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C O M M E N T A R I E S
ON THE
CONSTITUTION OF THE UNITED STATES;
WITH
A PRELIMINARY REVIEW
THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES,
BEFORE THE ADOPTION OF THE CONSTITUTION.

BY JOSEPH STORY, LL. D.,
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN THREE VOLUMES.

"GOVERNMENT IS A CONTRIVANCE
OF
HUMAN WISDOM
TO
PROVIDE FOR HUMAN WANTS."
BURKE.

VOLUME I.

BOSTON:
HILLIARD, GRAY AND COMPANY.
C A M B R I D G E :
BROWN, SHATTUCK, AND CO.
1833.

INTRODUCTION

This reprint of Joseph Story's 1833 Commentaries on the Constitution of the United States provides a welcome revival for a significant work in the literature of American constitutionalism. Today, a century and a third after Story's book first appeared, the fundamental law of the American republic is under more intense scrutiny than at any time since 1789, when the Constitution first became effective. Most of the urgent questions of present day domestic policy turn on the division of power to govern between the states and the national government. Allocation of national effort by means of heavier national taxation and selective federal expenditure; increasingly comprehensive control of the nation's economy under national legislation effectuated by federal administrators; more and more strict supervision of the administration of justice by federal courts which often irk state prosecutors and judges; readjustment of race relations, of labor relations, of land use in urban complexes--all relate in one way or another to a shift in governmental power from the local to the national.

Every change in government restricts some men for the benefit of others, and men so restricted are apt, under our system, to cry out that the change is unconstitutional. Story's Constitution is immensely useful for evaluating the arguments of those who contend that diminished local authority and the shift toward national control are counter to our historic constitutional ways. Story wrote, of course, before the Civil War, and before the Thirteenth, Fourteenth, and Fifteenth Amendments had institutionalized that war's results and had emphasized the diminution of state sovereignty which the Union victory had

demonstrated. He wrote before the dramatic efflorescence of technology, of transportation and communication, which followed the peace of 1865, and which made inevitably necessary an increasing federal control of all the ensuing aggregate of mechanical and human apparatus--railroad trains, electric power lines, radio broadcasts do not stop at state lines. And he wrote before the Income Tax Amendment of 1913 had increased federal power to canalize public revenue and expenditure, thereby still further centralizing the total government of the nation. But the perceptive reader of Story's 1833 book sees that the author, a justice of the United States Supreme Court and Dane Professor of Law at Harvard, was a fully committed believer in Chief Justice John Marshall's broad concept of national power. The details of federal concern have changed, but Story was ready, a century and a third ago, to find

the government of the United States adequate to the tasks of its time and to find in the Supreme Court ample powers to carry out its share of expanded national duties. His Constitution treatise has a lesson for our own time.

Story was born in Marblehead, Massachusetts, in 1779, graduated from Harvard in 1798, read law in Samuel Sewall's office in Marblehead, was admitted to the Massachusetts Bar in 1801, and began practice in Salem. Essex County was a strong center of the John Adams Federalists. Young Story turned instead toward Jefferson's Republican Party, ancestor of the present Democrats, a move undoubtedly fortunate for his later career. He was elected to the state legislature in 1805 and to the House of Representatives in 1808. In the time not allotted to his law practice and political activity, he began his career as a writer on legal subjects. He started with an annotated Selection of Pleadings in Civil Actions (1805), and then went on to produce American editions of standard English treatises on commercial paper, on the law of shipping,

and on legal procedure--areas in which American lawyers still followed English precedent. In 1810 Story appeared in the Supreme Court as successful counsel for one John Peck in the first case in which that Court held invalid a state statute on the ground that it violated the United States Constitution.1 In 1811, when Story was only thirtytwo years old, President Madison appointed him an Associate Justice of the Supreme Court of the United States.

