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NEW YORK AND ITS WATERS

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Abraham Lincoln, in his first message to the 37th Congress, asserted that no state ever possessed sovereign power. The union, he said, is older than the states. In fact, it created them.¹ He may have taken this theory from an article by the well known unionist, Dr. Breckenridge of Kentucky. Others have taken the same view, before and since.

Whatever may be true of communities later admitted to the union, and whatever ideas the exigencies of the Civil War may have required, the argument does not apply to New York. And upon this question may depend, to some extent, its rights to the navigable waters within its limits.

In the discussion we need not touch upon the Dutch occupation. Whether or not it was a usurpation as the English claimed, at least by the treaties of Breda (1667) and of Westminster (1674) all Dutch rights were ceded to the Crown. Nor is the Charter of the Duke of York important. His rights, governmental and proprietary, were merged when he became King in 1685.

New York was a Crown Colony, with no charter. Its governors were appointed first by the Duke and then by the King. The form of government was fixed by instructions given to them. (See Commission to Governor Dongan in 1686, and Commission to Governor Sloughter in 1689 as examples.) Finally, they came to rule with the aid of a council and a legislative assembly, subject to the right of veto.

In Crown Colonies, the King was the paramount owner of all land within their boundaries. This land was no part of the "ancient demesne", but was held by him in his corporate capacity for the benefit of his subjects. "As to acquisitions by conquest by the King of England they are annexed to his crown as his purchases are, as Ireland, Man and the new plantations."² All title came from him. "By his prerogative the king was the universal occupant of all vacant land in his dominions."³

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¹6 NICOLAY & HAY, COMPLETE WORKS OF LINCOLN (1890) 297, 314.

²CO. LITT. (Thomas' ed. 1836) 74 n.

³Mitchell v. United States, 9 Pet. 711, 748 (U. S. 1835).

And this included the lands, ungranted, unsettled, actually in the possession of the Indian tribes. Only the right of occupancy was theirs. The fee and the sole right of preemption was in the Crown.⁴ Included also were the ungranted beds of all streams navigable and unnavigable, a large part of the bed of Long Island Sound, and the bed of the sea to at least the three mile limit from the shore, so far as it was within the bounds of the colony.⁵ This title was asserted by repeated patents such as are referred to in *People ex rel Palmer v. Travis*⁶ and *Brookhaven v. Strong*.^{6a}

As to the actual water itself, true it is not the subject of private ownership. But probably the Crown had not only jurisdiction, but such temporary ownership as the nature of the element permitted. The right of the Crown in navigable streams was two-fold (1) *jus publicum*, the right of jurisdiction and control for the benefit of its subjects, and (2) *jus privatum*, the right of property, subject to the *jus publicum*.⁷ From them it might exclude foreigners, as was done by England from Jamaica and indeed from the colonies themselves. It might grant rights as to fisheries and ice.

The title of the government to running water has been compared to its title in wild game and fish. They were its property held in trust for the people.⁸ But this property is lost where the deer crosses a state line, as the title to running water is lost where it passes a boundary.

Title or no title,^{8a} however, the Crown had control of the use of the waters over which it had jurisdiction for the benefit of its subjects.

The various governors of New York, as its agents, were authorized to grant patents to public lands. Their instructions permitted them to do so with the advice and consent of the council, and they acted frequently.⁹

Then came the revolution. No binding tie had ever united the various colonies. They had no political connection, save their common

⁴Johnson v. McIntosh, 8 Wheat. 543 (U. S. 1832).

⁵GOULD, WATERS (3d ed. 1900) § 9; *Weston v. Sampson*, 8 Cush. 347, 353 (Mass. 1851); *Commonwealth v. City of Roxbury*, 9 Gray 451, 482 (Mass. 1857); *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559 (1891); *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548 (1894).

⁶223 N. Y. 150, 119 N. E. 437 (1918).

^{6a}60 N. Y. 56 (1875).

⁷HALE, DE JURE MARIS, c. 6; 1 KENT, COMM.* 26.

⁸*Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600 (1896); *Commonwealth v. Manchester*, 152 Mass. 230, *aff'd*, 139 U. S. 240, 11 Sup. Ct. 559 (1891).

^{8a}What is said on this subject in *Sweet v. Syracuse*, 129 N. Y. 316, 335, 29 N. E. 289, 294 (1891), is apparently a dictum. Compare opinion on reargument.

