

Secretary of State,
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Mem^o Nov. 20. 1906: Rights under our Treaty with Japan of 1894.

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Our Treaty with Japan was concluded Nov^r 22. 1894. Article XIX provides that it should go into effect July 17. 1899 and remain in force for twelve years - that is until July 17. 1911, after which time either party could notify the other of its intention to terminate it in twelve months. Therefore the earliest date provided for the abrogation of this treaty is July 17. 1912; unless by mutual consent embodied in a special convention, as is usually the case in making a new treaty in its stead.

Before discussing the rights created by this treaty, it seems proper in this connection to call attention to the 4th paragraph of Article II, which provides that the stipulated "Treatment" in the 1st & 2nd articles shall not in any way affect the laws, ordinances or regulations with regard to trade, the immigration of laborers, police and public security, which are in force, or which may ^{hereafter} be enacted, in either of the two countries. Whence it seems possible to regulate Japanese labor immigration under the Treaty.

Article I provides in the 1st paragraph that the citizens or subjects of either party "shall have full liberty to enter, travel or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property." In the 2nd paragraph, Article I provides that they shall have free access to the "Courts of justice" and, in all matters connected with the administration of justice, they shall enjoy all the rights and privileges enjoyed "by native citizens or subjects" - that is to say National Treatment. The 3^d paragraph defines the Treatment to be given to those residing or traveling in the respective countries; and herein will be noticed a

conflict of rights under "National Treatment" and under the "Treatment of the Most-favored Nation", both of which are specified as alternatives. The "Compilation of Treaties in force" - published under Resolution of the Senate of Feb. 11, 1904 (Sen. Doc. 318; 58th Cong., 2^d Sess. and in U.S. Stat. XXIX, 848) - states that this treaty was "ratified with Amendments, Feb. 5, 1895"; and this conflict may have arisen from one of these Amendments to the Treaty as negotiated.

That 3^d paragraph, apparently the basis of rights claimed by the Japanese, reads thus:

"In whatever relates to rights of residence and travel; to the succession to personal estate by will or otherwise, and the disposal of property of any sort, or in any manner whatever, which they may lawfully acquire; the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties and rights, and shall be subject to no higher imposts or charges in these respects, than Native citizens or subjects, or citizens or subjects of the most favored Nation."

As the remaining provisions of this paragraph are confined to special rights of worship and burial, they are immaterial to discuss.

Thus there appear to have been contemplated in Article I

1st "National Treatment" - the rights of native citizens - "in all matters connected with the administration of Justice":

2nd "National Treatment, or the Treatment of the most favored Nation",
"in whatever relates to rights of residence and travel."

But these two kinds of Treatment are by no means identical, one with the other. Generally speaking, the native citizen ^{in this country} enjoys the highest privileges under the law, and is moreover bound to perform in return certain duties civil and military, as a citizen of the United States and also

as a citizen of the State of his residence; And, in all matters connected with the administration of justice, he must obey the laws of such State and proceed in the State Courts, - except ^{that,} when his opponent is an alien resident or the citizen of another State, the Constitution provides United States Courts as the proper tribunal.

In this constitutional provision, the citizens of the different States are considered as foreigners to each other, precisely as though they were foreign subjects, - alien residents: and foreign citizens or subjects are guaranteed equal justice in ^{all our} ~~the Federal~~ Courts for the reason that the Government of the United States is responsible to the Government of such alien residents for the protection of the persons and property of such aliens and for the enjoyment of their treaty rights. For this reason, therefore, public treaties always provide what kind of Treatment shall be given to the subjects or citizens of the Contracting powers in their respective territories, - whether Reciprocal Treatment, National Treatment, or the Treatment of the Most Favored Nation.