The work of the Supreme Court itself was much lighter in 1811 than it is now, but the individual justices were then required to go on circuit in various parts of the United States, where, as circuit justices, they presided over trials in the circuit courts and heard appeals from the federal district courts. Thus Story not only sat on the Supreme Court in Washington several months each year, but he also held circuit courts in New Hampshire, Massachusetts (part of which became Maine in 1820), and Rhode Island. With all of these judicial duties, he nevertheless continued his writing. In 1829 Harvard appointed him Dane Professor of Law on the understanding that, like Blackstone at Oxford before him, he would not only lecture on various legal topics, but would publish those lectures as treatises. Harvard also contemplated that Story would remain on the Supreme Court, and he thus continued both as associate justice and as professor of law until he died in September, 1845.2

In January, 1832, Story published the first offshoot of his Dane professorship, a book on the Law of Bailments. This was a practical treatise, not novel, useful in its day,

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1 Fletcher v. Peck,6 Cranch 138 (1810). Peck had deeded lands in the State of Georgia to Fletcher. The Georgia legislature had passed a law holding Peck's title invalid. Fletcher sued Peck for selling lands he did not own. The Supreme Court held the Georgia statute invalid because it attempted to "impair the obligation of a contract," in violation of Article I, §10 of the U. S. Constitution.

2 A useful biography is Life and Letters of Joseph Story, written by his son, William Wetmore Story.

now read only by legal antiquarians. A year later he published the second treatise of his Dane chair, the three volume Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution. Of the nine books which Story wrote during his Dane professorship, his Constitution has been the most read, the most reprinted.

Story's Constitution was not the first American book on the subject. Hamilton, Madison, and Jay had written the Federalist Papers, which appeared serially in newspapers in 1787-1788 and which ever since, as published in book form and republished in numerous editions, has remained an invaluable commentary. The first volume of St. George Tucker's 1803 edition of Blackstone contained, as a 237-page appendix, a "View of the Constitution of the United States." Thomas Sergeant published his Constitutional Law in Philadelphia in 1822; a second edition appeared in 1830. William Rawle published his View of the Constitution in Philadelphia in 1825. Rawle's book is now principally remembered because he expressed in it the view that any state of the Union could constitutionally secede if the unequivocal voices of the state's people so determined. Rawle's text was used for instruction at West Point when the men who came to lead the Confederate armies in 1861-1865 were cadets. Kent's Commentaries of 1826 and Dane's Abridgment of 1823-1829 contained much constitutional commentary. Story was familiar with all these works.

But none of these earlier books had a sweep even approaching that of Story's Constitution; no one of their authors had Story's equipment. He had been a young lawyer when the Jefferson-Marshall antagonism came toa head in 1803 in the Supreme Court's Marbury v. Madison,3 which established that Court's power to declare an

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3 1 Cranch 137.

act of Congress unconstitutional--a power which Story vigorously supported thirty years later in his Constitution.4 He had been counsel in the first case to hold a state statute unconstitutional.5 He had sat on the Supreme Court from 1811 while Marshall's doctrines of strong national power were becoming entrenched, in a series of notable opinions, as the very foundations of American constitutionalism. And by 1833 he had mastered the art of authorship. His Constitution deserved its immediate popularity.

New American editions appeared in 1851, 1858, 1873, and 1891; the last--the fifth edition--was reprinted in 1905. A French translation appeared in 1843, somewhat abridged, with cross references to Tocqueville and other writers. Latin America during the mid-nineteenth century was trying to develop federal systems on the model of the United States, and Spanish editions of Story's Constitution appeared in Buenos Aires in 1860, 1881, and 1888, and in Mexico in 1879. A Brazilian edition, in Portuguese, was published between 1894 and 1896. Story himself, in 1834, brought out an abridged version entitled The Constitutional Class Book, intended, as he wrote, for "the higher classes in common schools." His abridgment ran through a series of editions in the middle and later years of the nineteenth century under the amended title, A Familiar Exposition of the Constitution.

But by 1905, when the reprint of the fifth American edition of the complete work appeared, the book had already become outdated as a currently useful text on American constitutional; law. The increasing use of the Fourteenth Amendment's due process and equal protection clauses as limitations on state economic regulation called for fundamentally revised constitutional texts. _____

4 § 1570 ff. Story explicitly endorses the Marbury doctrine, citing the case. 5 Fletcher v. Peck, 6 Cranch 87 (1810) .

Thomas M. Cooley's 1868 Constitutional Limitations and its several revised editions undoubtedly replaced Story's treatise in many libraries as a lawyer's working tool. The rise of casebooks for law-school instruction on the Constitution, led by James Bradley Thayer's massive two volume Cases on Constitutional Law of 1895, made Story's book less saleable for student use. Westel Woodbury Willoughby's three-volume Constitutional Law of the United States, published in 1910, and its "second edition" of 1928, became the standard reference text of the second and third decades of the twentieth century.