⁹SMITH, HISTORY OF NEW YORK, (2d ed.) 255.

allegiance to the Crown. Among them at times some temporary agreements for purposes of defense had existed, but they were transitory. All suggestions for a general union had failed. Each, however, was aggrieved by acts of the Crown, and with no expressed desire for independence, when the First Continental Congress met in 1774 it was to consult only on the practical means of redress. More or less informally chosen, delegates were sent from New York. As ambassadors or agents they acted for a political entity. They were told to represent the colony.¹⁰ The Congress had no binding authority whatever.¹¹ It was not a government in any sense. It itself stated in the Declaration of Rights that sole and exclusive right to legislate for the colonies resided in their respective assemblies.¹² The New York assembly refused to ratify its acts.¹³

The Second Congress met on May 10th, 1775. New York had elected delegates to represent it at a provincial assembly called for that purpose.¹⁴ Discussion soon arose as to the need of independence. On May 1st Massachusetts had set up a local government. On May 4th Rhode Island had renounced allegiance to the Crown. On June 9th Virginia had provided a constitution. Finally, on July 2nd Congress passed a resolution for independence. For it the New York delegates did not vote. To do so they had no authority. But approval was given by a Provincial Convention on July 9th, and on July 15th her delegates signed the Declaration which had then been drafted.

The Declaration was the unanimous act "of the thirteen united States of America" speaking through the representatives of the "united states". It proclaimed that they were and of right ought to be free and independent states, and as such have power to levy war, conclude peace and establish alliances, and do all other things which independent states may of right do.

Still no attempt was made to form a general government. The states were "united" in the sense of the partial leagues that had theretofore existed. This is shown by a capitalization of the words used. "United" is a description, not a title. They were "united" in the sense that all joined in the Declaration; that all complained of acts of the British government; that all were prepared to resist those acts. It is true that to make this resistance effective they sent ambassadors to Philadelphia so that their efforts might be coordinated. But they

¹⁰I CURTIS, HISTORY OF CONSTITUTION (1865) 12 n.

¹¹I *ibid.* 11.

¹²3 HILDRETH, HISTORY OF UNITED STATES (1856) 43.

¹³I JONES, HISTORY OF NEW YORK, 36.

¹⁴I LOSSING, SCHUYLER (1872) 304.

did not surrender their independent sovereignty. Without legal wrong any state might at pleasure make a separate treaty or alliance.^{14a}

Congress did assume to raise a continental army. But the quotas to be raised for that purpose required the consent of each state. It selected a commander-in-chief, but Washington's commission came from "the united colonies of Massachusetts—New York—" etc.¹⁵ It could recommend action, but not command. It raised money and issued currency but no state was liable. It opened the ports of the continent to foreign trade, but New York was not affected. In short it could not exact obedience.¹⁶ Even when it made a treaty with France in 1778, Virginia (as New York might have done) separately ratified it and the treaty was with the thirteen states.

Under these circumstances it is difficult to say, as does Mr. Curtis, that "the people of the several colonies had established a national government of a revolutionary character."¹⁷ Even he says later that Congress had no definite legislative power. When it passed a resolution "it constituted only a voluntary compact to which the people of each colony pledged themselves by their delegates, as to a treaty."¹⁸ "We have been accustomed to associate with the term Congress the idea of a legally constituted organic body, with defined powers authoritatively assigned to it, the exercise of which is binding on its constituents. Our Continental Congresses were of quite another sort and had no authority save what might be granted to the wisdom and practicability of the measures they advised."¹⁹ "The States possessed, respectively, all the attributes of sovereignty."²⁰

It would seem that, as Mr. Lincoln defines such an entity, each "was a political community without a political superior," or again as is said in the license cases "that state is not sovereign which is subject to the will of another."

Under this theory New York acted. Representatives were chosen to organize a provincial congress to take the place of the existing colonial legislature. This congress in May 1776 called for the election of a convention to form a government. The convention met and at White Plains on July 9th, 1776 declared that New York began its existence as a state on April 20th, 1775. A constitution

^{14a}1 CURTIS, *op. cit. supra* note 10, at 43.

¹⁵2 HUGHES, WASHINGTON (1926) 246.

¹⁶THE FEDERALIST, No. 15.

¹⁷1 CURTIS, *op. cit. supra* note 10, at 39.

¹⁸1 *ibid.* 63.

¹⁹6 WINDSOR, NARR. & CRIT. HIST., 233.

²⁰License Cases, 5 How. 504, 587 (U. S. 1847).

was soon adopted, beginning with the provision that no authority should on any pretence whatever be exercised over the people of the state but such as shall be derived from and granted by them. The convention also provided for delegates to Congress "to represent this state" and for naturalization, and it abrogated "the supremacy, sovereignty, government and prerogative by the King of Great Britain" over the colony.

The legislature, meeting under this constitution, assumed the complete sovereignty of the state. From all its officers it required an oath of allegiance "to the State of New York as a free and independent state."²¹ It prohibited the exportation of flour and grain.²² It raised a state army of seven hundred men and later of a thousand.²³ It issued its own currency,²⁴ for as understood at the time, "bills of credit" referred to paper issues, intended to circulate as currency and bearing the public promise to pay a sum of money at a future time.²⁵ It refused to receive continental money for taxes.²⁶ It permitted Congress to bring suit here.²⁷ It made it a felony to counterfeit bills of credit issued by Congress or by any state.²⁸ It provided that in any treaty of pacification made by Congress with the Iroquois, it be insisted and required that the State be a party as a principal "by particular specification as an independent state."²⁹

It is difficult to see why all this did not constitute complete and uncontrolled sovereignty. And this contemporary construction of the status of the state has been recognized by the Supreme Court.³⁰ As a sovereign state its recognized boundaries were later acknowledged by the treaty of Paris.³¹ And it may be noted that while this treaty was made with the United States of America, it recognizes each of the colonies to be "free, sovereign and independent states" and the Crown "relinquishes all claim to the Government, proprietary and territorial rights of the same." These boundaries were recognized also by the treaty of Hartford. On the north they ran through the center of Lakes Erie and Ontario and the Niagara and St. Lawrence

²¹N. Y. Laws 1778 (First Session) c. 7.

