government relies to "ensure that dangerous criminal aliens are removed from the United States." Brief for United States 54. Contrary to the Court's back-of-the-envelope assessment, see *ante,* at 23, n. 12, the Government explains that the definition is "critical" for "numerous" immigration provisions. Brief for United States 12.

In addition, §16 serves as the universal definition of "crime of violence" for all of Title 18 of the United States Code. Its language is incorporated into many procedural and substantive provisions of criminal law, including provisions concerning racketeering, money laundering, domestic violence, using a child to commit a violent crime, and distributing information about the making or use of explosives. See 18 U. S. C. §§25(a)(1), 842(p)(2), 1952(a), 1956(c)(7)(B)(ii), 1959(a)(4), 2261(a), 3561(b). Of special concern, §16 is replicated in the definition of "crime of violence" applicable to §924(c), which prohibits using or carrying a firearm "during and in relation to any crime of violence," or possessing a firearm "in furtherance of any such crime." §§924(c)(1)(A), (c)(3). Though I express no view on whether §924(c) can be distinguished from the provision we consider here, the Court's holding calls into question convictions under what the Government warns us is an "oft-prosecuted offense." Brief for United States 12.

Because *Johnson* does not compel today's result, I respectfully dissent.

THOMAS, J., dissenting

584 U. S. ____ (2018)

No. 15-1498

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL, PETITIONER *v.* JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 17, 2018]

JUSTICE THOMAS, with whom JUSTICE KENNEDY and JUSTICE ALITO join as to Parts I-C-2, II-A-1, and II-B, dissenting.

I agree with THE CHIEF JUSTICE that 18 U. S. C. §16(b), as incorporated by the Immigration and Nationality Act (INA), is not unconstitutionally vague. Section 16(b) lacks many of the features that caused this Court to invalidate the residual clause of the Armed Career Criminal Act (ACCA) in *Johnson* v. *United States*, 576 U. S. ___ (2015). ACCA's residual clause--a provision that this Court had applied four times before *Johnson*--was not unconstitutionally vague either. See *id.,* at ___ (THOMAS, J., concurring in judgment) (slip op., at 1); *id.,* at ___-___ (ALITO, J., dissenting) (slip op., at 13-17). But if the Court insists on adhering to *Johnson*, it should at least take *Johnson* at its word that the residual clause was vague due to the " 'sum' " of its specific features. *Id.,* at ___ (majority opinion) (slip op., at 10). By ignoring this limitation, the Court jettisons *Johnson*'s assurance that its holding would not jeopardize "dozens of federal and state criminal laws." *Id.,* at ___ (slip op., at 12).

While THE CHIEF JUSTICE persuasively explains why respondent cannot prevail under our precedents, I write separately to make two additional points. First, I continue to doubt that our practice of striking down statutes as unconstitutionally vague is consistent with the original meaning of the Due Process Clause. See *id.,* at ___-___ (opinion of THOMAS, J.) (slip op., at 7-18). Second, if the Court thinks that §16(b) is unconstitutionally vague because of the "categorical approach," see *ante*, at 6-11, then the Court should abandon that approach--not insist on reading it into statutes and then strike them down. Accordingly, I respectfully dissent.

I

I continue to harbor doubts about whether the vagueness doctrine can be squared with the original meaning of the Due Process Clause--and those doubts are only amplified in the removal context. I am also skeptical that the vagueness doctrine can be justified as a way to prevent delegations of core legislative power in this context. But I need not resolve these questions because, if the vagueness doctrine has any basis in the Due Process Clause, it must be limited to cases in which the statute is unconstitutionally vague as applied to the person challenging it. That is not the case for respondent, whose prior convictions for first-degree residential burglary in California fall comfortably within the scope of §16(b).

A

The Fifth Amendment's Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." Section 16(b), as incorpo-rated by the INA, cannot violate this Clause unless the following propositions are true: The Due Process Clause requires federal statutes to provide certain minimal procedures, the vagueness doctrine is one of those procedures, and the vagueness doctrine applies to statutes governing the removal of aliens. Although I need not resolve any of these propositions today, each one is questionable. I will address them in turn.

1

First, the vagueness doctrine is not legitimate unless the "law of the land" view of due process is incorrect. Under that view, due process "require[s] only that our Government . . . proceed . . . according to written constitutional and statutory provision[s] before depriving someone of life, liberty, or property." *Nelson* v. *Colorado*, 581 U. S. ___, ___, n. 1 (2017) (THOMAS, J., dissenting) (slip op., at 2, n. 1) (internal quotation marks omitted). More than a half century after the founding, the Court rejected this view of due process in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). See *id.,* at 276 (holding that the Due Process Clause "is a restraint on the legislative as well as on the executive and judicial powers of the government"). But the textual and historical support for the law-of-the-land view is not insubstantial.[1]

2

Even under *Murray's Lessee*, the vagueness doctrine is legitimate only if it is a "settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors." *Id.*, at 277. That proposition is dubious. Until the end of the 19th century, "there is little indication that anyone . . . believed that courts had the power under the Due Process Claus[e] to nullify statutes on [vagueness] ground[s]." *Johnson*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at

11). That is not because Americans were unfamiliar with vague laws. Rather, early American courts, like their English predecessors, addressed vague laws through statutory construction instead of constitutional law. See Note, Void for Vagueness: An Escape From Statutory Interpretation, 23 Ind. L. J. 272, 274-279 (1948). They invoked the rule of lenity and declined to apply vague penal statutes on a case-by-case basis. See *Johnson*, 576 U. S., at ___-___ (opinion of THOMAS, J.) (slip op., at 7-10); *e.g., ante,* at 5-6, and n. 1 (GORSUCH, J., concurring in part and concurring in judgment) (collecting cases).[2] The modern vagueness doctrine, which claims the judicial authority to "strike down" vague legislation on its face, did not emerge until the turn of the 20th century. See *Johnson*, 576 U. S., at ___-___ (opinion of THOMAS, J.) (slip op., at 11-13).

The difference between the traditional rule of lenity and

the modern vagueness doctrine is not merely semantic. Most obviously, lenity is a tool of statutory construction, which means States can abrogate it--and many have. Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 752-754 (1935); see also Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 583 (1989) ("Arizona, by the way, seems to have preserved a fair and free society without adopting the rule that criminal statutes are to be strictly construed" (citing Ariz. Rev. Stat. §1-211C (1989))). The vagueness doctrine, by contrast, is a rule of constitutional law that States cannot alter or abolish. Lenity, moreover, applies only to "penal" statutes, 1 Blackstone, Commentaries on the Laws of England 88 (1765), but the vagueness doctrine extends to all regulations of individual conduct, both penal and nonpenal, *Johnson*, 576 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 6); see also Note, Indefinite Criteria of Definiteness in Statutes, 45 Harv. L. Rev. 160, 163 (1931) (explaining that the modern vagueness doctrine was not merely an "extension of the rule of strict construction of penal statutes" because it "expressly include[s] civil statutes within its scope," reflecting a "regrettable disregard" for legislatures).[3] In short, early American courts were not applying the modern vagueness doctrine by another name. They were engaged in a fundamentally different enterprise.

Tellingly, the modern vagueness doctrine emerged at a time when this Court was actively interpreting the Due

Process Clause to strike down democratically enacted laws--first in the name of the "liberty of contract," then in the name of the "right to privacy." See *Johnson*, 576 U. S., at ___-___ (opinion of THOMAS, J.) (slip op., at 13-16). That the vagueness doctrine "develop[ed] on the federal level concurrently with the growth of the tool of substantive due process" does not seem like a coincidence. Note, 23 Ind. L. J., at 278. Like substantive due process, the vagueness doctrine provides courts with "open-ended authority to oversee [legislative] choices." *Kolender* v. *Lawson*, 461 U. S. 352, 374 (1983) (White, J., dissenting). This Court, for example, has used the vagueness doctrine to invalidate antiloitering laws, even though those laws predate the Declaration of Independence. See *Johnson*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 7) (discussing *Chicago* v. *Morales*, 527 U. S. 41 (1999)).

This Court also has a bad habit of invoking the Due Process Clause to constitutionalize rules that were traditionally left to the democratic process. See, *e.g., Williams* v. *Pennsylvania*, 579 U. S. ___ (2016); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996); *Foucha* v. *Louisiana*, 504 U. S. 71 (1992); cf. *Montgomery* v. *Louisiana*, 577 U. S. ___ (2016). If vagueness is another example of this practice, then that is all the more reason to doubt its legitimacy.

3

Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens. Cf. *Johnson*, 576 U. S., at ___, n. 7 (opinion of THOMAS, J.) (slip op., at 17, n. 7) (stressing the need for specificity when assessing alleged due process rights). The Founders were familiar with English law, where " 'the only question that ha[d] ever been made in regard to the power to expel aliens [was] whether it could be exercised by the King without the consent of Parliament.' " *Demore* v. *Kim*, 538 U. S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in judgment) (quoting *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709 (1893)). And, in this country, the notion that the Due Process Clause governed the removal of aliens was not announced until the 20th century.