But all these scholarly books, from Cooley on, are products of lamp and library. Story on the other hand had lived in the first great formative era of American constitutionalism, had taken part in most of the great Supreme Court decisions which then made up its substance. To a large extent Story's 1833 book attains the status of a primary source. Copies of the first edition are hard to find and costly. A reprint is welcome alike to professional scholars and to those thoughtful laymen who are interested in the constitutional development of the United States.

Arthur E. Sutherland Cambridge, Massachusetts May, 1968

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CAMBRIDGE:
E. W. METCALF AND CO.
Printers to the University.

TO THE
HONORABLE JOHN MARSHALL, LL. D.,
CHIEF JUSTICE OF THE UNITED STATES OF AMERICA.

SIR,

I ask the favour of dedicating this work to you. I know not, to whom it could with so much propriety be dedicated, as to one, whose youth was engaged in the arduous enterprises of the Revolution; whose manhood assisted in framing and supporting the national Constitution; and whose maturer years have been devoted to the task of unfolding its powers, and illustrating its principles. When, indeed, I look back upon your judicial labours during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning, and the solid principles, which they every where display. Other Judges have attained an elevated reputation by similar labours in a single department of jurisprudence. But in one department, (it needs scarcely be said, that I allude to that of constitutional law,) the common consent of your countrymen has admitted you to stand without a rival. Posterity will assuredly confirm by its deliberate award, what the present age has approved, as an act of undisputed justice. Your expositions of constitutional law enjoy a rare and extraordinary authority. They constitute a monument of fame far beyond the ordinary memorials of political and military glory. They are destined to enlighten, instruct, and convince future generations; and can scarcely perish but with the memory of the constitution itself. They are the victories of a mind accustomed to grapple with difficulties, capable of unfolding the most comprehensive truths with masculine simplicity, and severe logic, and prompt to dissipate the illusions of ingenious doubt, and subtle argument, and impassioned eloquence. They remind us of some mighty river of our

own country, which, gathering in its course the contributions of many tributary streams, pours at last its own current into the ocean, deep, clear, and irresistible.

But I confess, that I dwell with even more pleasure upon the entirety of a life adorned by consistent principles, and filled up in the discharge of virtuous duty; where there is nothing to regret, and nothing to conceal; no friendships broken; no confidence betrayed; no timid surrenders to popular clamour; no eager reaches for popular favour. Who does not listen with conscious pride to the truth, that the disciple, the friend, the biographer of Washington, still lives, the uncompromising advocate of his principles?

I am but too sensible, that to some minds the time may not seem yet to have arrived, when language, like this, however true, should meet the eyes or the public. May the period be yet far distant, when praise shall speak out with that fulness of utterance, which belongs to the sanctity of the grave.

But I know not, that in the course of providence the privilege will be allowed me hereafter, to declare, in any suitable form my deep sense of the obligations, which the jurisprudence of my country owes to your labours, or which I have been for twenty-one years a witness, and in some humble measure a companion. And if any apology should be required for my present freedom, may I not say, that at your age all reserve may well be spared, since all your labours must soon belong exclusively to history?

Allow me to add, that I have a desire (will it be deemed presumptuous?) to record upon these pages the memory of a friendship, which has for so many years been to me a source of inexpressible satisfaction; and which, I indulge the hope, may continue to accompany and cheer me to the close of life.

I am with the highest respect,
affectionately your servant,
JOSEPH STORY.

Cambridge, January, 1833.

PREFACE.

I NOW offer to the public another portion of the labours devolved on me in the execution of the duties of the Dane Professorship of Law in Harvard University. The importance of the subject will hardly be doubled by any pers ons, who have been accustomed to deep reflection upon the nature and value of the Constitution of the United States. I

can only regret, that it has not fallen into abler hands, with more leisure to prepare, and more various knowledge to bring to such a task.

Imperfect, however, as these Commentaries may seem to those, who are accustomed to demand a perfect finish in all elementary works, they have been attended with a degree of uninviting labour, and dry research, of which it is scarcely possible for the general reader to form any adequate estimate. Many of the materials lay loose and scattered; and were to be gathered up among pamphlets and discussions of a temporary character; among obscure private and public documents; and from collections, which required an exhausting diligence to master their contents, or to select from unimportant masses, a few facts, or a solitary argument. Indeed, it required no small labour, even after these sources were explored, to bring together the irregular fragments, and to form them into groups, in which they might illustrate and support each other.