²²N. Y. Laws 1778 (First Session) c. 10.

²³N. Y. Laws 1778 (First Session) c. 22. N. Y. Laws 1779 (Second Session) c. 33.

²⁴N. Y. Laws 1779 (Second Session) c. 15.

²⁵I CURTIS, *op. cit. supra* note 10, at 525.

²⁶N. Y. Laws 1779 (Second Session) c. 16.

²⁷N. Y. Laws 1779 (Second Session) c. 22.

²⁸N. Y. Laws 1779 (Second Session) c. 25.

²⁹N. Y. Laws 1779 (Third Session) c. 29.

³⁰Massachusetts v. New York, 271 U. S. 65, 46 Sup. Ct. 357 (1926).

³¹Treaty of Paris, art. 2, 8 STAT. 55 (1782).

rivers. On the southeast the state was bounded by the lower Hudson and the sea.

Within these limits every power of government and jurisdiction, every right of property hitherto vested in the Crown or in the Crown and Parliament was vested in the State. So as to property says our declaratory act.³² So has the Federal Supreme Court held repeatedly.³³ So our own courts have held.³⁴ And this property included the beds of Ontario and Erie, and necessarily of the Niagara and St. Lawrence to the boundary line.³⁵

It was soon seen that to wage a successful war some closer union between the states was necessary—some sort of a federated republic. So a circular letter was sent by Congress to the several state legislatures. It speaks of the difficulties of meeting the interests and sentiments of a continent “divided into so many sovereign and independent communities,” and it asks each state to invest its delegates with power to agree to proposed Articles of Confederation.

These Articles were styled “Articles of Confederation and Perpetual Union” and this union was to be called the United States of America. At the very outset it declares that “each state retains”—not is granted but “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.” And only to a limited extent was such delegation made. No state should make a treaty without the consent of Congress. No duties or imposts should be laid which might interfere with stipulations contained in proposed treaties with France and Spain. In peace times no army or navy should be maintained by any state except by congressional approval. In war time there was no limitation. No state should engage in war. Boundary disputes between the states were referred to Congress for arbitration. And there were certain other provisions of less importance.

This document constituted but a federal league between sovereign states.³⁶ Such arrangements were not unknown. At other periods, influenced by the needs of war or peace, independent communities have agreed to surrender a portion of their rights either to the more powerful among them or to a council representing them all. But

³²Laws of N. Y. 1779 (Third Session) c. 25, § 14.

³³*Martin v. Waddell*, 16 Pet. 367 (U. S. 1842); *Shively v. Bowlby*, *supra* note 5.

³⁴*People v. The Rector of Trinity Church*, 22 N. Y. 44 (1860); *People v. Ferry Co.*, 68 N. Y. 71 (1877); *Langdon v. Mayor*, 93 N. Y. 129 (1883).

³⁵*Massachusetts v. New York*, *supra* note 30.

³⁶1 CURTIS, *op. cit.* *supra* note 10, at 334.

except what they specifically surrendered they retained. And being in reality a treaty between sovereigns, each might, however inequity, end it. Any act of the state legislatures to that effect would bind their courts and their citizens. In these legislatures resided the ultimate authority. So when in 1786 New Jersey for a time refused except upon conditions, to raise the money quota requested by Congress, it was regarded as secession from the league. There was no power to restrain her.

Such was the understanding of New York. It voted to assent to these articles in due course,³⁷ but they did not formally take effect until March 1st, 1781.³⁸ It repeatedly passed statutes indicating what powers were granted and what retained. In 1784 it established a custom house and imposed duties for the benefit of the state upon goods imported.³⁹ The consent once given that Congress might levy such duties had been withdrawn. Instead certain duties were to be collected by the state and then given to the United States.⁴⁰ It imposed tonnage duties and made regulations as to pilots.⁴¹ It expressly permitted Congress to impose certain trade restrictions otherwise invalid.⁴² It enacted a copyright law.⁴³ It had its own court of admiralty.⁴⁴ It regulated the circulation of copper coin.⁴⁵ To permit it to operate within this state it was necessary to incorporate here the Bank of North America.⁴⁶ Finally it still issued its own currency and declared the bills it issued to be legal tender.⁴⁷

Whatever else the Articles accomplished, therefore, it is very clear there was but a limited surrender of preexisting state sovereignty and no surrender to any extent whatever of property rights passing from the Crown to the people.