Less than a decade after the ratification of the Bill of Rights, the founding generation had an extensive debate about the relationship between the Constitution and federal removal statutes. In 1798, the Fifth Congress enacted the Alien Acts. One of those Acts, the Alien Friends Act, gave the President unfettered discretion to expel any aliens "he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof." An Act Concerning Aliens §1, 1 Stat. 571. This statute was modeled after the Aliens Act 1793 in England, which similarly gave the King unfettered discretion to expel aliens as he "shall think necessary for the publick Security." 33 Geo. III, ch. 4, §18, in 39 Eng. Stat. at Large 16. Both the Fifth Congress and the States thoroughly debated the Alien Friends Act. Virginia and Kentucky enacted resolutions (anonymously drafted by Madison and Jefferson) opposing the Act, while 10 States enacted counter-resolutions condemning the views of Virginia and Kentucky. See Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 85, 103 (2002).

The Jeffersonian Democratic-Republicans, who viewed the Alien Friends Act as a threat to their party and the institution of slavery,[4] raised a number of constitutional objections. Some of the Jeffersonians argued that the Alien Friends Act violated the Fifth Amendment's Due Process Clause. They complained that the Act failed to provide aliens with all the accouterments of a criminal trial. See, *e.g.,* Kentucky Resolutions ¶6, in 4 The Debates in the Several Conventions on the Adoption of the Federal Constitution 541-542 (J. Elliot ed. 1836) (Elliot's Debates); 8 Annals of Cong. 1982-1983 (1798) (statement of Rep. Gallatin); Madison's Report on the Virginia Resolutions (Jan. 7, 1800), in 6 Writings of James Madison 361-362 (G. Hunt ed. 1906) (Madison's Report).[5]

The Federalists gave two primary responses to this due process argument. First, the Federalists argued that the rights of aliens were governed by the law of nations, not the Constitution. See, *e.g.,* Randolph, Debate on Virginia Resolutions, in The Virginia Report of 1799-1800, pp. 34-35 (1850) (Virginia Debates) (statement of George K. Taylor) (arguing that aliens "were not a party to the [Constitution]" and that "cases between the government and aliens . . . arise under the law of nations"); *id.*, at 100 (statement of William Cowan) (identifying the source of rights "as to citizens, the Constitution; as to aliens, the law of nations"); A. Addison, A Charge to the Grand Juries of the County Courts of the Fifth Circuit of the State of Pennsylvania 18 (1799) (Charge to the Grand Juries) ("[T]he Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations"); Answer to the Resolutions of the State of Kentucky, Oct. 29, 1799, in 4 Records of the Governor and Council of the State of Vermont 528 (1876) (denying "that aliens had any rights among us, except what they derived from the law of nations, and rights of hospitality"). The law of nations imposed no enforceable limits on a nation's power to remove aliens. See, *e.g.,* 1 E. de Vattel, Law of Nations, §§230-231, pp. 108-109 (J. Chitty et al. transl. and ed. 1883).

Second, the Federalists responded that the expulsion of aliens "did not touch life, liberty, or property." Virginia Debates 34. The founding generation understood the phrase "life, liberty, or property" to refer to a relatively narrow set of core private rights that did not depend on the will of the government. See *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U. S. ___, ___-___ (2015) (THOMAS, J., dissenting) (slip op., at 9-10); Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 566-568 (2007) (Nelson). Quasi-private rights--"privileges" or "franchises" bestowed by the government on individuals--did not qualify and could be taken away without judicial process. See *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. ___, ___ (2015) (THOMAS, J., dissenting) (slip op., at 12); Nelson 567-569. The Federalists argued that an alien's right to reside in this country was one such privilege. See, *e.g.*, Virginia Debates 34 (arguing that "ordering away an alien . . . was not a matter of right, but of favour," which did not require a jury trial); Report of the Select Committee of the House of Representatives, Made to the House of Representatives on Feb. 21, 1799, 9 Annals of Cong. 2987 (1799) (stating that aliens "remain in the country . . . merely as matter of favor and permission" and can be removed at any time without a criminal trial); Charge to the Grand Juries 11-13 (similar). According to the Minority Address of the Virginia Legislature (anonymously drafted by John Marshall), "[T]he right of remaining in our country is vested in no alien; he enters and remains by the courtesy of the sovereign power, and that courtesy may at pleasure be withdrawn" without judicial process. Address of the Minority in the Virginia Legislature to the People of that State 9-10 (1799) (Virginia Minority Address). Unlike "a grant of land," the "[a]dmission of an alien to residence . . . is revocable, like a permission." A. Addison, Analysis of the Report of the Committee of the Virginia Assembly 23 (1800). Removing a resident alien from the country did not affect "life, liberty, or property," the Federalists argued, until the alien became a naturalized citizen. See *id.*, at 23-24; Charge to the Grand Juries 11-13. That the alien's permanent residence was conferred by statute would not have made a difference. See Nelson 571, 580-582; *Teva Pharmaceuticals USA, Inc.* v. *Sandoz, Inc.*, 574 U. S. ___, ___, n. 2 (2015) (THOMAS, J., dissenting) (slip op., at 9, n. 2).

After the Alien Friends Act lapsed in 1800, Congress did not enact another removal statute for nearly a century. The States enacted their own removal statutes during this period, see G. Neuman, Strangers to the Constitution 19-43 (1996), and I am aware of no decision questioning the legality of these statutes under State due-process or law-of-the-land provisions. Beginning in the late 19th century, the Federal Government reinserted itself into the regulation of immigration. When this Court was presented with constitutional challenges to Congress' removal laws, it initially rejected them for many of the same reasons that Marshall and the Federalists had cited in defense of the Alien Friends Act. Although the Court rejected the Federalists' argument that resident aliens do not enjoy constitutional rights, see *Wong Wing* v. *United States*, 163 U. S. 228, 238 (1896), it agreed that civil deportation statutes do not implicate "life, liberty, or property," see, *e.g., Harisi- ades* v. *Shaughnessy*, 342 U. S. 580, 584-585 (1952) ("[T]hat admission for permanent residence confers a 'vested right' on the alien [is] not founded in precedents of this Court"); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 290 (1904) ("[T]he deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law"); *Fong Yue Ting*, 149 U. S., at 730 ("[Deportation] is but a method of enforcing the return to his own country of an alien who has not complied with [statutory] conditions . . . . He has not, therefore, been deprived of life, liberty, or property without due process of law"); *id.,* at 713-715 (similar). Consistent with this understanding, "federal immigration laws from 1891 until 1952 made no express provision for judicial review." *Demore*, 538 U. S., at 538 (opinion of O'Connor, J.).

It was not until the 20th century that this Court held that nonpenal removal statutes could violate the Due Process Clause. See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49 (1950). That ruling opened the door for the Court to apply the then-nascent vagueness doctrine to immigration statutes. But the Court upheld vague standards in immigration laws that it likely would not have tolerated in criminal statutes. See, *e.g., Boutilier* v. *INS*, 387 U. S. 118, 122 (1967) (" 'psychopathic personality' "); *Jordan* v. *De George*, 341 U. S. 223, 232 (1951) (" 'crime involving moral turpitude' "); cf. *Mahler*, *supra*, at 40 (" 'undesirable residents' "). Until today, this Court has never held that an immigration statute is unconstitutionally vague.

Thus, for more than a century after the founding, it was, at best, unclear whether federal removal statutes could violate the Due Process Clause. And until today, this Court had never deemed a federal removal statute void for vagueness. Given this history, it is difficult to conclude that a ban on vague removal statutes is a "settled usag[e] and mod[e] of proceeding existing in the common and statute law of England, before the emigration of our ancestors" protected by the Fifth Amendment's Due Process Clause. *Murray's Lessee*, 18 How., at 277.

B

Instead of a longstanding procedure under *Murray's Lessee*, perhaps the vagueness doctrine is really a way to enforce the separation of powers--specifically, the doctrine of nondelegation. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1806 (2012) ("Vague statutes have the effect of delegating lawmaking authority to the executive"). Madison raised a similar objection to the Alien Friends Act, arguing that its expansive language effectively allowed the President to exercise legislative (and judicial) power. See Madison's Report 369-371. And this Court's precedents have occasionally described the vagueness doctrine in terms of nondelegation. See, *e.g., Grayned* v. *City of Rockford*, 408 U. S. 104, 108-109 (1972) ("A vague law impermissibly delegates basic policy matters"). But they have not been consistent on this front. See, *e.g., Aptheker* v. *Secretary of State*, 378 U. S. 500, 516 (1964) (" 'The objectionable quality of vagueness . . . does not depend upon . . . unchanneled delegation of legislative powers' "); *Maynard* v. *Cartwright*, 486 U. S. 356, 361 (1988) ("Objections to vagueness under the Due Process Clause rest on the lack of notice").

I agree that the Constitution prohibits Congress from delegating core legislative power to another branch. See *Department of Transportation* v. *Association of American Railroads*, 575 U. S. ___, ___ (2015) (*AAR*) (THOMAS, J., concurring in judgment) (slip op., at 3) ("Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power"); accord, *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 487 (2001) (THOMAS, J., concurring). But I locate that principle in the Vesting Clauses of Articles I, II, and III--not in the Due Process Clause. *AAR, supra*, at ___-___ (opinion of THOMAS, J.) (slip op., at 2-3); see also *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 123 (1976) (Rehnquist, J., dissenting) ("[T]hat there was an improper delegation of authority . . . has not previously been thought to depend upon the procedural requirements of the Due Process Clause"). In my view, impermissible delegations of legislative power violate this principle, not just delegations that deprive individuals of "life, liberty, or property," Amdt. 5.