From two great sources, however, I have drawn by far the greatest part of my most valuable materials. These are, The Federalist, an incomparable commentary of three of the greatest statesmen of their age; and the extraordinary Judgements of Mr. Chief Justice Marshall upon constitutional law. The former have discussed the structure and organization of the national government, in all its departments, with admirable fulness and force. The latter has expounded the application and limits or its powers and functions with unrivalled profoundness and felicity. The Federalist could do little more, than state the objects and general bearing of these powers and functions. The masterly reasoning of the Chief Justice has followed them out to their ultimate results and boundaries, with a precision and clearness, approaching, as near as may be, to mathematical demonstration. The Federalist, being written to meet the most prevalent popular objections at the time of the adoption of the Constitution, has not attempted to pursue any very exact order in its reasonings; but has taken up subjects in such a manner, as was best adapted at the time to overcome prejudices, and win favour. Topics, therefore, having a natural connexion, are sometimes separated; and illustrations appropriate to several important points, are sometimes presented in an incidental discussion. I have transferred into my own pages all, which seemed to be of permanent importance in that great work; and have thereby endeavoured to make its merits more generally known.

The reader must not expect to find in these pages any novel views, and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. My object will be sufficiently attained, if I shall have succeeded in bringing before the reader the true view of its powers maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government. The expositions to be found in the work are less to be regarded, as my own opinions, than as those of the great minds, which framed the Constitution, or which have been from time to time called upon to administer it. Union subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.

The reader will sometimes find the same train of reasoning brought before him in different parts of these Commentaries. It was indispensable to do so, unless the discussion was left imperfect, or the reader was referred back to other pages, to gather up and combine disjointed portions of reasoning. In cases, which have undergone judicial investigation, or which concern the judicial department, I have felt myself restricted to more narrow discussions, than in the rest of the work; and have sometimes contented myself with a mere transcript from the judgments of the court. It may readily be understood, that this course has been adopted from a solicitude, not to go incidentally beyond the line pointed out by the authorities.

In dismissing the work, I cannot but solicit the indulgence of the public for its omissions and deficiencies. With more copious materials it might have been made more exact, as well as more satisfactory. With more leisure and more learning it might have been wrought up more in the spirit of political philosophy. Such as it is, it may not be wholly useless, as a means of stimulating abler minds to a more thorough review of the whole subject; and of impressing upon Americans a reverential attachment to the Constitution, as in the highest sense the palladium of American liberty.

January, 1833.

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OF THE

UNITED STATES OF AMERICA.

WE, the people of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1.

1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SECTION 2.

1. The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3.

1. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature

of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen or the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

5. The senate shall choose their other officers, and also a president pro tempore in the absence of the vice president, or when he shall exercise the office of president of the United States.
6. The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.
7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4.

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof: but the congress may at any time by law, make or alter such regulations, except as to the places of choosing senators.
2. The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.
2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.
3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the Journal.
4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from, the same; and for any speech or debate in either house, they shall not be questioned in any other place.
2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SECTION 7.

1. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.
2. Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days, (Sundays excepted,) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.
3. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary, (except on a question of adjournment,) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-

thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.

The congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and gen-

eral welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies through out the United States:

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the Supreme Court:

10. To define and punish piracies, and felonies, committed on the high seas, and offences against the law of nations:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years:

13. To provide and maintain a navy:

14. To make rules for the government and regulation of the land and naval forces:

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and acceptance of congress,

become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:--And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9.

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

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or ex post facto law shall be passed.

4. No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties, in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

SECTION 10.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.
2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1 .

l. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and together with the vice-president, chosen for the same term, be elected as follows:
2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.
3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify,

and transmit, sealed, to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then, from the five highest on the list the said house shall in like manner choose the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.
4. The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.
5. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.
6. In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as pres-

ident, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.
7. The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.
8. Before he enter on the execution of his office, he shall take the following oath or affirmation:
9. " I do solemnly swear, (or affirm,) that I will faithfully " execute the office of president of the United States, and will, " to the best of my ability, preserve, protect, and defend the " Constitution of the United States."

SECTION 2.

l. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the

principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

3. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SECTION 3.

1. He shall from time to time give to the congress information or the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4.

1. The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE Ill.

SECTION 1 .

l. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2.

1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between

a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SECTION 3.

1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.

1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

SECTION 3.

1. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

2. The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4.

1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

ARTICLE V.

1. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds or the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and

purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thins in the constitution or laws of any state to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

1. The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

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

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

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

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

be compelled, in any criminal case, to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour; and to have the assistance of counsel for his defence.