Whence it follows that "Treatment" is the crux of Treaties of Amity, Commerce and Navigation. If treatment of the most favored nation is granted, the alien resident becomes vested with "every privilege, liberty and right" which any other alien resident may enjoy, without discrimination on account of race or color. If a British or a German, a French or Italian or a Latin American citizen or subject residing in the United States has the right of admission to our public hospitals, public libraries or any other

institution supported at the public expense; or to railway cars or other public conveyance existing by State Charter as of public utility; it would seem that public schools, also created as of public utility and maintained altogether at the public expense, would fall into the same category.

If then the right to attend the public schools is a privilege and a right — and it is not material which such privilege or right is granted by statute or established by custom — for any other foreign residents, it would seem to be a right also of Japanese alien-residents by virtue of Article I of our Treaty with Japan.

Mark here the precise language of that Treaty:— "The same privileges, liberties and rights." Equivalence and exact Equality are not identical: a right deemed equivalent to another right is, or may be, an entirely different right. For instance, John Doe has a house on Beacon Street & Richard Roe a house on Commonwealth Avenue of precisely equivalent value: but they are not the same and no law would compel their owners to exchange them. The State, by right of Eminent Domain, might take John Doe's house for public use: it would be obliged to pay the full value of the house in Cash, and John Doe would be obliged to accept such payment in full settlement; but if the State should offer him Richard Roe's house, being precisely equivalent in value to the one seized by right of Eminent Domain, in full settlement, John Doe would be as perfectly within his rights to refuse it as if the State had offered him a drove of cattle or a sewage plant of exact equivalence in value.

Now, to apply this principle: - if the Japanese are entitled, under the Most Favored Nation Treatment, to the same privileges as the British, French or German ^{neighboring fellow aliens} in regard to attending ^{the regular} public schools any where in the United States, - wherein can it be contended that, if perfect equality of school-instruction is provided for Japanese children in a separate school, they must accept the exchange? Until it shall be decided by our courts that general Equivalency and exact Equality are identical, that equivalent rights and precisely identical rights are the same thing, it seems that the Japanese Government has a substantial right to insist that such discrimination is a violation of our Treaty with Japan,

In opposition to this claim of the Japanese Government, it has been urged with apparent confidence that the Courts have ruled it to be constitutional to establish separate schools for Colored Children - that is, of African descent, provided an equal opportunity for education is thus given to them; that equivalency of educational opportunity brings the separate colored schools within the Constitutional requirement; and, by parity of reasoning, it is claimed that it is constitutional for any State of the Union to establish separate public schools for other than white school-children - whether of the Negro, Indian, Mongolian or Japanese races. The ground upon which this is urged is that all public schools are supported at the public expense as a matter of State policy; and that the State Legislature, in providing such support,

reserves to itself the exclusive control of the school administration and the school regulations; that the regulation of public schools is as much a part of the public school system as their establishment and support, and is therefore a prudential matter, exclusively of local concern.

In reply to this argument, it is contended that public education is a statutory right and is therefore, like suffrage also a statutory right, based upon principles of public policy for the time being; and is, therefore, subject to change as circumstances may seem to warrant. Hence it is not a natural or inherent right of all men to have public schools provided, any more than the privilege of suffrage, irrespective of age, color or sex; it is, on the contrary, not a natural inalienable right, but a right incident to the public policy at present deemed advisable.

Equality of opportunity is now, since the Constitutional Amendments came into operation, part of our Constitutional rights; and, as above stated, the Courts have judicially established that equivalency of school-instruction for American citizens ^{of African descent} constitutes that equality of opportunity contemplated in the Constitutional Amendment. But it can hardly be assumed that the Courts would have decided that Substantial Equivalency was Exact Equality, if the Constitution had prescribed an absolutely exact Equality, in specific terms; or that this doctrine of Equivalency should apply to the construction of the Most Favored Nation clause of treaties in favor of discrimination on account of race or color. Moreover the question of colored schools for children of negro descent was purely a local question, with which

no foreign power had any concern, as Chief Justice Marshall styled this class of questions, "infraterritorial". But a public treaty may confer private rights on subjects of the contracting powers, which may be enforced in a court of justice (112 U.S. 580) and, as a compact between independent nations, the enforcement of a treaty depends upon the honor and interest of the parties to it. The rights under a treaty are therefore not a merely local question but of international moment, and for this reason the Constitution 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," thus placing our public treaties on the same footing as the Constitution and Acts of Congress "made in pursuance thereof." It is submitted, therefore, that the decision of the Courts in regard to Colored Schools, a domestic question altogether, can not properly be considered as a precedent in the international question of Japanese School rights under the most favored nation treatment granted by our Treaty with Japan.