Respondent does not argue that §16(b), as incorporated by the INA, is an impermissible delegation of power. See Brief for Respondent 50 (stating that "there is no delegation question" in this case). I would not reach that question here, because this case can be resolved on narrower grounds. See Part I-C, *infra*. But at first blush, it is not at all obvious that the nondelegation doctrine would justify wholesale invalidation of §16(b).

If §16(b) delegates power in this context, it delegates power primarily to the Executive Branch entities that administer the INA--namely, the Attorney General, immigration judges, and the Board of Immigration Appeals (BIA). But Congress does not "delegate" when it merely authorizes the Executive Branch to exercise a power that it already has. See *AAR*, *supra*, at ___ (opinion of THOMAS, J.) (slip op., at 3). And there is some founding-era evidence that "the executive Power," Art. II, §1, includes the power to deport aliens.

Blackstone--one of the political philosophers whose writings on executive power were "most familiar to the Framers," Prakash & Ramsey, The Executive Power Over Foreign Affairs, 111 Yale L. J. 231, 253 (2001)--described the power to deport aliens as executive and located it with the King. Alien friends, Blackstone explained, are "liable to be sent home whenever the king sees occasion." 1 Commentaries on the Laws of England 252 (1765). When our Constitution was ratified, moreover, "[e]minent English judges, sitting in the Judicial Committee of the Privy Council, ha[d] gone very far in supporting the . . .

expulsion, by the executive authority of a colony, of aliens." *Demore*, 538 U. S., at 538 (opinion of O'Connor, J.) (quoting *Fong Yue Ting*, 149 U. S., at 709). Some of the Federalists defending the Alien Friends Act similarly argued that the President had the power to remove aliens. See, *e.g.,* Virginia Debates 35 (statement of George K. Taylor) (arguing that the power to remove aliens is "most properly entrusted" with the President, since "[h]e, by the Constitution, was bound to execute the laws" and is "the executive officer, with whom all persons and bodies whatever were accustomed to communicate"); Virginia Minority Address 9 (arguing that the removal of aliens "is a measure of general safety, in its nature political and not forensic, the execution of which is properly trusted to the department which represents the nation in all its interior relations"); Charge to the Grand Juries 29-30 ("As a measure of national defence, this discretion, of expulsion or indulgence, seems properly vested in the branch of the government peculiarly charged with the direction of the executive powers, and of our foreign relations. There is in it a mixture of external policy, and of the law of nations, that justifies this disposition"). More recently, this Court recognized that " [r]emoval decisions" implicate "our customary policy of deference to the President in matters of foreign affairs" because they touch on "our relations with foreign powers and require consideration of changing political and economic circumstances." *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 348 (2005) (internal quotation marks omitted). Taken together, this evidence makes it difficult to confidently conclude that the INA, through §16(b), delegates core legislative power to the Executive.

Instead of the Executive, perhaps §16(b) impermissibly delegates power to the Judiciary, since the Courts of Appeals often review the BIA's application of §16(b). I assume that, at some point, a statute could be so devoid of content that a court tasked with interpreting it "would simply be making up a law--that is, exercising legislative power." Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 339 (2002); see *id.,* at 339-340 (providing examples such as a gibberish-filled statute or a statute that requires " 'goodness and niceness' "). But I am not confident that our modern vagueness doctrine--which focuses on whether regulations of individual conduct provide "fair warning," are "clearly defined," and do not encourage "arbitrary and discriminatory enforcement," *Grayned*, 408 U. S., at 108; *Kolender*, 461 U. S., at 357--accurately demarcates the line between legislative and judicial power. The Founders understood that the interpretation of legal texts, even vague ones, remained an exercise of core judicial power. See *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. ___, ___-___ (2015) (THOMAS, J., concurring in judgment) (slip op., at 8-9); Hamburger, The Constitution's Accommodation of Social Change, 88 Mich. L. Rev. 239, 303-310 (1989). Courts were expected to clarify the meaning of such texts over time as they applied their terms to specific cases. See *id.,* at 309-310; Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 526 (2003). Although early American courts declined to apply vague or unintelligible statutes as appropriate in individual cases, they did not wholesale invalidate them as unconstitutional delegations of legislative power. See *Johnson*, 576 U. S., at ___-___, and n. 3 (opinion of THOMAS, J.) (slip op., at 10-11, and n. 3).

C

1

I need not resolve these historical questions today, as this case can be decided on narrower grounds. If the vagueness doctrine has any basis in the original meaning of the Due Process Clause, it must be limited to case-by-case challenges to particular applications of a statute. That is what early American courts did when they applied the rule of lenity. See *id.*, at ___ (slip op., at 10). And that is how early American courts addressed constitutional challenges to statutes more generally. See *ibid.* ("[T]here is good evidence that [antebellum] courts . . . understood judicial review to consist 'of a refusal to give a statute effect as operative law in resolving a case,' a notion quite distinct from our modern practice of ' "strik[ing] down" legislation' " (quoting Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 756 (2010)).

2

This Court's precedents likewise recognize that, outside the First Amendment context, a challenger must prove that the statute is vague as applied to him. See *Holder* v. *Humanitarian Law Project*, 561 U. S. 1, 18-19 (2010); *United States* v. *Williams*, 553 U. S. 285, 304 (2008); *Maynard*, 486 U. S., at 361; *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495, and n. 7 (1982) (collecting cases). *Johnson* did not overrule these precedents. While *Johnson* weakened the principle that a facial challenge requires a statute to be vague "in *all* applications," 576 U. S., at ___ (slip op., at 11) (emphasis added), it did not address whether a statute must be vague as applied to the person challenging it. That question did not arise because the Court concluded that ACCA's residual clause was vague as applied to the crime at issue there: unlawful possession of a short-barreled shotgun. See *id.,* at ___ (slip op., at 9).

In my view, §16(b) is not vague as applied to respondent. When respondent committed his burglaries in 2007 and 2009, he was "sufficiently forewarned . . . that the statutory consequence . . . is deportation." *De George*, 341 U. S., at 232. At the time, courts had "unanimous[ly]" concluded that residential burglary is a crime of violence, and not "a single opinion . . . ha[d] held that [it] is *not*." *United States* v. *M. C. E.*, 232 F. 3d 1252, 1255-1256 (CA9 2000); see also *United States* v. *Davis*, 881 F. 2d 973, 976 (CA11 1989) (explaining that treating residential burglary as a crime of violence was "[i]n accord with common law tradition and the settled law of the federal circuits"). Residential burglary "ha[d] been considered a violent offense for hundreds of years . . . because of the potential for mayhem if burglar encounters resident." *United States* v. *Pinto*, 875 F. 2d 143, 144 (CA7 1989). The Model Penal Code had recognized that risk, see ALI, Model Penal Code §221.1, Comment 3(c), p. 75 (1980); the Sentencing Commission had recognized that risk; see United States Sentencing Commission, Guidelines Manual §4B1.2(a)(2) (Nov. 2006); and this Court had repeatedly recognized that risk, see, *e.g., James* v. *United States*, 550 U. S. 192, 203 (2007); *Taylor* v. *United States*, 495 U. S. 575, 588 (1990). In *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004), this Court unanimously agreed that burglary is the "classic example" of a crime of violence under §16(b), because it "involves a substantial risk that the burglar will use force against a victim in completing the crime." *Id.*, at 10.

That same risk is present with respect to respondent's statute of conviction--first-degree residential burglary, Cal. Penal Code Ann. §§459, 460(a) (West 1999). The California Supreme Court has explained that the State's burglary laws recognize "the dangers to personal safety created by the *usual* burglary situation." *People* v. *Davis*, 18 Cal. 4th 712, 721, 958 P. 2d 1083, 1089 (1998) (emphasis added). " '[T]he fact that a building is used as a home . . . increases such danger,' " which is why California elevates residential burglary to a first-degree offense. *People* v. *Rodriguez*, 122 Cal. App. 4th 121, 133, 18 Cal. Rptr. 3d 550, 558 (2004); see also *People* v. *Wilson*, 208 Cal. App. 3d 611, 615, 256 Cal. Rptr. 422, 425 (1989) ("[T]he higher degree . . . is intended to prevent those situations which are most dangerous, most likely to cause personal injury" (emphasis deleted)). Although unlawful entry is not an element of the offense, courts "unanimous[ly]" agree that the offense still involves a substantial risk of physical force. *United States* v. *Avila*, 770 F. 3d 1100, 1106 (CA4 2014); accord, *United States* v. *Maldonado*, 696 F. 3d 1095, 1102, 1104 (CA10 2012); *United States* v. *Scanlan*, 667 F. 3d 896, 900 (CA7 2012); *United States* v. *Echeverria-Gomez*, 627 F. 3d 971, 976 (CA5 2010); *United States* v. *Becker*, 919 F. 2d 568, 573 (CA9 1990). First-degree residential burglary requires entry into an inhabited dwelling, with the intent to commit a felony, against the will of the homeowner--the key elements that create the risk of violence. See *United States* v. *Park*, 649 F. 3d 1175, 1178-1180 (CA9 2011); *Avila*, *supra*, at 1106-1107; *Becker*, *supra*, at 571, n. 5. As this Court has explained, "[t]he main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party." *James*, *supra*, at 203.

