REVIEWS

The Treaty-Making Power of the United States and the Methods of its Enforcement as affecting the Police Powers of the States. By CHARLES H. BURR. (Proceedings of the American Philosophical Society.) Lancaster, Pa., New Era Printing Company, 1912.—pp. 269–422.

National Supremacy: Treaty Power v. State Power. By EDWARD S. CORWIN. New York, Henry Holt and Company, 1913.—viii, 321 pp.

Limitations of the Treaty-Making Power under the Constitution of the United States. By HENRY ST. GEORGE TUCKER. Boston, Little, Brown, and Company, 1915.—xxi, 444 pp.

The monograph by Mr. Burr is one of nine essays submitted to the American Philosophical Society for the Henry M. Phillips Prize for the best dissertation on the subject mentioned in the title. Its meritorious character is presumptively attested by the circumstance that it secured the award. A careful examination shows that its excellence is intrinsic as well as comparative. In reality it constitutes a distinct and material contribution to the exposition of the nature and extent of a power than which none more far-reaching or more important is confided to the national government. The author's clear and precise preliminary statement is followed by a full and analytical discussion of the federal cases, and especially of those which have been determined by the Supreme Court of the United States. In performing this task Mr. Burr displays an intelligent discrimination, the lack of which often causes writers to flounder about among inconsistent dicta in apparent unconsciousness of the fact that the dicta are inconsistent and that the inconsistency, proceeding from radically different conceptions of the nature and powers of the government of the United States, is such as to render appropriate the rejection of one or the other view rather than an attempt to reconcile them.

The view maintained by Mr. Burr, as the result of his investigations, is that the treaty-making power is, within the lines drawn by international usage, practically unlimited. To the suggestion that a treaty stipulation cannot control the exercise of state police powers, his answer is that, "without qualification of any kind whatsoever and

without limitation by any possible definition of the treaty-making power, a treaty provision as the embodied manifestation of the federal will is supreme over any and all state enactments made in the exercise of the police power." This opinion he maintains upon the strength of the purposes and beliefs of the framers of the Constitution, and on contemporary interpretations of that instrument by the Supreme Court, especially while Marshall was chief justice, as well as upon the decisions of that tribunal since the Civil War.

The committee of the American Philosophical Society, in making its award, stated that it had "found very great difficulty" in deciding between Mr. Burr's essay and one written by Mr. Edward S. Corwin, whose present volume apparently preserves the results of his effort. Mr. Corwin's conclusions are in harmony with those of Mr. Burr. He maintains (1) that the treaty-making power is not constitutionally restricted by the police powers of the states, and (2) that no real peril lurks in this view. Not only, as he points out, did the framers of the Constitution repeatedly refuse to insert a clause to safeguard the internal police of the states against the operation of federal power, but they specifically recognized that the treaty-making power might deal with subjects reserved to the states. Such was the view early taken by the courts, and it has been confirmed by subsequent practice. That it involves no real danger is, as he contends, shown by the circumstance that the Senate, without whose approval a treaty cannot be ratified, is so constitued as to represent in a special sense state interests, as well as by other considerations of a legal and practical nature.

Mr. Tucker approaches the subject from a different point of view. Considering what he deems to be "limitations on the treaty-making power," he concludes that a treaty "cannot take away or impair the fundamental rights and liberties of the people, secured to them in the Constitution itself, or in any Amendment thereof;" that it cannot bind the government to do "what is expressly or impliedly forbidden in the Constitution;" that it "cannot change the form of the government of the United States;" that, where the protection or control of personal or property rights is by the Constitution confided to a state, the latter cannot be ousted of its jurisdiction "by having the same transferred to the treaty-making power;" and that "the treaty power cannot confer greater rights upon foreigners than are accorded citizens of the United States under the Constitution."