ARTICLE VII.

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

ARTICLE VIII.

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

ARTICLE IX.

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

ARTICLE X.

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.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

l. The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vicepresident, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as vicepresident, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president: a quorum for the purpose shall consist of two-thirds of the whole number of senators, a majority of the whole number shall be necessary to a choice.
3. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

C O M M E N T A R I E S
ON
THE CONSTITUTION.

COMMENTARIES.

PRELIMINARY CHAPTER.

PLAN OF THE WORK.

The principal object of these Commentaries is to present a full analysis and exposition of the Constitution of Government of the United States of America. In order to do this with clearness and accuracy, it is necessary to understand, what was the political position of the several States, composing the Union, in relation to each other at the time of its adoption. This will naturally conduct us back to the American Revolution; and to the formation of the Confederation consequent thereon. But if we stop here, we shall still be surrounded with many difficulties in regard to our domestic institutions and policy, which have grown out of transactions of a much earlier date, connected on one side with the common dependence of all the Colonies upon the British Empire, and on the other with the particular charters of government and internal legislation, which belonged to each Colony, as a distinct sovereignty, and which have impressed upon each peculiar habits, opinions, attachments, and even prejudices. Traces of these peculiarities are every where discernible in the actual jurisprudence of each State; and are silently or openly referred to in several of the pro-
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visions of the Constitution of the United States. In short, without a careful review of the origin and constitutional and juridical history of all the colonies, of the principles common to all, and of the diversities, which were no less remarkable in all, it would be impossible fully to understand the nature and objects of the Constitution; the reasons on which several of its most important provisions are founded; and the necessity of those concessions and compromises, which a desire to form a solid and perpetual Union has incorporated into its leading features.
The plan of the work will, therefore, naturally comprehend three great divisions. The first will embrace a sketch of the charters, constitutional history, and ante-revolutionary jurisprudence of the Colonies. The second will embrace a sketch of the constitutional history of the States during the Revolution, and the rise, progress, decline, and fall of the Confederation. The third will embrace the history of the rise and adoption of the Constitution; and a full exposition of all its provisions, with the reasons, on which they were respectively founded, the objections, by which they were respectively assailed, and such illustrations drawn from contemporaneous documents, and the subsequent operations of the government, as may best enable the reader to estimate for himself the true value of each. In this way (as it is hoped) his judgment as well as his affections will be enlisted on the side of the Constitution, as the truest security of the Union, and the only solid basis, on which to rest the private rights, the public liberties, and the substantial prosperity of the people composing the American Republic.

BOOK I.

HISTORY OF THE COLONIES.

CHAPTER I.

ORIGIN OF THE TITLE TO TERRITORY OF THE COLONIES.

§ 1. THE discovery of the Continent of America by Columbus in the fifteenth century awakened the attention of all the maritime States of Europe. Stimulated by the love of glory, and still more by the hope of gain and dominion, many of them early embarked in adventurous enterprises, the object of which was to found colonies, or to search for the precious metals, or to exchange the products and manufactures of the old world for whatever was most valuable and attractive in the new.1 England was not behind her continental neighbours in seeking her own aggrandizement, and nourishing her then infant commerce.2 The ambition of Henry the Seventh was roused by the communications of Columbus, and in 1495 he granted a commission to John Cabot, an enterprising Venitian, then settled in England, to proceed on a voyage of discovery, and to subdue and take possession of any lands unoccupied

1 Marshall's Amer. Colonies, 12, 13; 1 Haz. Collec. 51,72,82,103, 105; Robertson's Hist. of America, B. 9. 2 Robertson's America, B. 9.

by any Christian Power, in the name and for the benefit of the British Crown.1 In the succeeding year Cabot sailed on his voyage, and having first discovered the Islands of Newfoundland and St. Johns, he afterwards sailed along the coast of the continent from the 56th to the 38th degree of north latitude; and claimed for his sovereign the vast region, which stretches from the Gulf of Mexico to the most northern regions.2

§ 2. Such is the origin of the British title to the territory composing these United States. That title was founded on the right of discovery, a right, which was held among the European nations a just and sufficient foundation, on which to rest their respective claims to the American continent. Whatever controversies existed among them (and they were numerous) respecting the extent of their own acquisitions abroad, they appealed to this as the ultimate fact, by which their various and conflicting claims were to be adjusted. It may not be easy upon general reasoning to establish the doctrine, that priority of discovery confers any exclusive right to territory. It was probably adopted by the European nations as a convenient and flexible rule, by which to regulate their respective claims. For it was obvious, that in the mutual contests for dominion in newly discovered lands, there would soon arise violent and sanguinary struggles for exclusive possession, unless some common principle should be recognized by all maritime nations for the benefit of all. None more readily suggested itself than the one now under consideration; and as it was a principle of peace and repose, of perfect equality or benefit in proportion to