Whether the Treatment stipulated, as above set forth, is a rule for the Court is a question to which the Opinion of Chief Justice Marshall in *Foster v. Neilson* (2 Peters 314) may be quoted as established law, to wit:

"a treaty is, in its nature, a Contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial. . . . Our Constitution declares a Treaty to be the Law of the Land. It is, consequently, to be regarded as equivalent to an act of legislature whenever it operates of itself without ^{any} legislative provision." In the Japanese Treaty

, in the 1st article already quoted, it is provided that the citizens or subjects of either of the Contracting powers shall enjoy in the territories of the other the same privileges, liberties and rights as the native citizens or subjects, or the citizens or subjects of the most favored nation. In this case, then, no legislative provision was needed to effect the object to be accomplished; it became automatically operative from the moment it went into operation — namely on July 17, 1899 — and will, by the terms of the Treaty, continue in full force until its abrogation, on or after July 17, 1912.

Another Argument in favor of the authority of the California Legislature to enact the present School Law, which provides for the establishment of separate schools for children of Negroes, Indian and Mongolian descent, is that the establishment and management of public schools is among the reserved rights of the States, over which the United States have absolutely no control or right to interfere. It is admitted that the San Francisco School Board had no right to consider the constitutional authority of the State Legislature to enact such provision and that the Board was fully justified in carrying the State Law into effect. But whether the State Legislature had a constitutional right to pass an act in contravention to this treaty, ^{the exercise of} whether such right was one of the reserved rights of the ^{several} States of the Union is quite a distinct question. Therefore, while accepting in general terms the claim of the right of a State to the exclusive and to prescribe the school-age, to establish evening schools for those over the school age, applicable to all alike, — support and regulation of its public schools, let us consider the Eleventh and Twelfth Amendments of the United States Constitution, which constitute the basis of the Reserved Rights of the several States.

Amendment XI. "The enumeration in the Constitution of Certain Rights shall not be construed to deny or disparage others retained by the People."

Amendment XII. "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."

From these two Amendments it appears that the political powers of government are recognized as distributed between the Federal Government, and the several States of the Union, and the People of the United States as a political entity: in other words, that the United States as a Federal Union possesses certain powers delegated by the United States Constitution; that the several States possess certain other powers under their respective State Constitutions; and that there is a residuum of powers reserved to the body of the People of the United States as a political entity. It is therefore misleading to speak of State Rights as covering all rights not expressly delegated to the United States by the Constitution. Not a little is the debt our country owes to Chief Justice Marshall for establishing the ^{implied} powers of the Federal Government under the Constitution, powers existing by necessary implication for carrying into effect the professed objects of the Constitution, without which our Constitution could not have adapted itself to our marvellous expansion as a nation and a world power.

In fact, the constitution recognizes what may be called the "Three Estates of the Nation", to wit: 1st The People of the United States as a political entity or indivisible whole, represented by the

President; 2nd—The several States, as equal political units, equally represented in the Senate; 3rd—The People of each State, as distinct political entities, proportionally represented in the House of Representatives.

The Preamble of the Constitution constitutes a Declaration as broad and far-reaching in its effects upon our governmental system as was our Declaration of Independence upon ^{our} relations with foreign governments: it may rightfully be called the Golden Milestone from which radiate the great highways of our development as a nation: it marks the end of the old system "founded on legislatures only" and the new system "founded on the People"; it marks the difference between a Treaty and a Constitution"—to quote Madison's earnest words in the Constitutional Convention. That Preamble declares that "We, the People of the United States, in order to form a more perfect union"
 " , do ordain and establish this Constitution for the United States of America."