In the main it may be said that these so-called "limitations," in the broad and general terms in which they are expressed, involve in a proper sense not so much the question of restrictions upon the treaty-

making power as that of its proper scope. Probably no one would contend that any power given under the Constitution for a certain purpose, though unlimited as to the appropriate subject-matter, could be equally employed for any other purpose. Should the courts, being invested with all the judicial power of the federal government, undertake to pass statutes, or should the president, in the exercise of his executive functions, assume to render judicial decisions, or should the Congress, as the national legislature, engage in diplomatic correspondence, we should think of these acts as mere usurpations rather than as stretches of power. The conceptions are quite distinct.

Of his proposition that treaties "cannot confer greater rights upon foreigners than are accorded to citizens of the United States under the Constitution," Mr. Tucker remarks that it "would seem to be self-evident from the very nature and object of governments, and therefore needs no discussion." It may, however, be observed that the enunciation of "rights" as "self-evident" is often found to be strangely at variance with actual legal conditions. The word "rights" is itself a term that requires definition and specification. Certain it is that there is no country in which the position of aliens does not to some extent differ from that of citizens, and if in the term "rights" we embrace privileges and exemptions, there is no country in which rights are not accorded and secured to aliens by treaty in matters in which natives enjoy none. On the other hand, the alien may in other particulars enjoy less "rights" than the citizen. The simple truth is that the two categories are different, and that neither can be controlled by sweeping inferences from the position or condition of the other.

But, to come to questions of a tangible and concrete nature, there is one subject on which Mr. Tucker seeks to propound a view essentially opposed to that maintained by the two previous writers, namely, as to matters falling within the police powers and "reserved" powers of the states. He would exclude such matters from treaty regulation; and in this relation he largely relies upon a partly new version or interpretation of Ware *v.* Hylton (3 Dallas, 199), decided by the Supreme Court of the United States in 1796. Much as I should personally be inclined to concur in any view set forth by Mr. Tucker, I find myself wholly unable to accept this novel version, nor has it, in my opinion, the importance ascribed to it. During the Revolution, Virginia, like some other states, adopted legislation for the sequestration or confiscation of debts due to British subjects prior to the war, whereby payment into the state treasury was declared to be a bar to any future suit by the creditor for the recovery of the money. By article iv of

the treaty of peace with Great Britain of 1782–83, an attempt was made to nullify such acts, by agreeing that creditors on 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. It was in order to give effect, among other things, to this very stipulation that the Constitution was made (article vi, clause 2) expressly to declare 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" should be "bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Language could not be plainer, nor could the intent, as demonstrated by the historical record, be clearer, that the state statutes were in this matter to give way to and fall before the treaty. Mr. Tucker, however, essays to question the judicial assertion of the supremacy of the treaty in Ware *v.* Hylton, by arguing that, as some of the justices thought that the Virginia law did not finally "confiscate" debts, the treaty was not held to override the statutory bar because there was no such bar to be overridden!

In answer to this suggestion, it perhaps might suffice to point out that, as it was the avowed object of the treaty to remove any and every "lawful impediment," without regard to the form, the question of "confiscation" (save on the theory of Mr. Justice Wilson, hereafter noticed) was in effect immaterial; but we will examine the judicial record.

There were five judges in the court, Iredell, Chase, Paterson, Cushing and Wilson. Iredell, as the reporter states, did not take part in the decision, though he read the opinion he had delivered in the court below. Chase, as Mr. Tucker concedes, squarely held that the treaty was superior to the Virginia law and annulled it. And so did the three remaining judges; for, when we examine their opinions, we find that the effect which Mr. Tucker attaches to the word "confiscate" is altogether illusory. Regarding the "confiscation" of private debts as "disreputable," the judges sought, while holding that the treaty removed the bar of the statutes, to find in the language of those enactments evidence that the state did not intend a *permanent* deprivation and thus to console the unfortunate debtor-defendant with the hope that the state might eventually step in and pay the judgment rendered against him. Justice Wilson did indeed incline to the view that Virginia had exceeded her power, arguing that the power to confiscate debts due to aliens belonged exclusively to the "nation;" but he hastened to add that, even if she had that power, "the treaty annuls