1 1 Haz. Coll. 9; Robertson's Hist. of America, B. 9. 2 Marshall, Am. Colon 12,13; Robertson's America, B. 9.

the actual or supposed expenditures and hazards attendant upon such enterprises, it received a universal Acquiescence, if not a ready approbation. It became the basis of European polity, and regulated the exercise of the rights of sovereignty and settlement in all the cis-Atlantic Plantations.1 In respect to desert and uninhabited lands, there does not seem any important objection, which can be urged against it. But in respect to countries, then inhabited by the natives, it is not easy to perceive, how, in point of justice, or humanity, or general conformity to the law of nature, it can be successfully vindicated. As a conventional rule it might properly govern all the nations, which recognized its obligation; but it could have no authority over the aborigines of America, whether gathered into civilized communities, or scattered in hunting tribes over the wilderness. Their right, whatever it was, of occupation or use, stood upon original principles deducible from the law of nature, and could not be justly narrowed or extinguished without their own free consent.

§ 3. There is no doubt, that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil. They acknowledged no obedience, or allegiance, or subordination to any foreign sovereign whatsoever; and as far as they have possessed the means, they have ever since asserted this plenary right of dominion, and yielded it up only when lost by the superior force of conquest, or transferred by a voluntary cession.

1 Johnson v. McIntosh, 8 Wheat. R. 543, 572, 573; 1 Doug. Summ. 110.

§ 4. This is not the place to enter upon the discussion of the question of the actual merits of the titles claimed by the respective parties upon principles of natural law. That would involve the consideration of many nice and delicate topics, as to the nature and origin of property in the soil, and the extent, to which civilized man may demand it from the savage for uses or cultivation different from, and perhaps more beneficial to society than the uses, to which the latter may choose to appropriate it. Such topics belong more properly to a treatise on natural law, than to lectures professing to treat upon the law of a single nation.

§ 5. The European nations found little difficulty in reconciling themselves to the adoption of any principle, which gave ample scope to their ambition, and employed little reasoning to support it. They were content to take counsel of their interests, their prejudices, and their passions, and felt no necessity of vindicating their conduct before cabinets, which were already eager to recognise its justice and its policy. The Indians were a savage race, sunk in the depths of ignorance and heathenism. If they might not be extirpated for their want of religion and just morals, they might be reclaimed from their errors. They were bound to yield to the superior genius of Europe, and in exchanging their wild and debasing habits for civilization and Christianity they were deemed to gain more than an equivalent for every sacrifice and suffering.1 The Papal authority, too, was brought in aid of these great designs;

and for the purpose of overthrowing heathenism, and propagat-

1 8 Wheat. R. 543, 573; 1 Haz. Coll. 50, 51, 72, 82, 103, 105; Vattel, B. I, ch. 18, § 207, 208, 209, and note.

ing the Catholic religion,1 Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.2

§ 6. The principle, then, that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments, being once established, it followed almost as a matter of course, that every government within the limits of its discoveries excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives. No nation would suffer either its own subjects or those of any other nation to set up or vindicate any such title.3 It was deemed a right exclusively belonging to the government in its sovereign capacity to extinguish the Indian title, and to perfect its own dominion over the soil, and dispose of it according to its own good pleasure.

§ 7. It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans it created a peculiar relation between themselves and the aboriginal inhabitants. The latter were admitted to possess a present right of occupancy, or use in the soil, which was subordinate to the ultimate dominion of the discoverer. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim

1 "Ut fides Catholica, et Christiana Religio nostris praesertim temporibus exaltetur, &c., ac barbarae nationes deprimantur, et ad fidem ipsam reducantur," is the language of the Bull. 1 Haz. Coll. 3. 2 1 Haz. Collect.; 3 Marshall, Hist. Col. 13,14. 3 Chalmers, Annals, 676, 677; 1 Doug. Summ. 213; Chalmers, Annals, 677.

to retain possession of it, and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign, who discovered it; but they were denied the authority to dispose of it to any other persons; and until such a sale or transfer, they were generally permitted to occupy it as sovereigns de facto. But notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil, while yet in possession of the natives, subject however to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treatises of public law, it was a transfer of plenum et utile dominium.