Drawing on *Johnson* and the decision below, the Court suggests that residential burglary might not be a crime of violence because " 'only about seven percent of burglaries actually involve violence.' " *Ante,* at 9, n. 3 (citing *Dimaya* v. *Lynch*, 803 F. 3d 1110, 1116, n. 7 (CA9 2015)); see Bureau of Justice Statistics, S. Catalano, National Crime Victimization Survey: Victimization During Household Burglary 1 (Sept. 2010), https://www.bjs.gov/content/pub/ pdf/vdhb.pdf (as last visited Apr. 13, 2018). But this statistic--which measures actual violence against a member of the household, see *id.,* at 1, 12--is woefully underinclusive. It excludes other potential victims besides household members--for example, "a police officer, or a bystande[r] who comes to investigate," *James*, *supra*, at 203. And §16(b) requires only a risk of physical force, not actual physical force, and that risk would seem to be present whenever someone is home during the burglary. Further, *Johnson* is not conclusive because, unlike ACCA's residual clause, §16(b) covers offenses that involve a substantial risk of physical force "against the person *or property* of another." (Emphasis added.) Surely the ordinary case of residential burglary involves at least one of these risks. According to the statistics referenced by the Court, most burglaries involve either a forcible entry (*e.g.,* breaking a window or slashing a door screen), an attempted forcible entry, or an unlawful entry when someone is home. See Bureau of Justice Statistics, *supra,* at 2 (Table 1). Thus, under any metric, respondent's convictions for first-degree residential burglary are crimes of violence under §16(b).

3

Finally, if facial vagueness challenges are ever appropriate, I adhere to my view that a law is not facially vague " '[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law.' " *Morales*, 527 U. S., at 112 (THOMAS, J., dissenting) (quoting *Kolender*, 461 U. S., at 370-371 (White, J., dissenting)). The residual clause of ACCA had such a core. See *Johnson*, 576 U. S., at ___ (slip op., at 10); *id.,* at ___-___ (ALITO, J., dissenting) (slip op., at 14-15). And §16(b) has an even wider core, as THE CHIEF JUSTICE explains. Thus, the Court should not have invalidated §16(b), either on its face or as applied to respondent.

II

Even taking the vagueness doctrine and *Johnson* at face value, I disagree with the Court's decision to invalidate §16(b). The sole reason that the Court deems §16(b) unconstitutionally vague is because it reads the statute as incorporating the categorical approach--specifically, the "ordinary case" approach from ACCA's residual clause. Although the Court mentions "[t]wo features" of §16(b) that make it vague--the ordinary-case approach and an imprecise risk standard--the Court admits that the second feature is problematic only in combination with the first. *Ante,* at 8. Without the ordinary-case approach, the Court "do[es] not doubt" the constitutionality of §16(b). *Ante,* at 10.

But if the categorical approach renders §16(b) unconstitutionally vague, then constitutional avoidance requires us to make a reasonable effort to avoid that interpretation. And a reasonable alternative interpretation is available: Instead of asking whether the ordinary case of an alien's offense presents a substantial risk of physical force, courts should ask whether the alien's actual underlying conduct presents a substantial risk of physical force. I will briefly discuss the origins of the categorical approach and then explain why the Court should abandon it for §16(b).

A

1

The categorical approach originated with Justice Blackmun's opinion for the Court in *Taylor* v. *United States*, 495 U. S. 575 (1990). The question in *Taylor* was whether ACCA's reference to "burglary" meant burglary as defined by state law or burglary in the generic sense. After "devoting 10 pages of [its] opinion to legislative history," *id.,* at 603 (Scalia, J., concurring in part and concurring in judgment), and finding that Congress had made "an inadvertent casualty in [the] complex drafting process," *id.,* at 589-590 (majority opinion), the Court concluded that ACCA referred to burglary in the generic sense, *id.,* at 598. The Court

then addressed how the Government would prove that a defendant was convicted of generic burglary, as opposed to another offense. *Id.,* at 599-602. *Taylor* rejected the notion that the Government could introduce evidence about the "particular facts" of the defendant's underlying crime. *Id.,* at 600. Instead, the Court adopted a "categorical approach," which focused primarily on the "statutory definition of the prior offense." *Id.,* at 602.

Although *Taylor* was interpreting one of ACCA's enumerated offenses, this Court later extended the categorical approach to ACCA's residual clause. See *James*, 550 U. S., at 208. That extension required some reworking. Because ACCA's enumerated-offenses clause asks whether a prior conviction "is burglary, arson, or extortion," 18 U. S. C. §924(e)(2)(B)(ii), *Taylor* instructed courts to focus on the definition of the underlying crime. The residual clause, by contrast, asks whether a prior conviction "involves conduct that presents a serious potential risk of physical injury to another." §924(e)(2)(B)(ii). Thus, the Court held that the categorical approach for the residual clause asks "whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *James*, *supra*, at 208 (emphasis added). This "ordinary case" approach allowed courts to apply the residual clause without inquiring into the individual facts of the defendant's prior crime.

Taylor gave a few reasons why the categorical approach was the correct reading of ACCA, see 495 U. S., at 600-601, but the "heart of the decision" was the Court's concern with limiting the amount of evidence that the parties could introduce at sentencing. *Shepard* v. *United States*, 544 U. S. 13, 23 (2005). Specifically, the Court was worried about potential violations of the Sixth Amendment. If the parties could introduce evidence about the defendant's underlying conduct, then sentencing proceedings might devolve into a full-blown minitrial, with factfinding by the judge instead of the jury. See *id.*, at 24-26; *Taylor*, *supra*, at 601. While this Court's decision in *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), allows judges to find facts about a defendant's prior convictions, a full-blown minitrial would look "too much like" the kind of factfinding that the Sixth Amendment requires the jury to conduct. *Shepard*, 544 U. S., at 25. By construing ACCA to require a categorical approach, then, the Court was following "[t]he rule of reading statutes to avoid serious risks of unconstitutionality." *Ibid.*

2

I disagreed with the Court's decision to extend the categorical approach to ACCA's residual clause. See *James*, 550 U. S., at 231-232 (dissenting opinion). The categorical approach was an " 'unnecessary exercise,' " I explained, because it created the same Sixth Amendment problem that it tried to avoid. *Id.,* at 231. Absent waiver, a defendant has the right to have a jury find "every fact that is by law a basis for imposing or increasing punishment," including the fact of a prior conviction. *Apprendi* v. *New Jersey*, 530 U. S. 466, 501 (2000) (THOMAS, J., concurring). The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered. See *Mathis* v. *United States*, 579 U. S. ___, ___ (2016) (THOMAS, J., concurring) (slip op., at 1); *Shepard*, *supra*, at 27-28 (THOMAS, J., concurring in part and concurring in judgment). In my view, if the Government wants to enhance a defendant's sentence based on his prior convictions, it must put those convictions in the indictment and prove them to a jury beyond a reasonable doubt.[6]

B

My objection aside, the ordinary-case approach soon created problems of its own. The Court's attempt to avoid the Scylla of the Sixth Amendment steered it straight into the Charybdis of the Fifth. The ordinary-case approach that was created to honor the individual right to a jury is now, according to the Court, so vague that it deprives individuals of due process.

I see no good reason for the Court to persist in reading the ordinary-case approach into §16(b). The text of §16(b) does not mandate the ordinary-case approach, the concerns that led this Court to adopt it do not apply here, and there are no prudential reasons for retaining it. In my view, we should abandon the categorical approach for §16(b).

1

The text of §16(b) does not require a categorical approach. The INA declares an alien deportable if he is

"convicted of an aggravated felony" after he is admitted to the United States. 8 U. S. C. §1227(a)(2)(A)(iii). Aggravated felonies include "crime[s] of violence" as defined in §16. §1101(a)(43)(F). Section 16, in turn, defines crimes of violence as follows:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

At first glance, §16(b) is not clear about the precise question it poses. On the one hand, the statute might refer to the metaphysical "nature" of the offense and ask whether it ordinarily involves a substantial risk of physical force. On the other hand, the statute might refer to the underlying facts of the offense that the offender committed; the words "by its nature," "substantial risk," and "may" would mean only that an offender who engages in risky conduct cannot benefit from the fortuitous fact that physical force was not actually used during his offense. The text can bear either interpretation. See *Nijhawan* v. *Holder*, 557 U. S. 29, 33-34 (2009) ("[I]n ordinary speech words such as 'crime,' 'felony,' 'offense,' and the like sometimes refer to a generic crime . . . and sometimes refer to the specific acts in which an offender engaged on a specific occasion"). It is entirely natural to use words like "nature" and "offense" to refer to an offender's actual underlying conduct.[7]

Although both interpretations are linguistically possible, several factors indicate that the underlying-conduct approach is the better one. To begin, §16(b) asks whether an offense "involves" a substantial risk of force. The word "involves" suggests that the offense must *necessarily* include a substantial risk of force. See The New Oxford Dictionary of English 962 (2001) ("include (something) as a necessary part or result"); Random House Dictionary of the English Language 1005 (2d ed. 1987) ("1. to include as

a necessary circumstance, condition, or consequence"); Oxford American Dictionary 349 (1980) ("1. to contain within itself, to make necessary as a condition or result"). That condition is always satisfied if the Government must prove that the alien's underlying conduct involves a substantial risk of force, but it is not always satisfied if the Government need only prove that the "ordinary case" involves such a risk. See *Johnson*, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 12). Tellingly, the other aggravated felonies in the INA that use the word "involves" employ the underlying-conduct approach. See 8 U. S. C. §1101(a)(43)(M)(i) ("an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000"); §1101(h)(3) ("any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another"). As do the similarly worded provisions of the Comprehensive Crime Control Act of 1984, the bill that contained §16(b). See, *e.g.,* 98 Stat. 2059 (elevating the burden of proof for the release of "a person found not guilty only by reason of insanity of an offense involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage"); *id.,* at 2068 (establishing the sentence for drug offenses "involving" specific quantities and types of drugs); *id.,* at 2137 (defining violent crimes in aid of racketeering to include "attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury").