There is no need to rehearse the defects of the league. We required something more than a confederation. We required a stronger central government, acting directly on the people as well as on the states. To this end the sovereignty of the state must be surrendered to a

³⁷N. Y. Laws 1778 (First Session) c. 1; N. Y. Laws 1779 (Third Session) c. 30.

³⁸STORY, CONSTITUTION (5th ed. 1891) § 225.

³⁹N. Y. Laws 1784 (Eighth Session) c. 6 and 7.

⁴⁰N. Y. Laws 1781 (Fourth Session) c. 31; N. Y. Laws 1783 (Sixth Session) c. 27.

⁴¹N. Y. Laws 1782-1783 (Sixth Session) c. 1 and 31.

⁴²N. Y. Laws 1784 (Seventh Session) c. 53; N. Y. Laws 1785 (Eighth Session) c. 56.

⁴³N. Y. Laws 1786 (Ninth Session) c. 54.

⁴⁴N. Y. Laws 1787 (Tenth Session) c. 24.

⁴⁵N. Y. Laws 1787 (Tenth Session) c. 97.

⁴⁶N. Y. Laws 1782 (Fifth Session) c. 35.

⁴⁷N. Y. Laws 1786 (Ninth Session) c. 40.

greater degree. But this surrender was to be a voluntary act. Each state might refuse its consent. Should it do so, it remained what it was before, a sovereign and independent state. And more. Without doubt, in such circumstances it resumed the shreds of sovereignty it had surrendered to the Confederation. The new nation was to be formed upon the ratification of nine states. Notwithstanding the statement that it was to be perpetual, notwithstanding the fact that by its terms any amendment required the consent of all, it cannot be that a state refusing to consent to the constitution would still be bound by an alliance now dead. In truth it was contemplated that the Confederation should be dissolved by the action of nine states against the protest of the other four.⁴⁸ I find no trace of any other theory with respect, for instance, to Rhode Island.

Whatever the nature of this constitution, it is enough to say that it binds New York and its people, and that by it New York has surrendered to Congress the power to regulate commerce and jurisdiction over maritime and admiralty cases. That, so far as concerns its waters, is all New York has done. Any rights to or over them or to the lands beneath them, possessed by it before March 1789, not delegated to the United States or prohibited to the state, it still retains. These remain precisely where they were before the constitution was adopted. For the United States is a government of delegated powers. What we gave, we gave. It may not extend this gift by any claim that every sovereignty has necessarily inherent attributes.^{48a}

In construing the constitution it is well to remember what was once said in another connection. "It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community; and in that light should be regarded and construed."⁴⁹ Construed liberally, to effect its purpose. Not only are powers expressly given. There is a grant of what is necessary and proper to carry such powers into effect. This covers a wide field as the Supreme Court holds. The commerce clause, for instance, involved more than the regulation of shipping on the navigable waters of a state. Any land of state or individual under such waters is subject to the right of the United States to improve navigation.⁵⁰ Consequently it may dredge the sea bottom beyond high

⁴⁸THE FEDERALIST, Nos. 4 to 43.

^{48a}Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655 (1907).

⁴⁹Martin v. Waddell, *supra* note 33, at 411.

⁵⁰Gibson v. The United States, 166 U. S. 269, 17 Sup. Ct. 578 (1897).

water mark.⁵¹ It may erect piers on land under water,⁵² or lighthouses, jetties and dykes.⁵³ It may close a channel or do anything necessary for its improvement,⁵⁴ such as the removal of obstructions.⁵⁵ It may prohibit the erection of bridges across streams and doubtless many other things. But all these powers must be connected with commerce. Only the right to regulate commerce formerly residing in New York, has been conferred on Congress with no limitations other than those prescribed in the Constitution.⁵⁶

As title to New York lands or control of its waters except for commercial purposes was never transferred to the United States, no act of the federal government, after the constitution was adopted may alter or affect the rights of the state.⁵⁷ No such surrender can be inferred from either the admiralty or the commerce clauses. "There is no belt of land under the sea adjacent to the coast which is the property of the United States and not the property of the state."⁵⁸ "It is the settled rule of law in this court that absolute property in and dominion and sovereignty over the soils under the tide waters of the original states were reserved to the several states."⁵⁹ This statement has been so often repeated it has become a truism.⁶⁰ And so of the control of its waters beyond the needs of commerce. The state controls the fisheries within its limits whether the fish be free and migratory or attached to the soil.⁶¹ It may limit fisheries to its own citizens.⁶² It may regulate the cutting of ice.⁶³ It is entitled to have migratory fish pass up and down.⁶⁴ It may regulate the

⁵¹Lewis Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679 (1913).

⁵²Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48 (1900).

⁵³South Carolina v. Georgia, 93 U. S. 4 (1876).

⁵⁴Mobile Co. v. Kimball, 102 U. S. 691 (1880).

⁵⁵Gilman v. Philadelphia, 3 Wall. 713, 723 (U. S. 1865).