This was a new conception at that time; as Ellsworth, then a Member of the Convention & later Chief Justice of the Supreme Court, said "a new set of ideas seems to have crept in, since the Articles of Confederation were established. Conventions of the People, with power derived expressly from the People, were not then thought of." And the Constitutional Convention itself was the most famous example of this principle.

Under the Articles of Confederation, the old system could not go into operation without the ratification of the articles of Confederation by the Legislatures of every one of the Thirteen States, nor could those Articles be amended with a similar unanimous ratification by the thirteen State Legislatures. For this reason the Articles of Confederation, agreed to

by the United States in Congress Assembled on Nov. 15, 1777 after sixteen months of emasculation in the interest of State-rights, — could not go into operation without the unanimous approval of all Thirteen State Legislatures, which was not obtained until March 1, 1781. Each State was jealous of its sovereign rights, grudgingly parting with any to the Congress and hampering those granted; all powers, not expressly granted, were reserved to the State; implied powers, necessary for executing the powers granted, were likewise withheld.

There was no recognition whatever of "The People of the United States", as a political entity, in the Articles of Confederation; not even by name. The only party recognized was "The United States in Congress Assembled", an assembly of State-delegations appointed by their State Legislatures, which they represented and by which they were instructed as agents of their State Government; they were not elected by the People of the State, nor were they responsible to the People, nor did they act under the instructions of the People. The Congress represented neither the People of the several States as a political entity, nor the People of the United States as a political entity of any kind whatsoever — much less as the Supreme Political entity invested with power unlimited in all matters of national concern: on the contrary the United States ⁱⁿ Congress Assembled represented nothing whatever beyond the Legislatures of the several States, under whose instructions they acted, but ~~with~~ ^{without any real power or} authority to enforce its decrees recommendations by Executive force or Judicial command.

The change of ^{fundamental} principles from those of the Confederation to those of the Constitution was momentous: — "The difference between a system founded on the Legislatures only and one founded on the People, is the difference between

"a Treaty and a Constitution. * * A breach of any one article of a Treaty by any one of its parties frees the other parties from their engagements: a union of the people, under one Constitution, by its nature excludes such an interpretation." (Madison—in Elliot 355)

Thus we realize the momentous change involved in the recognition of the "People of the United States" as a political entity, the Supreme power which established and ordained our Constitution and provided therein that "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 this same article VI declares that this Supreme Law shall be paramount in every State "anything in the Constitution or Laws of any State to the contrary, notwithstanding."

Not only is the Supreme Law of the Land, made by the People of the United States as an indivisible political entity or by their Authority, declared paramount to the Constitution and the Laws of any State, or any number of States, to the contrary; but the Union thereby created by the People of the United States cannot be dissolved without the consent and formal action of the whole People. Even though it should be provable that one or more articles of the Constitution had been violated by some of States or by the United States, that would not make the Union voidable, as would be the case of a Treaty. This indicates the momentous change made in our governmental system by the adoption of the Constitution of 1787.

The great leaders in the Constitutional Convention recognized the far-reaching character of the change of system they were making: — Thomas Mason, the great Virginia lawyer and ^{profound} statesman, when the question was discussed of how the Constitution should be ratified, said "The legislatures of the States have no power to ratify it; and, if they had, it would be wrong to refer the plan to them because succeeding legislatures, having equal authority, could undo the acts of their predecessors. * * * Whither then must we resort? To the People, with whom all power remains that has not been given up in the constitutions derived from them."

James Wilson of Pennsylvania, second to none of his fellow members in the convention, declared himself "lost in the magnitude of the object. We are laying the foundation of a building in which millions are interested and which will last for ages. * * * A citizen of America is a citizen of the general government, and is a citizen of the particular State in which he may reside. The general government is meant for them in the first capacity; the state governments in the second; both governments are derived from the People, both meant for the People; both, therefore, ought to be regulated on the same principles."