A comparison of §16(b) and §16(a) further highlights why the former likely adopts an underlying-conduct approach. Section 16(a) covers offenses that have the use, attempted use, or threatened use of physical force "as an element." Because §16(b) covers "other" offenses and is separated from §16(a) by the disjunctive word "or," the natural inference is that §16(b) asks a different question. In other words, §16(b) must require immigration judges to look beyond the elements of an offense to determine whether it involves a substantial risk of physical force. But if the elements are insufficient, where else should immigration judges look to determine the riskiness of an offense? Two options are possible, only one of which is workable.

The first option is to consult the underlying facts of the alien's crime and then assess its riskiness. This approach would provide a definitive answer in every case. And courts are already familiar with this kind of inquiry. Cf. *Johnson*, *supra,* at ___ (slip op., at 12) (noting that "dozens" of similarly worded laws ask courts to assess "the riskiness of conduct in which an individual defendant engages *on a particular occasion*"). Nothing suggests that Congress imposed a more limited inquiry when it enacted §16(b) in 1984. At the time, Congress had not yet enacted ACCA's residual clause, this Court had not yet created the categorical approach, and this Court had not yet recognized a Sixth Amendment limit on judicial factfinding at sentencing, see *Chambers* v. *United States*, 555 U. S. 122, 132 (2009) (ALITO, J., concurring in judgment).

The second option is to imagine the "ordinary case" of the alien's crime and then assess the riskiness of that hypothetical offense. But the phrase "ordinary case" does not appear in the statute. And imagining the ordinary case, the Court reminds us, is "hopeless[ly] indetermina[te]," "wholly 'speculative,' " and mere "guesswork." *Ante,* at 7, 24 (quoting *Johnson*, *supra,* at ___-___ (slip op., at 5, 7)); see also *Chambers*, *supra*, at 133 (opinion of ALITO, J.) (observing that the categorical approach is "nearly impossible to apply consistently"). Because courts disfavor interpretations that make a statute impossible to apply, see A. Scalia & B. Garner, Reading Law 63 (2012), this Court should reject the ordinary-case approach for §16(b) and adopt the underlying-facts approach instead. See *Johnson*, *supra*, at ___ (ALITO, J., dissenting) (slip op., at 10) ("When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible--or even, exceedingly difficult--to apply").

2

That the categorical approach is not the better reading of §16(b) should not be surprising, since the categorical approach was never really about the best reading of the text. As explained, this Court adopted that approach to avoid a potential Sixth Amendment problem with sentencing judges conducting minitrials to determine a defendant's past conduct. But even assuming the categorical approach solved this Sixth Amendment problem in criminal cases, no such problem arises in immigration cases. "[T]he provisions of the Constitution securing the right of trial by jury have no application" in a removal proceeding. *Turner*, 194 U. S., at 290. And, in criminal cases, the underlying-conduct approach would be perfectly constitutional if the Government included the defendant's prior conduct in the indictment, tried it to a jury, and proved it beyond a reasonable doubt. See *Johnson*, 576 U. S., at ___ (ALITO, J., dissenting) (slip op., at 12). Nothing in §16(b) prohibits the Government from proceeding this way, so the plurality is wrong to suggest that the underlying-conduct approach would necessarily "ping-pong us from one constitutional issue to another." *Ante,* at 14.

If constitutional avoidance applies here at all, it requires us to *reject* the categorical approach for §16(b). According to the Court, the categorical approach is unconstitutionally vague. And, all agree that the underlying-conduct approach would not be. See *Johnson*, 576 U. S., at ___ (majority opinion) (slip op., at 12) ("[W]e do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct"). Thus, if the underlying-conduct approach is a "reasonabl[e]" interpretation of §16(b), it is our "plain duty" to adopt it. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909). And it is reasonable, as explained above.

In *Johnson*, the Court declined to adopt the underlying-conduct approach for ACCA's residual clause. See 576 U. S., at ___-___ (slip op., at 12-13). The Court concluded that the categorical approach was the only reasonable reading of ACCA because the residual clause uses the word "convictions." *Id.,* at ___ (slip op., at 13). The Court also stressed the "utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Ibid.*

Neither of these arguments is persuasive with respect to the INA. Moreover, this Court has already rejected them. In *Nijhawan*, this Court unanimously concluded that one of the aggravated felonies in the INA--"an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," §1101(a)(43)(M)(i)--applies the underlying-conduct approach, not the categorical approach. 557 U. S., at 32. Although the INA also refers to "convict[ions]," §1227(a)(2)(A)(iii), the Court was not swayed by that argument. The word "convict[ion]" means only that the defendant's underlying conduct must " 'be tied to the specific counts covered by the conviction,' " not "acquitted or dismissed counts or general conduct." *Id.,* at 42. As for the supposed practical problems with proving an alien's prior conduct, the Court did not find that argument persuasive either. "[T]he 'sole purpose' of the 'aggravated felony' inquiry," the Court explained, " 'is to ascertain the nature of a prior conviction; it is not an invitation to relitigate the conviction itself.' " *Ibid.* And because the INA places the burden on the Government to prove an alien's conduct by clear and convincing evidence, §1229a(c)(3)(A), "uncertainties caused by the passage of time are likely to count in the alien's favor," *id.*, at 42.

There are additional reasons why the practical problems identified in *Johnson* should not matter for §16(b)--even assuming they should have mattered for ACCA's residual clause, see *Lewis* v. *Chicago*, 560 U. S. 205, 217 (2010) ("[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted"). In a removal proceeding, any difficulties with identifying an alien's past conduct will fall on immigration judges, not federal courts. But those judges are already accustomed to finding facts about the conduct underlying an alien's prior convictions, since some of the INA's aggravated felonies employ the underlying-conduct approach. The BIA has instructed immigration judges to determine such conduct based on "any evidence admissible in removal proceedings," not just the elements of the offense or the record of conviction. See *Matter of Babaisakov*, 24 I. & N. Dec. 306, 307 (2007). No one has submitted any evidence that the BIA's approach has been "utter[ly] impracticab[le]" or "daunting[ly] difficul[t]" in practice. *Ante,* at 15. And even if it were, "how much time the agency wants to devote to the resolution of particular issues is . . . a question for the agency itself." *Ali* v. *Mukasey*, 521 F. 3d 737, 741 (CA7 2008). Hypothetical burdens on the BIA should not influence how this Court interprets §16(b).

In short, we should not blithely assume that the reasons why this Court adopted the categorical approach for ACCA's residual clause also apply to the INA's list of aggravated felonies. As *Nijhawan* explained, "the 'aggravated felony' statute, unlike ACCA, contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed." 557 U. S., at 38. "The question" in each case is "to which category [the aggravated felony] belongs." *Ibid.* As I have explained, §16(b) belongs in the underlying-conduct category. Because that is the better reading of §16(b)'s text--or at least a reasonable reading--the Court should have adopted it here.

3

I see no prudential reason for maintaining the categorical approach for §16(b). The Court notes that the Government "explicitly acknowledges" that §16(b) employs the categorical approach. *Ante,* at 9. But we cannot permit the Government's concessions to dictate how we interpret a statute, much less cause us to invalidate a statute enacted by a coordinate branch. See *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 446-447 (1993); *Young* v. *United States*, 315 U. S. 257, 258-259 (1942). This Court's "traditional practice" is to "refus[e] to decide constitutional questions" when other grounds of decision are available, "whether or not they have been properly raised before us by the parties." *Neese* v. *Southern R. Co.*, 350 U. S. 77, 78 (1955) (*per curiam*); see also Vermeule, Saving Constructions, 85 Geo. L. J. 1945, 1948-1949 (1997) (explaining that courts commonly "decide an antecedent statutory issue, even one waived by the parties, if its resolution could preclude a constitutional claim"). This Court has raised potential saving constructions "on our own motion" when they could avoid a ruling on constitutional vagueness grounds, even in cases where the Government was a party. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 88 (1921). We should have followed that established practice here.