⁵⁶South Carolina v. Georgia, *supra* note 53; Smith v. Alabama, 124 U.S. 473, 8 Sup. Ct. 564 (1888); Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681 (1890). And see Kansas v. Colorado, *supra* note 48a.

⁵⁷Goodtitle v. Kibbe, 9 How. 471 (U. S. 1850).

⁵⁸Commonwealth v. Manchester, 152 Mass. 230, 25 N. E. 113 (1890), *aff'd.*, 139 U. S. 240, 11 Sup. Ct. 559 (1891).

⁵⁹Knight v. United Land Ass'n., 142 U. S. 161, 12 Sup. Ct. 258 (1891).

⁶⁰Smith v. Maryland, 18 How. 71 (U. S. 1855); McCreedy v. Virginia, 94 U. S. 391, 394 (1876); United States v. Chandler-Dunbar, 229 U. S. 53, 33 Sup. Ct. 667 (1913); Kansas v. Colorado, *supra* note 48a; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 18 Sup. Ct. 157 (1897).

⁶¹Commonwealth v. Manchester, *supra* note 58.

⁶²N. Y. CONS. LAWS, c. 65 (NEW YORK CONSERVATION LAW) § 324, *et. seq.*

⁶³Slingerland v. International Contracting Co., 169 N. Y. 60, 61 N. E. 995 (1901).

⁶⁴Commonwealth v. Alger, 7 Cush. 53, 99 (Mass. 1851).

placing of nets. "In short the cession of maritime and admiralty jurisdiction" (and the same is true of the commerce clause) "was not a cession of the waters on which the case might arise."⁶⁵

Over these lands under water, over the waters themselves, part of the natural resources of the state, New York has complete and absolute control, subject only to such uses as the United States may choose to make of them for purposes of navigation. That this is the extreme limit of the power of the federal government is, I think, decisively established both by our courts and by those of the United States.

The latest New York decision came in 1928.⁶⁶ Flash boards were placed on the top of a dam, not for purposes of navigation but to furnish power to an individual. Notwithstanding a permit by the United States, they were wrongful as against a private owner whose water power was interfered with. Congress had no power to grant such a right. On a navigable river, except for the improvement of navigation, the right to construct a dam must be established independently of a federal permit. And if a private owner could complain, it follows that the state might also.

Again and again the absolute ownership and control over the beds of streams and the waters above are asserted, subject to the one federal right over commerce.⁶⁷ And in one case,⁶⁸ speaking of an analogous right of the state over inland waters the bed of which had been granted subject to the public easement of navigation, it was held that this easement gave the government no right either directly or indirectly to use it for other purposes.

The same view is taken by the Supreme Court. What was granted by the constitution, it says, was the control of navigable waters "so far as it may be necessary to insure their free navigation."⁶⁹ Congress may not impair riparian rights by legislation having no substantial relation to the control of navigation.⁷⁰ Again, the power of Congress

⁶⁵United States v. Bevans, 3 Wheat. 336, 388 (U. S. 1818).

⁶⁶Little Falls Co. v. Ford, 249 N. Y. 495, 164 N. E. 558 (1928). The decision was affirmed in 280 U. S. 369, 50 Sup. Ct. 140 (1930) (The Supreme Court does not pass upon the constitutional question for under the language of the act itself the plaintiff must succeed).

⁶⁷Mohler v. Transportation Co., 35 N. Y. 352 (1866) (L. I. Sound); Langdon v. The Mayor, 93 N. Y. 129, 155 (1883); Matter of City of New York, 168 N. Y. 134, 61 N. E. 158 (1901); People v. International Bridge Co., 223 N. Y. 137, 119 N. E. 351 (1918).

⁶⁸Smith v. Rochester, 92 N. Y. 463 (1883).

⁶⁹Escanaba Co. v. Chicago, 107 U. S. 678, 682, 2 Sup. Ct. 185, 188 (1883).

⁷⁰New York v. Illinois, 279 U. S. 820, 49 Sup. Ct. 163 (1929).

does not extend further than the regulation of commerce.⁷¹ These statements are often repeated.⁷² And by its acceptance of the various cessions by the state of land under water with title and jurisdiction, enumerated in Chapter 678, Laws of 1892, the United States itself has acquiesced in this rule.

It would seem, therefore, beyond doubt that any attempt on the part of Congress to extend its authority over New York lands and waters for any purpose foreign to navigation and commerce would be a usurpation. Such an act as the Federal Water Power Act,⁷³ in so far as it assumes that the United States owns or controls the waters and may grant them for the creation of power, or may regulate them except for navigation, could not be sustained. In water power as water power the federal government has no proprietorship. A clear statement as to the rights of New York will be found in a letter of Chief Justice Hughes to the Federal Water Power Commission, dated December 4th, 1925, and printed in the Sixth Annual Report of the Commission at page 155. At the most, it may require consent to any act thought by Congress likely to improve navigation and commerce.

There may arise, however, two subordinate questions of less importance.