Without quoting the words of others, their colleagues, to the same effect, we have ample recognition ^{of} the People of the United States, as an indivisible political entity, invested with amplest powers to establish and maintain a permanent national government; 2^d of the People of the several States as political entities, invested

with all the powers not given, expressly or by necessary implication, to the People of the United States under the Constitution, and to their State governments under their respective State Constitutions; 3rd The several States as political entities invested by their State Constitutions with such powers as the People of their respective States deem right and proper to give for their local government — always, however, subject to the "Supreme Law of the Land."

These are the "Three Estates" of the governmental system of the United States. In one or the other of these Estates every conceivable power of government is lodged: a careful consideration of the distinctive character and *raison d'être* of each of these Estates will determine to which Estate any given power properly belongs, and thus may be avoided error and conflict of authority, such as not long ago led to the War of Secession, and which may in time to come bring about grave political consequences.

It is a notable feature of the Constitution that Article I on the Legislative Power of the government defines, with great minuteness, the powers granted and those prohibited to Congress: that Article II on the Executive Power is much less explicit, more general in terms and contains no express prohibitions. This 2nd article declares that "The Executive Power shall be vested in a President of the United States": there is no qualification or limitation of the power thus granted by the People of the United States to the only Federal officer elected by them and representing them as a political entity. In the Constitutional convention every proposition to associate with the Executive a Council, or in any degree divest the Executive of an exclusive responsibility for all Executive action by a Responsible Ministry was summarily dismissed and a single Executive vested with all the Executive power of the People; who

^{granted him}
~~presented~~, unlimited power to "take care that the laws be faithfully executed";

Oliver Ellsworth as Senator in 1789, explaining the powers of the President under the Constitution which he had done so much to form, said of the President;

"He shall take care that the laws be faithfully executed", are sweeping words."

Chief Justice Marshall judicially established the doctrine of "Implied Powers" of the President as those necessary to the full performance of his executive functions "by necessary implication". It was this statesmanlike decision, in strict accord with the spirit of the Constitution, which is an insuperable bar against Congressional encroachment upon Executive independence, under whatever guise.

It is suggestive to contrast the ^{limited} powers vested in Congress and those granted as above to the President:—"Art. I All legislative powers herein granted shall be vested in a Congress of the United States." That is to say, the specific powers recited at length in Section 8 of Article I of the Constitution; and, being thus expressly granted, are not to be enlarged by necessary implication. The next to sections (9+10) of Art. I contain the prohibitions upon the power of Congress: and it seems a fair construction of the Twelfth Amendment to hold that it was directed against the danger of the encroachment of Congress - of the Legislative branch of the Government, not of either the Executive or the Judiciary - upon the reserved rights of the States and those of the People of the United States as a political entity. That Amendment reads thus, "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."

One word more in this connection seems proper as to the construction of the above 12th Amendment: - the residuum of rights are reserved to two distinct political entities, - the Several States, or to the People. Had it been intended to reserve them to the People of the respective States, as the States Rights doctrine assumes, this distinction would have been superfluous. The language refers to two distinct points, naturally one is the granting ^{to the People of the United States}.

In support of the positions thus far taken and maintained, may be cited the following opinions of the United States Supreme Court:

I. Mr. Justice Chase in 1796, in *Ware v. Hylton* (3 Dallas, 220-284), gave the opinion of the Court, quoted by Mr. Justice Story in *Hawkinson v. Lynham* (100 U.S. 488) as the views of those who framed the Constitution and still held to be correct:—

3 Dallas 488

"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 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 its repeal or nullification by a State Legislature, this certain consequence follows;—that the will of a small part of the United States may control or defeat the will of the Whole."

The foregoing lucid exposition of Constitutional law by our Supreme Court seems conclusive against any State law in contravention of a U.S. Treaty,

II.