Nor should *stare decisis* prevent us from rejecting the categorical approach for §16(b). This Court has never held that §16(b) incorporates the ordinary-case approach. Although *Leocal* held that §16(b) incorporates a version of the categorical approach, the Court must not feel bound by that decision, as it largely overrules it today. See *ante,* at 22, n. 7. Surely the Court cannot credibly invoke *stare decisis* to defend the categorical approach--the same approach it says only a "lunatic" would continue to apply. *Ante,* at 24. If the Court views the categorical approach that way--the same way *Johnson* viewed it--then it must also agree that "[s]tanding by [the categorical approach] would undermine, rather than promote, the goals that *stare decisis* is meant to serve." 576 U. S., at ___ (slip

op., at 15). That is especially true if the Court's decision leads to the invalidation of scores of similarly worded state and federal statutes, which seems even more likely after today than it did after *Johnson*. Instead of adhering to an interpretation that it thinks unconstitutional and then using that interpretation to strike down another statute, the Court should have taken this opportunity to abandon the categorical approach for §16(b) once and for all.

* * *

The Court's decision today is triply flawed. It unnecessarily extends our incorrect decision in *Johnson*. It uses a constitutional doctrine with dubious origins to invalidate yet another statute (while calling into question countless more). And it does all this in the name of a statutory interpretation that we should have discarded long ago. Because I cannot follow the Court down any of these rabbit holes, I respectfully dissent.

FOOTNOTES

Footnote 1

The analysis thus differs from the form of categorical approach used to determine whether a prior conviction is for a particular listed offense (say, murder or arson). In that context, courts ask what the elements of a given crime always require--in effect, what is legally necessary for a conviction. See, *e.g., Descamps* v. *United States*, 570 U. S. 254, 260-261 (2013); *Moncrieffe* v. *Holder*, 569 U. S. 184, 190-191 (2013).

Footnote 2

Compare *Shuti* v. *Lynch*, 828 F. 3d 440 (CA6 2016) (finding §16(b) unconstitutionally vague); *United States* v. *Vivas-Ceja*, 808 F. 3d 719 (CA7 2015) (same), with *United States* v. *Gonzalez-Longoria*, 831 F. 3d 670 (CA5 2016) (en banc) (upholding §16(b)).

Footnote 3

Johnson also anticipated and rejected a significant aspect of JUSTICE THOMAS's dissent in this case. According to JUSTICE THOMAS, a court may not invalidate a statute for vagueness if it is clear in any of its applications--as he thinks is true of *completed* burglary, which is the offense Dimaya committed. See *post,* at 16-20. But as an initial matter, *Johnson* explained that supposedly easy applications of the residual clause might not be "so easy after all." 576 U. S., at ___-___ (slip op., at 10-11). The crime of completed burglary at issue here illustrates that point forcefully. See *id.,* at ___ (slip op., at 6) (asking whether "an ordinary burglar invade[s] an occupied home by night or an unoccupied home by day"); *Dimaya* v. *Lynch,* 803 F. 3d 1110, 1116, n. 7 (CA9 2015) (noting that only about seven percent of burglaries actually involve violence); Cal. Penal Code Ann. §§459, 460 (West 2010) (sweeping so broadly as to cover even dishonest door-to-door salesmen). And still more fundamentally, *Johnson* made clear that our decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U. S., at ___ (slip op., at 11).

Footnote 4

THE CHIEF JUSTICE's dissent makes light of the difficulty of identifying a crime's ordinary case. In a single footnote, THE CHIEF JUSTICE portrays that task as no big deal: Just eliminate the "atypical" cases, and (presto!) the crime's nature and risk are revealed. See *post,* at 5, n. 1. That rosy view--at complete odds with *Johnson*--underlies his whole dissent (and especially, his analysis of how §16(b) applies to particular offenses, see *post,* at 7-10). In effect, THE CHIEF JUSTICE is able to conclude that §16(b) can survive *Johnson* only by refusing to acknowledge one of the two core insights of that decision.

Footnote 5

For example, in *United States* v. *Hayes*, 555 U. S. 415 (2009), this Court held that a firearms statute referring to former crimes as "committed by" specified persons requires courts to consider underlying facts. *Id.,* at 421. And in *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), the Court similarly adopted a non-categorical interpretation of one of the aggravated felonies listed in the INA because of the phrase, appended to the named offense, "in which the loss to the victim or victims exceeds $10,000." *Id.,* at 34, 36 (emphasis deleted). JUSTICE THOMAS suggests that *Nijhawan* rejected the relevance of our ACCA precedents in interpreting the INA's aggravated-felony list--including its incorporation of §16(b). *Post,* at 29-30. But that misreads the decision. In *Nijhawan*, we considered an item on the INA's list that looks nothing like ACCA, and we concluded--no surprise here--that our ACCA decisions did not offer a useful guide. As to items on the INA's list that *do* mirror ACCA, the opposite conclusion of course follows.

Footnote 6

In response to repeated questioning at two oral arguments, the Government proposed one (and only one) such crime--but we disagree that §16(b)'s temporal language would aid in its analysis. According to the Government, possession of a short-barreled shotgun could count as violent under ACCA but not under §16(b) because shooting the gun is "not in the course of committing the crime of possession." Tr. of Oral Arg. 59-60 (Oct. 2, 2017); see Tr. of Oral Arg. 6-7 (Jan. 17, 2017); Brief for Petitioner 32-34. That is just wrong: When a criminal shoots a gun, he does so while ("in the course of ") possessing it (except perhaps in some physics-defying fantasy world). What makes the offense difficult to classify as violent is something different: that while some people use the short-barreled shotguns they possess to commit murder, others merely store them in a nearby firearms cabinet--and it is hard to settle which is the more likely scenario. Compare *Johnson*, 576 U. S., at ___-___ (slip op., at 19-20) (ALITO, J., dissenting) ("It is fanciful to assume that a person who [unlawfully possesses] a notoriously dangerous weapon is unlikely to use that weapon in violent ways"), with *id.,* at ___ (slip op., at 4) (THOMAS, J., concurring) (Unlawful possession of a short-barreled shotgun "takes place in a variety of ways . . . many, perhaps most, of which do not involve likely accompanying violence" (internal quotation marks omitted)). But contrary to THE CHIEF JUSTICE's suggestion, see *post,* at 7-8 (which, again, is tied to his disregard of the ordinary-case inquiry, see *supra,* at 10, n. 4), that issue must be settled no less under §16(b) than under ACCA.

Footnote 7

And, THE CHIEF JUSTICE emphasizes, we decided that one unanimously! See *post,* at 3 (discussing *Leocal* v. *Ashcroft*, 543 U. S. 1 (2004)). But one simple application does not a clear statute make. As we put the point in *Johnson*: Our decisions "squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 576 U. S., at ___ (slip op., at 11); see *supra,* at 9, n. 4.

Footnote 8

Compare *Escudero-Arciniega* v. *Holder*, 702 F. 3d 781, 784-785 (CA5 2012) (*per curiam*) (yes, it does), and *United States* v. *Guzman-Landeros*, 207 F. 3d 1034, 1035 (CA8 2000) (*per curiam*) (same), with *Sareang Ye* v. *INS*, 214 F. 3d 1128, 1133-1134 (CA9 2000) (no, it does not).

Footnote 9

Compare *Aguiar* v. *Gonzales*, 438 F. 3d 86, 89-90 (CA1 2006) (statutory rape involves a substantial risk of force); *Chery* v. *Ashcroft*, 347 F. 3d 404, 408-409 (CA2 2003) (same); and *United States* v. *Velazquez-Overa*, 100 F. 3d 418, 422 (CA5 1996) (same), with *Valencia* v. *Gonzales*, 439 F. 3d 1046, 1052 (CA9 2006) (statutory rape does not involve such a risk).

Footnote 10

Compare *Dixon* v. *Attorney Gen.*, 768 F. 3d 1339, 1343-1346 (CA11 2014) (holding that one such statute falls under §16(b)), with *Flores-Lopez* v. *Holder*, 685 F. 3d 857, 863-865 (CA9 2012) (holding that another does not).

Footnote 11

Compare *United States* v. *Venegas-Ornelas*, 348 F. 3d 1273, 1277-1278 (CA10 2003) (residential trespass is a crime of violence), with *Zivkovic* v. *Holder*, 724 F. 3d 894, 906 (CA7 2013) (it is not).

Footnote 12

From all we can tell--and all the Government has told us, see Brief for Petitioner 45-52--lower courts have also decided many fewer cases involving §16(b) than ACCA's residual clause. That disparity likely reflects the Government's lesser need to rely on §16(b). That provision is mainly employed (as here) in the immigration context, to establish an "aggravated felony" requiring deportation. See *supra,* at 2. But immigration law offers many other ways to achieve that result. The INA lists 80 or so crimes that count as aggravated felonies; only if a conviction is not for one of those specified offenses need the Government resort to §16(b) (or another catch-all provision). See *Luna Torres* v. *Lynch*, 578 U. S. ___, ___ (2016) (slip op., at 2). By contrast, ACCA enumerates only four crimes as a basis for enhancing sentences; the Government therefore had reason to use the statute's residual clause more often.