Congress may itself authorize the construction of bridges over New York's navigable waters for the promotion of interstate commerce.⁷⁴ If these bridges involve the taking of private property on land, that property must be condemned and paid for. May Congress for such a purpose seize, without compensation or consent, the property of New York under water for the erection of piers or other necessary structures of a bridge—not for improving the navigation of the stream itself, but for the creation of an independent line of transportation? One case and only one as far as I can find, holds that this may be done.⁷⁵ Eminent as was Judge Bradley, I doubt if in this decision he is right. I doubt whether the general government

⁷¹License Cases, *supra* note 20, at 575.

⁷²Cummings v. Chicago, 188 U. S. 410, 427, 23 Sup. Ct. 472, 476 (1902); Gilman v. Philadelphia, *supra* note 55, at 724; Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578 (1897); Seattle v. Oregon R. R., 255 U. S. 56, 41 Sup. Ct. 237 (1921). See also a statement by Mr. Taft when Attorney General, quoted in Le Boeuf, *State or Federal Control of the Water Powers of Navigable Streams* (1927) 15 GEO. L. J. 201, 221; Monongahela Nav. Co. v. United States, 148 U. S. 312, 335, 13 Sup. Ct. 622, 630 (1893).

⁷³41 STAT. 1077 (1920), 16 U. S. C. A. §§ 791 *et seq.*

⁷⁴Luxton v. Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891 (1894).

⁷⁵Stockton v. Baltimore R. R., 32 Fed. 9 (C. C. D. N. J. 1887).

may girdle Manhattan Island, below high water mark, with a commercial railroad, even had the fee been in the state and not the city. I doubt if it might authorize a railroad in the Oswego river without the consent of the state or of private owners of the bed of the stream. For if this action is covered by the commerce clause, private ownership as well as that of the state is subject thereto. And in one New York case it is said that the right to build a bridge on lands of the state must come from its consent.⁷⁶

This matter, however, is at present of little practical importance. The more serious question is this. The government may dam navigable streams in aid of navigation. Such dams, as a by-product, create water power. All the waters impounded may not be needed for purposes of navigation. May the United States appropriate the surplus?

Precisely what happens in such a case is this. The rights to water power as far as the impounded waters extend up stream, hitherto vested in riparian owners, are gone, and gone without compensation. All these water powers are concentrated at the point where the dam is located. Normally the riparian owner at that point would be entitled to the use of water power in the river as it exists in its new condition. Not so now. The dam having been erected to provide water for navigation and being theoretically used for that purpose, not a particle can be drawn by the riparian owner, without public consent. Would it be equitable to allow the United States to sell what it has taken from the private owner under the pretence that it was needed for commerce? Further than this. The state retains control of its waters except in so far as they are required for that purpose. To it these surplus waters belong.

Subject to the commerce clause, the state may itself improve the navigable river. Again, if it does so the riparian owner has no redress for the loss of water power. But the state, at least, if it sells surplus waters is dealing with a subject over which it has a control not possessed by the national government. It deals with its own natural resources. Further than this, however, our Conservation Law recognizes the injustice of such a rule. It authorizes the improvement of public waters to promote public welfare, including navigation.⁷⁷ The state owns and may sell the water power it creates, but it condemns the riparian rights injured by its proceedings.

⁷⁶*International Bridge Co. v. New York*, 254 U. S. 126, 132, 41 Sup. Ct. 56, 58 (1920).

⁷⁷Report submitted to Legislature, June 10th, 1912, p. 26.

Three cases refer to the subject. They are *United States v. Chandler-Dunbar*,⁷⁸ *Green Bay Co. v. Patten Co.*,^{78a} and *Kau Kauna Co. v. Canal Co.*^{78b} The first deals with various questions and what is said on this point, being unnecessary to the decision, is plainly a dictum. In the other two very different facts are presented. In none does the question of authority arise between the general government and the state.

New York has these rights of government and property, now fully protected. May they be taken from the state without its consent? There are two possibilities.

The first is by a constitutional amendment. Of old it was a vexed question whether the constitution was a "compact". Pages of argument are found on this question in Story. Here it is immaterial. At least it was not imposed upon the people and their states. Their action was voluntary and it was action based upon certain understandings; upon what may be called certain implied covenants. The states were to be preserved and each was to have a republican form of government and two senators. Might a constitutional amendment transfer northern New York to Canada, or alter its republican government to a dictatorship. Might Article 5 be repealed and a new article adopted giving New York five senators and Delaware one. In discussing possible amendments *The Federalist*⁷⁹ speaks of them as "useful alterations". Curtis said amendments are to be such as will modify the mode of carrying into effect the original provisions and powers of the constitution. They are not to enable three-fourths of the states to grasp new power at the expense of an unwilling state.⁸⁰ In the Prohibition cases⁸¹ the Supreme Court seems to admit that there are limits to the amending power. Uncertain, it may be, where this limit is. Somewhere the line must be drawn.