In the Japanese Treaty, already quoted so far as concerns the form or kind of Treatment stipulated in the 3rd paragraph of Article I, we have found that, "in whatever relates to rights of residence and travel", the Japanese in the territories of the United States are guaranteed the privileges, liberties and rights of "Native citizens or subjects, or Citizens or Subjects of the most favored Nation"—that is National Treatment, or that of the most favored Nation.

Whatever may have been the reason for establishing, as the Treaty clearly does, an alternative in this respect, the only thing which is of present moment is, which of those two kinds of treatment shall be taken as a rule of the Court.

On this point we have the decision of the Supreme Court in *Hawkinson v. Lynham* (100 U.S. 483) as our guide:—

U.S. 487

"When a Treaty admits of two constructions, one restrictive as to the rights which may be claimed under it and the other liberal, the latter is to be preferred. (*Shanks v. Dupont*, 3 Peters 242). Such is the settled rule of this Court."

Therefore, if the Japanese find that their rights to send their children to the public schools are more liberal under the "Most favored Nation Treatment" than under "National Treatment", the rule of courts of the United States would seem to assure what, in this respect, is shown to be the more liberal,

We find in *Taylor v. Morton* (2 Curtis 454) a very lucid exposition as to the rights of a foreign government and the responsibility of our government for the infra-territorial carrying out of Treaty provisions. This opinion, delivered by Mr. Justice Curtis in the U.S. Circuit Court for Massachusetts in 1855, makes a very keen distinction between the judicial

III.

and the Executive departments in regard to the operation of Treaties. The case was in regard to Russian Hemp upon which duties were paid under an act of Congress, fixing one rate of duty on Hemp generally and a lower rate on Hemp imported from India and Manilla. It was urged that our Treaty with Russia provided that no ^{higher} rates of duty should be chargeable on the products of Russia than on like products of other countries. The court decided that the duty was assessed under an act of Congress and it was for the political department to determine whether it was a violation of the Treaty; that, though a treaty is the law of the land under the Constitution, Congress may repeal it so far as it is a municipal law, provided the subject-matter is within the ^{power} of Congress. The following extract from that opinion is worthy of careful consideration:

2 Cuts 459

"This is solely a question of municipal, as distinguished from public, Law. The foreign sovereign, between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith; but, through what internal arrangements this shall be done, is exclusively for the consideration of the United States. Whether the Treaty shall be the rule of action for the people as well as the government, whether the power to enforce it & apply it shall reside in one department or another, - neither the Treaty itself, nor any implication drawn from it, gives him [i.e. the foreign sovereign] any right to inquire."

Under this opinion, it would seem that the U.S. Court declined to go behind an act of Congress ~~which is~~ claimed to be in violation of a public treaty, on the ground that such violation was a matter for the

Executive (or political), not the judicial, department to determine. It would, however, seem that the court had ample authority to interpret the provisions of a Treaty as a part of the Supreme Law of the Land, rather than the political department, provided it was duly certified by the political department that the Treaty ^{in its intra-territorial operation, a} was in present force and obligation & therefore, part of the municipal law.

Moreover, while in *Ponyer v. Morton* the issue was between an Act of Congress and a public treaty—both equally part of the Law of the Land, it may be doubted whether the court would ^{have} declined jurisdiction had the issue been between the provisions of a State Constitution, or of a State law, and the Supreme Law of the Land whatever its origin—whether it be the Constitution, the Acts of Congress or a Public Treaty. For, whenever the Supreme Law of the Land conflicts with a State Constitution or a State Law, the Judges of all Courts are bound to enforce that Supreme Law and to interpret and apply its provisions.

Returning to our Treaty with Japan, in conclusion it may be said that the Japanese Government has a right to expect and require that its stipulations shall be kept with scrupulous good faith, though it has no right to inquire by what agency our Government may act in so doing; that question is one wholly within the official duty of the Executive; it is a part of the Law of the Land and the People of the United States, in ordaining the Constitution, made it obligatory that the President "shall take care that the laws be faithfully executed," and they granted all powers necessary therefor, whether express or by necessary implication.

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Horace N. Fisher