Footnote 13

See, *e.g., Amendariz-Moreno* v. *United States*, 555 U. S. 1133 (2009) (vacating and remanding for reconsideration in light of *Begay* v. *United States*, 553 U. S. 137 (2008), and *Chambers* v. *United States*, 555 U. S. 122 (2009)); *Castillo-Lucio* v. *United States*, 555 U. S. 1133 (2009) (same); *Addo* v. *Mukasey*, 555 U. S. 1132 (2009) (vacating and remanding in light of *Chambers*); *Serna-Guerra* v. *Holder*, 556 U. S 1279 (2009) (same); *Reyes-Figueroa* v. *United States*, 555 U. S. 1132 (2009) (same).

FOOTNOTES

Footnote 1

Many state courts also held vague laws ineffectual. See, *e.g., State* v. *Mann*, 2 Ore. 238, 240-241 (1867) (holding statute that prohibited "gambling devices" was "void" because "the term has no settled and definite meaning"); *Drake* v. *Drake*, 15 N. C. 110, 115 (1833) (explaining that "if the terms in which [a statute] is couched be so vague as to convey no definite meaning to those whose duty it is to execute it . . . it is necessarily inoperative"); *McConvill* v. *Mayor and Aldermen of Jersey City*, 39 N. J. L. 38, 44 (1876) (holding that an ordinance was "bad for vagueness and uncertainty in the thing forbidden"); *State* v. *Boon*, 1 N. C. 103, 105 (1801) (refusing to apply a statute because "no punishment whatever can be inflicted; without using a discretion and indulging a latitude, which in criminal cases ought never to be allowed a Judge"); *Ex parte Jackson*, 45 Ark. 158, 164 (1885) (declaring a statutory prohibition on acts "injurious to the public morals" to be "vague" and "simply null" (emphasis deleted)); *McJunkins* v. *State*, 10 Ind. 140, 145 (1858) ("It would therefore appear that the term *public indecency* has no fixed legal meaning--is vague and indefinite, and cannot in itself imply a definite offense"); *Jennings* v. *State*, 16 Ind. 335, 336 (1861) ("We are of opinion that for want of a proper definition, no act is made criminal by the terms 'public indecency,' employed in the statute"); *Commonwealth* v. *Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (Pa. 1842) (holding "the language of [shareholder election] legislation so devoid of certainty" that "no valid election [could have] been held, and that none can be held without further legislation"); *Cheezem* v. *State*, 2 Ind. 149, 150 (1850) (finding statute to "contai[n] no prohibition of any kind whatever" and thus declaring it "a nullity"); see also Note, Statutory Standards of Personal Conduct: Indefiniteness and Uncertainty as Violations of Due Process, 38 Harv. L. Rev. 963, 964, n. 4 (1925) (collecting cases).

Footnote 2

See, *e.g.,* Virginia Resolutions in 4 Debates on the Federal Constitution 528 (J. Elliot ed. 1836) (explaining that the Act, "by uniting legislative and judicial powers to those of executive, subverts . . . the particular organization, and positive provisions of the federal constitution"); Madison's Report on the Virginia Resolutions (Jan. 7, 1800) in 17 Papers of James Madison 318 (D. Mattern ed. 1991) (Madison's Report) (contending that the Act violated "the only preventive justice known to American jurisprudence," because "[t]he ground of suspicion is to be judged of, not by any judicial authority, but by the executive magistrate alone"); L. Canfield & H. Wilder, The Making of Modern America 158 (H. Anderson et al. eds. 1952) ("People all over the country protested against the Alien and Sedition Acts"); M. Baseler, "Asylum for Mankind": America, 1607-1800, p. 287 (1998) ("The election of 1800 was a referendum on--and a repudiation of--the Federalist 'doctrines' enunciated in the debates" over, among other things, the Alien Friends Act); Moore, Aliens and the Constitution, 88 N. Y. U. L. Rev. 801, 865, n. 300 (2013) ("The Aliens Act and Sedition Act were met with widespread criticism"); Lindsay, Immigration, Sovereignty, and the Constitution of Foreignness, 45 Conn. L. Rev. 743, 759 (2013) ("[T]he [Alien Friends] Act proved wildly unpopular among the American public, and contributed to the Republican electoral triumph in 1800 and the subsequent demise of the Federalist Party"). Whether the law was unenforced or, at most, enforced only once, the literature is not quite clear. Compare Sidak, War, Liberty, and Enemy Aliens, 67 N. Y. U. L. Rev. 1402, 1406 (1992) (explaining the Act was never enforced); Cole, Enemy Aliens, 54 Stan. L. Rev. 953, 989 (2002) (same); Klein & Wittes, Preventative Detention in American Theory and Practice, 2 Harv. Nat'l Sec. J. 85, 102, n. 71 (2011) (same); Rosenfeld, Deportation Proceedings and Due Process of Law, 26 Colum. Hum. Rts. L. Rev. 713, 726, 733 (1995) (same); with Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 109 (2002) (stating that the Act was enforced once, on someone who was planning on leaving the country in a few months anyway).

Footnote 3

This Court already and long ago held that due process requires affording aliens the "opportunity, at some time, to be heard" before some lawful authority in advance of removal--and it's unclear how that opportunity might be meaningful without fair notice of the law's demands. *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). Nor do the cases JUSTICE THOMAS cites hold that a statutory right to lawful permanent residency in this country can be withdrawn without due process. *Post,* at 11 (dissenting opinion). Rather, each merely holds that the particular statutory removal procedures under attack comported with due process. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 584-585 (1952) (rejecting argument that an "alien is entitled to constitutional [due process] protection . . . *to the same extent as the citizen*" before removal (emphasis added)); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 289-290 (1904) (deporting an alien found to be in violation of a constitutionally valid law doesn't violate due process); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730 (1893) (deporting an alien who hasn't "complied with the conditions" required to stay in the country doesn't violate due process). Even when it came to judicially unenforceable privileges in the past, "executive officials had to respect statutory privileges that had been granted to private individuals and that Congress had not authorized the officials to abrogate." Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 581 (2007) (emphasis deleted). So in a case like ours it would've been incumbent on any executive official to determine that the alien committed a qualifying crime and statutory vagueness could pose a disabling problem even there.

FOOTNOTES

Footnote 1

All this "ordinary case" caveat means is that while "[o]ne can always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk," courts should exclude those atypical cases in assessing whether the offense qualifies. *James*, 550 U. S., at 208. As we have explained, under that approach, it is not the case that "every conceivable factual offense covered by a statute" must pose the requisite risk "before the offense can be deemed" a crime of violence. *Ibid.* But the same is true of the categorical approach generally. See *ibid.* (using the terms just quoted to characterize both the ordinary case approach and the categorical approach for enumerated offenses set forth in *Taylor* v. *United States*, 495 U. S. 575 (1990)); *Moncrieffe* v. *Holder*, 569 U. S. 184, 191 (2013); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 193 (2007).

Footnote 2

The Court protests that this straightforward analysis fails to take account of the crime's ordinary case. *Ante,* at 18-19, n. 6. But the fact that the element of "possession" may "take[ ] place in a variety of ways"--for instance, one may possess a firearm "in a closet, in a storeroom, in a car, in a pocket," "unloaded, disassembled, or locked away," *Johnson*, 576 U. S., at __ (THOMAS, J., concurring in judgment) (slip op., at 4)--matters very little. That is because none of the alternative ways of satisfying that element produce a substantial risk that the possessor will use physical force against the person or property of another. And no one would say that a person "possesses" a gun by firing it or threatening someone with it. Cf. *id.,* at ___ (opinion of THOMAS, J.) (slip op., at 5) ("[T]he risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it."). The Court's insistence that this offense is nonetheless "difficult to classify" under §16(b), *ante,* at 18, n. 6, is surprising in light of our assessment, just two Terms ago, that §16 does not cover "felon-in-possession laws and other firearms offenses," *Luna Torres* v. *Lynch*, 578 U. S. ___, ___ (2016) (slip op., at 13).

Footnote 3

To name a round dozen: *Ayestas* v. *Davis*, 584 U. S. ___, ___ (2018) (slip op., at 16); *Life Technologies Corp.* v. *Promega Corp.*, 580 U. S. ___, ___-___ (2017) (slip op., at 5-8); *Virginia* v. *Hicks*, 539 U. S. 113, 119-120, 122-124 (2003); *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U. S. 184, 196-198 (2002); *Slack* v. *McDaniel*, 529 U. S. 473, 483-484 (2000); *Gentile* v. *State Bar of Nev.*, 501 U. S. 1030, 1075-1076 (1991); *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*); *Steadman* v. *SEC*, 450 U. S. 91, 98 (1981); *Palermo* v. *United States*, 360 U. S. 343, 351-353 (1959); *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593-596 (1957); *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 670-671 (1947); *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 (1938).

Footnote 4

The Court also finds it probative that "a host of issues" respecting §16(b) "divide" the lower courts. *Ante,* at 22. Yet the Court does little to explain how those alleged conflicts vindicate its particular concern about the provision (namely, the ordinary case inquiry). And as the Government illustrates, many of those divergent results likely can be chalked up to material differences in the state offense statutes at issue. Compare *Escudero-Arciniega* v. *Holder*, 702 F. 3d 781, 783-785 (CA5 2012) (*per curiam*) (reasoning that New Mexico car burglary "requires that the criminal lack authorization to enter the vehicle--a requirement alone which will most often ensure some force [against property] is used"), with *Sareang Ye* v. *INS*, 214 F. 3d 1128, 1134 (CA9 2000) (finding it relevant that California car burglary does not require unlawful or unprivileged entry); see Reply Brief 17-20, and nn. 5-6.