But to argue this question here is unnecessary. There is no present danger of an amendment which seeks to deprive us of our property, whatever may be said of our police power. Much more likely is some action in the guise of a treaty.

"All treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." The precise object and scope of this provision has been long in dispute. Mr. Butler holds that this

⁷⁸*Supra* note 60.

^{78a}172 U. S. 58, 19 Sup. Ct. 97 (1898).

^{78b}142 U. S. 254, 12 Sup. Ct. 173 (1891).

⁷⁹THE FEDERALIST, No. 42.

⁸⁰2 CURTIS, *op. cit. supra* note 10, at 16.

⁸¹*Rhode Island v. Palmer*, 253 U. S. 350, 40 Sup. Ct. 486, 588 (1920).

power is without limit.⁸² Treaties extend to every subject that may be the basis of contract between nations. Every affair of every state, external or internal, that may be affected thereby, is subject to treaties. As against them there are no reserved rights. Senator Root seems to take much the same view as do those who follow the Hamilton School of thought. Others urge that as the powers of the general government are circumscribed by the Constitution, so are the powers of the president acting with the advice and consent of the Senate. The latter view, I believe, has the support of reason and authority.

Equally with treaties the Constitution is said to be supreme. With it treaties may conflict. Clearly, construing the document as a whole, the Constitution is the ultimate source of power. Not only laws but treaties must be subject to its provisions. This much seems to be conceded. Few would insist that by treaty, legislative power vested in Congress might be transferred to the Supreme Court, or that the qualifications for the presidency might be altered. A treaty, says the Supreme Court, "cannot change the Constitution or be held valid if it be a violation of that instrument."⁸³ The treaty making power does not extend "so far as to authorize what the Constitution forbids."⁸⁴

So much for the powers secured to the general government. A different rule applies, it is urged, to the powers reserved to the states. They have no rights of government or property which may not be regulated by treaty. What Congress may not do, may be done by the president and Senate. Its property held by it in governmental or private capacity may be taken. The rights of its citizens may be lost. Its boundaries may be changed. Its jurisdiction forfeited. Its police power said to be inalienable may be alienated by a bargain with a foreign nation. The Ninth and Tenth Amendments gave no protection.

If this be so, the rights of the states, so jealously safeguarded against congressional action, were unconsciously surrendered. That was done which no one at the time intended.

But it was not done by an obscure and ambiguous phrase. As effectively as the national government is protected by the Constitution, so are the states and their governments. The very nature of

⁸²BUTLER, TREATY-MAKING POWER UNDER THE CONSTITUTION, p. 4.

⁸³The Cherokee Tobacco, 11 Wall. 616, 620 (U. S. 1870).

⁸⁴De Geofroy v. Riggs, 133 U. S. 266, 10 Sup. Ct. 295 (1890). And see Downes v. Bidwell, 182 U. S. 312; Asakura v. Seattle, 265 U. S. 332, 44 Sup. Ct. 515 (1924); Doe v. Braden, 16 How. 635 (U. S. 1853).

our union involves their existence as well as that of the United States. We are "an indestructible Union, composed of indestructible States."⁸⁵ As was said by Chief Justice Marshall of them, "they remain and constitute a most important part of our system."⁸⁶ And by Judge Story, "the State governments are, by the very theory of the Constitution, essential constituent parts of the general government."⁸⁷

And the existence of the state means New York as it was when it joined the federal union, a free and independent government with existing boundaries, vested with certain rights and certain property, having fixed jurisdiction and fixed control over its natural resources. Its continued existence means more than the preservation of a name; it means the preservation of all the name connotes. These things may not be transferred one by one to the United States or to Canada and the "indestructible state" remain.

The treaty making power was never supposed to cover ground so extensive. As was once said by Mr. Calhoun "whatever concerns our foreign relations, whatever requires the consent of a foreign nation, belongs to the treaty power;" and by the Supreme Court, it extends "to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States."⁸⁸ Text writers have expressed the same view⁸⁹ and a collection of the opinions of statesmen will be found in a valuable work by Mr. Tucker.⁹⁰

Fortunately, we are not left without a further guide. In the decisions of the Supreme Court we find statements, some perhaps dicta, but all deserving most careful consideration. And while it has been said that no treaty has ever been declared unconstitutional, never, so far as I can find, has it been held that a power reserved to a state may be taken without its consent.

In an early case⁹¹ this was said by Mr. Justice Daniel. The provisions as to treaties are sometimes quoted without the required qualifications. Every power confided to the United States must be expounded in coincidence with the right of the states to power un-

⁸⁵Texas v. White, 7 Wall. 700, 725 (U. S. 1868).

⁸⁶Gibbons v. Ogden, 9 Wheat. 1, 186 (U. S. 1824).

⁸⁷STORY, *op. cit. supra* note 38, at § 511.

⁸⁸Holden v. Joy, 17 Wall. 211, 243 (U. S. 1872).

⁸⁹STORY, *op. cit. supra* note 38, at § 1508; COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW (2d ed. 1891) 117.