the confiscation." Paterson said: "The Fourth Article . . . removes all lawful impediments, repeals the legislative act of Virginia . . . and with regard to the creditor annuls everything done under it." Cushing said he should "not question the right of a state to confiscate debts;" he thought, however, that an intent was expressed in the Virginia act of 1777 not to "confiscate" (using the word in the sense of permanency), unless Great Britain should set the example. But, he continued, if payment under the act was "to be considered as a discharge, or a bar, so long as the act had force," was there "a power, by the treaty . . . entirely to remove this law, and this bar, out of the creditor's way? This power," he declared, "seems not to have been contended against by the defendant's counsel: 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." He further affirmed that "the plain and obvious meaning" of the treaty was "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;" and that it must also "annihilate all [state] tender laws, making anything a tender, but sterling money."

In the face of these clear and decisive pronouncements, on which the judgment of the court was founded, we are at liberty to believe that the understanding of Ware *v.* Hylton entertained by the bench and the bar for a hundred and twenty years remains unshaken. But, even were the fact otherwise, we should not be justified in holding that a plain provision of the Constitution may be nullified by the discovery that some case that was supposed to have given judicial effect to it had been erroneously interpreted.

There is a method of interpreting the Constitution which may be denominated the *apprehensive*. It is fertile in doubts, and treats of powers as subjects of abuse rather than as national necessities or sources of advantage. Approaching the treaty-making power in this spirit, writers too often forget that, in proportion as they would curtail, thwart, and hamper the operation of the ample clause of the Constitution in this country, in the same measure must citizens of the United States be put at a disadvantage in foreign countries, reciprocity being essential to successful negotiation. One of the primary objects of treaty making is the regulation of the rights of aliens. The first treaties made by the United States exercised this power. That it was a valid exercise of power was not doubted.

J. B. MOORE.

Retrospections of an Active Life. By JOHN BIGELOW. Volumes IV and V. New York, Doubleday, Page and Company, 1913. —572, 459 pp.

These two volumes complete the set of which the first three were reviewed in the POLITICAL SCIENCE QUARTERLY (volume xxv, page 138). Mr. Bigelow died in 1911, at the age of ninety-four. The preparation of these volumes was the task to which his last years were devoted, and it was substantially completed when he passed away. They cover the period 1867–1879, years less rich in dramatic experience than those that immediately preceded, but hardly less full of incidents likely to inform and amuse the historically-minded reader.

Before referring to the more serious matters touched upon in the volumes it should be stated that the reader in search of mere entertainment will not go unrewarded, especially if he looks with some attention through the selections from the correspondence of Mr. Bigelow with his more intimate friends. John Hay contributes a number of items that exhibit the same epistolary vivacity that enlivens Mr. Thayer's *Life and Letters of John Hay*. Most copious, however, is the stream of humor that flows from the pen of Huntington, Paris correspondent of the *New York Tribune*, whose spirit and tastes seem to have been singularly congenial to Bigelow. It would be hard to find, for example, a more diverting essay in the gentle art of malediction than that which appears in a letter of Huntington's of August 16, 1869. Huntington was a collector of *Americana*, and he learned one day that a piece he was interested in had been picked up at a bargain by another collector. Telling Bigelow of his woe, Huntington bursts out upon his lucky and unconscious rival with these fearsome curses:

> May corns and bunions wait upon his steps! Let him miss the omnibus and the hour for mailing! Let his proprietor raise the *loyer*, and the *concierge* forget the names of his visitors! May bedbugs bite him, and showers catch him without an unbrella! Let carriages bespatter him, and deserving but needy Americans get monies out of him, and the binder mis-letter his books! May his shirt buttons fall off, and his coat ruck in the back! . . . Let his cigar not draw, and his ink be muddy and his lamp sputter and go out! I hate him [volume iv, page 309].

The two volumes under review begin with Mr. Bigelow's retirement from service as minister to France. He never again held office under the federal government, but between the spring of 1875 and the end of 1877 he served the state of New York, first as appointed commis-