FOOTNOTES

Footnote 1

See, *e.g., In re Winship*, 397 U. S. 358, 382-384 (1970) (Black, J., dissenting); Rosenkranz, The Objects of the Constitution, 63 Stan. L. Rev. 1005, 1041-1043 (2011); Berger, "Law of the Land" Reconsidered, 74 Nw. U. L. Rev. 1, 2-17 (1979); Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368-373 (1911); see also 4 The Papers of Alexander Hamilton 35 (Syrett & Cooke eds. 1962) ("The words 'due process' have a precise technical import, and . . . can never be referred to an act of legislature").

Footnote 2

Before the 19th century, when virtually all felonies were punishable by death, English courts would sometimes go to extremes to find a reason to invoke the rule of lenity. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 751 (1935); *e.g., ante,* at 4-7 (GORSUCH, J., concurring in part and concurring in judgment) (citing Blackstone's discussion of a case about "cattle"). As the death penalty became less common, courts on this side of the Atlantic tempered the rule of lenity, clarifying that the rule requires an "ambiguity" in the text and cannot be used "to defeat the obvious intention of the legislature." *United States* v. *Wiltberger*, 5 Wheat. 76 (1820) (Marshall, C. J.).

Early American courts also declined to apply nonpenal statutes that were "unintelligible." *Johnson* v. *United States*, 576 U. S. ___, ___, n. 3 (2014) (THOMAS, J., concurring in judgment) (slip op., at 10, n. 3); *e.g., ante,* at 5-6, and n. 1 (opinion of GORSUCH, J.) (collecting cases). Like lenity, however, this practice reflected a principle of statutory construction that was much narrower than the modern constitutional vagueness doctrine. Unintelligible statutes were considered

inoperative because they were impossible to apply to individual cases, not because they were unconstitutional for failing to provide "fair notice." See *Johnson*, 576 U. S., at ___, n. 3 (opinion of THOMAS, J.) (slip op., at 10, n. 3).

Footnote 3

This distinction between penal and nonpenal statutes would be decisive here because, traditionally, civil deportation laws were not considered penal. See *Bugajewitz* v. *Adams*, 228 U. S. 585, 591 (1913); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 709, 730 (1893). Although this Court has applied a kind of strict construction to civil deportation laws, that practice did not emerge until the mid-20th century. See *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948).

Footnote 4

The Jeffersonian Democratic-Republicans who opposed the Alien Friends Act primarily represented slave States, and their party's political strength came from the South. See Fehlings, Storm on the Constitution: The First Deportation Law, 10 Tulsa J. Comp. & Int'l L. 63, 84 (2002). The Jeffersonians opposed any federal control over immigration, which their constituents feared would be used to pre-empt State laws that prohibited the entry of free blacks. *Id.,* at 84-85; see also Berns, Freedom of the Press and the Alien and Sedition Laws: A Reappraisal, 1970 S. Ct. Rev. 109, 116 ("Whether pro- or anti-slavery, most southerners, including Jefferson and Madison . . . were united behind a policy of denying to the national government any competence to deal with the question of slavery"). The fear was that "mobile free Negroes would intermingle with slaves, encourage them to run away, and foment insurrection." I. Berlin, Slaves Without Masters 92 (1974).

Footnote 5

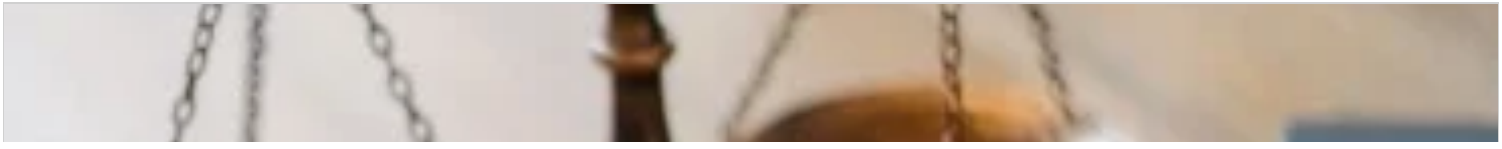
The Jeffersonians also argued that the Alien Friends Act violated due process because, if aliens disobeyed the President's orders to leave the country, they could be convicted of a crime and imprisoned without a trial. See, *e.g.,* Kentucky Resolutions ¶6, 4 Elliot's Debates 541. That charge was false. The Alien Friends Act gave federal courts jurisdiction over alleged violations of the President's orders. See §4, 1 Stat. 571.

Footnote 6

The Sixth Amendment is, thus, not a reason to maintain the categorical approach in criminal cases. Contra, *ante,* at 13-14 (plurality opinion). Even if it were, the Sixth Amendment does not apply in immigration cases like this one. See Part II-B-2, *infra*. The plurality contends that, if it must contort the text of §16(b) to avoid a Sixth Amendment problem in criminal cases, then it must also contort the text of §16(b) in immigration cases, even though the Sixth Amendment problem does not arise in the immigration context. See *ante,* at 13-14, 15. But, as I have explained elsewhere, this "lowest common denominator" approach to constitutional avoidance is both ahistorical and illogical. See *Clark* v. *Martinez*, 543 U. S. 371, 395-401 (2005) (dissenting opinion).

Footnote 7

See, *e.g.,* 18 U. S. C. §3553(a)(2) (directing sentencing judges to consider "the nature and circumstances of the offense"); *Schware* v. *Board of Bar Examiners of N. M.*, 353 U. S. 232, 242-243 (1957) (describing "the nature of the offense" committed by a bar applicant as "recruiting persons to go overseas to aid the Loyalists in the Spanish Civil War"); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 482 (1993) (O'Connor, J., dissenting) (describing "the nature of the offense at issue" as not "involving grave physical injury" but rather as a "business dispute between two companies in the oil and gas industry"); *United States* v. *Broce*, 488 U. S. 563, 585-587 (1989) (Blackmun, J., dissenting) (describing "the nature of the charged offense" in terms of the specific facts alleged in the indictment); *People* v. *Golba*, 273 Mich. App. 603, 611, 729 N. W. 2d 916, 922 (2007) ("[T]he underlying factual basis for a conviction governs whether the offense 'by its nature constitutes a sexual offense against an individual who is less than 18 years of age.' " (quoting Mich. Comp. Laws §28.722(e)(xi) (2006))); A Fix for Animal Abusers, Boston Herald, Nov. 22, 2017, p. 16 ("prosecutors were so horrified at the nature of his offense--his torture of a neighbor's dog"); P. Ward, Attorney of Convicted Ex-Official Accuses Case's Judge, Pittsburgh Post-Gazette, Nov. 10, 2015, p. B1 (identifying the "nature of his offense" as "taking money from an elderly, widowed client, and giving it to campaign funds"); Cross-Burning-Article Painted an Inaccurate Picture of Young Man in Question, Seattle Times, Aug. 12, 1991, p. A9 ("[The defendant] took no steps to prevent the cross that was burned from being constructed on his family's premises and later . . . assisted in concealing a second cross . . . . This was the nature of his offense"); N. Libman, A Parole/Probation Officer Talks With Norma Libman, Chicago Tribune, May 29, 1988, p. I31 (describing "the nature of the offense" as "not serious" if "there was no definitive threat on life" or if "the dollar- and cents- amount was not great"); E. Walsh, District-U. S. Argument Delays Warrant for Escapee's Arrest, Washington Post, May 29, 1986, p. C1 (describing "the nature of Murray's alleged offenses" as "point[ing] at two officers a gun that was later found to contain one round of ammunition").



SESSIONS, ATTORNEY GENERAL *v. DIMAYA* (2018)

Docket No: No. 15-1498

Argued: January 17, 2017

Decided: April 17, 2018

Court: United States Supreme Court

FindLaw

Questions?

At FindLaw.com, we pride ourselves on being the number one source of free legal information and resources on the web. Contact us. (https://www.findlaw.com/company/contact-us/contacts.html)

Stay up-to-date with how the law affects your life. Sign up for our consumer newsletter.

ENTER YOUR EMAIL ADDRESS

ABOUT US > (https://www.findlaw.com/company.html)

Our Team (https://www.findlaw.com/company/our-team.html)

Accessibility (https://www.findlaw.com/company/our-commitment-to-accessibility.html)

Contact Us (https://www.findlaw.com/company/contact-us/contacts.html)

FIND A LAWYER > (https://lawyers.findlav

By Location (https://lawyers.findlaw.com/#brow

By Legal Issue (https://lawyers.findlaw.com/lega

By Lawyer Profiles (https://lawyers.findlaw.com/profile/profiles/law

By Name (https://lawyers.findlaw.com/lawyer/lawyer_dir/

SELF-HELP RESOURCES

Legal Forms & Services (https://www.findlaw.com/forms.html)

(https://www.youtube.com/watch?v=WQiNbzaZOhw)