⁹⁰TUCKER, LIMITATIONS OF THE TREATY-MAKING POWER (1915).

⁹¹License Cases, *supra* note 20, at 613.

delegated; "in coincidence, too, with the possession of every power and right necessary for their existence and preservation." Treaties, to be valid, must be within the scope of the delegated powers. "A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of a citizen." And again⁹² "Admitting . . . the treaty to be in full force, and that it purported to take from the State of New York the right to tax aliens coming and commorant within her territory, it would certainly be incompetent for such a purpose, because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation." And further,^{92a} "if the people of the several States of the Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace . . . then any treaty . . . invalidating this right . . . would be an usurpation of power which this court could neither recognize nor enforce." A cession of state territory may not be made by treaty.⁹³ "The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution. . . . No treaty should be construed as intended to divest rights of property—such as the state possessed in these lands" and there is a query whether it might be done which "we are not now prepared to hold."⁹⁴ In another case⁹⁵ is a query whether the right to take oysters on land within the state's boundaries might be granted to foreigners by treaty. There are matters, it is again stated,⁹⁶ of domestic concern with which foreign governments have no interest. By treaties, fisheries on the border may perhaps be regulated, but the vested rights of individuals may not be destroyed. Again comes the query whether the disposal of the property of foreigners dying within the state may be regulated by treaty,⁹⁷ although possibly this question may be settled now.

Perhaps the furthest point to which the Supreme Court has gone is in *Missouri v. Holland*.⁹⁸ The regulation of game within its limits

⁹²Passenger Cases, 7 How. 283, 507 (U. S. 1849).

^{92a}*Ibid* 466. ⁹³*Ibid*.

⁹⁴Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 541, 5 Sup. Ct. 995, 1000 (1885); *Geofroy v. Riggs*, *supra* note 84.

⁹⁵United States v. Minnesota, 270 U. S. 181, 208, 209, 46 Sup. Ct. 298, 305, 306 (1926).

⁹⁶Smith v. Maryland, *supra* note 60, at 74.

⁹⁷Prevost v. Greneaux, 19 How. 1 (U. S. 1856).

⁹⁸*Rocca v. Thompson*, 223 U. S. 317, 32 Sup. Ct. 207 (1912).

⁹⁹252 U. S. 416, 40 Sup. Ct. 382 (1920).

is a police power reserved to the state. But while some limit to the treaty making power is conceded, it is held that the treaty with Great Britain concerning migratory birds is valid. They do not belong to the state in the same sense as do deer. They have no fixed habitation within its borders. They remain but a few minutes or hours. No one state or nation may effectively regulate their capture. International agreement is essential. But the very elaboration of the argument shows the difficulty of even this question.

That this is the practical construction given by the general government to this power is shown by the Ashburton treaty in 1842, regulating the boundaries between Maine and Canada. Here the consent of Maine was required to the cession from it and to the cession to it of small parcels of territory.

No treaty then may deprive New York without its consent of rights and property long possessed by it and which make the state what it was and is. They may not be ceded to Canada. Still less may they be confiscated to the United States.

This is far from saying, however, that in certain cases they may not be affected. New York is separated from Canada by the center of the Niagara and St. Lawrence rivers. Over the waters to the boundary line it has full jurisdiction, subject to the commerce clause, and in them probably a temporary species of property. To their beds it has title.

But here the United States comes in contact with an alien power, equally interested in navigation, interested in all uses to which the rivers may be applied. Our relations with Great Britain—matters of peace or war—may be involved. Probably questions so arising and fairly involving foreign affairs may be settled by treaty. Independently of the strict question of navigation the amount of water to be withdrawn by New York and Canada may be fixed,⁹⁹ as has in fact been done.¹⁰⁰ Perhaps the uses permitting such withdrawal. Perhaps questions as to fishing. Perhaps other things. A catalogue of possible subjects cannot be made today. As our foreign relations alter, so will the powers change. But whatever happens the local powers, interests and property of New York can never be ceded to Canada or confiscated by our own government. New York comes to the nation an independent, sovereign state, owning the bed of these rivers and the usufruct of a moiety of their waters. This is a property right never surrendered. The use of the property may perhaps be regulated. It cannot be taken by the United States under the guise

⁹⁹Sanitary District v. United States, 266 U. S. 405, 45 Sup. Ct. 176 (1924).

¹⁰⁰Treaty with Great Britain, 36 STAT. 2448 (1910).

of a treaty. The property of an individual may not be taken by any method by the United States without compensation. Neither may that of New York.

I close by quoting the words of a wise historian. John Fiske says:¹⁰¹ "Our federal government has indeed shown a strong tendency to encroach upon the province of the state governments, especially since our late Civil War. Too much centralization is our danger today, as the weakness of the federal tie was our danger a century ago If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-governments of the states shall have been so far lost as that of the departments of France, or even so far as that of the counties of England,—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever."

¹⁰¹FISKE, CRITICAL PERIOD OF AMERICAN HISTORY (1889) 237.