§ 8. This subject was discussed at great length in the celebrated case of Johnson v. McIntosh, (8 Wheat. 543); and one cannot do better than transcribe from the pages of that report a summary of the historical confirmations adduced in support of these principles, which is more clear and exact than has ever been before in print.

§ 9. "The history of America, (says Mr. Chief Justice Marshall, in delivering the opinion of the Court,)1 from its discovery to the present day, proves, we think, the universal recognition of these principles. "Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States,

1 See also Woreester v. Georgia, 6 Peters's R. 515; 4 Jefferson's Corresp. 478; Mackintosh's History of Ethical Philosophy, (Phila. 1832,) 50; Johnson v. McIntosh, 8 Wheat. R. 574-588.

all show, that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

§ 10. "France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil, which remained in the occupation of Indians. Her monarch claimed all Canada and Acadic, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers, which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him Lieutenant General, and the representative of the King in Acadie, which is described as stretching from the 40th to the 46th degree of north latitude, with authority to extend the power of the French over that country, and its inhabitants, to

give laws to the people, to treat with the natives, and enforce the observance of treaties, and to parcel out, and give title to lands, according to his own judgment.

§ 11. "The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New-York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the 43d degree of north latitude; and this country they

claimed under the title acquired by this voyage. Their first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands. The claim of the Dutch was always contested by the English; not, because they questioned the title given by discovery, but because they insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

§ 12. "No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title. In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle, which has been mentioned. The right of discovery given by this commission is confined to countries 'then unknown to all Christian people;' and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people, who may have made a previous discovery.

§ 13. "The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

§ 14. "By the charter of 1606, under which the first permanent English settlement on this continent was made, James the First granted to Sir Thomas Gates and others, those territories in America lying on the seacoast between the 34th and 45th degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the 34th and 41st degrees of north latitude; and the second, or northern colony, between the 38th and 45th degrees.

§ 15. "In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the ' Treasurer and Company of Adventurers of the city of London for the first colony in Virginia,' in absolute property, the lands extending along the sea-coast four hundred miles, and into the land throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a writ of quo waarranto; but the whole effect allowed to this judgment was, to revest in the crown the powers of government, and the title to the lands within its limits.

§ 16. "At the association of those who held under the grant to the second or northern colony, a new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the 40th and 48th degrees of north latitude. Under this patent, New-England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and, in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers. A great part of New-England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property. All the grants made by the Plymouth Company, so far as we can learn, have been respected.

§ 17. "In pursuance of the same principle, the king, in 1664, granted to the Duke of York the country of New-England as far south as the Delaware bay. His royal highness transferred New-Jersey to Lord Berkeley and Sir George Carteret.

§ 18. "In 1663, the crown granted to Lord Clarendon and others, the country Iying between the 36th degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the king's dominions in North America, which lies from 36 degrees 30 minutes north latitude to the 29th degree, and from the Atlantic ocean to the South sea.

§ 19. "Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil, as well as the right of dominion to the grantees. In those governments, which were denominated royal, were the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting, lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New-England, New-York, New-Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

§ 20. "These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter, intended to convey political power only, would never contain words expressly granting, the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases, in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember

proprietary governments was not claimed. And, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

§ 21. "Charles the Second was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of the colony to the soil. The Carolinas were originally proprietary governments; In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those, who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title was respected till the revolution, when it was forfeited by the laws of war.

§ 22. "Further proofs of the extent, to which this principle has been recognized, will be found in the history of the wars, negotiations, and treaties, which the different nations, claiming territory in America, have carried on, and held with each other. The contests between the cabinets of Versailles and Aladrid, respecting the territory on the northern coast of the gulf of Mexico, were fierce and bloody; and continued, until the establishment of a Bourbon on the throne of Spain, produced such amicable dispositions in the two crowns, as to suspend or terminate them. Between France and Great Britain, whose discoveries,as well as settlements, were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

§ 23. " Each nation had granted and partially settled the country, denominated by the French, Acadie, and by the English, Nova Scotia. By the 12th article of the treaty of Utrecht, made in 1713, his most Christian Majesty ceded to the Queen of Great Britain, 'all Nova Scotia or Acadie, with its ancient boundaries.' A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners, to whom it was to be referred. The treaty of Aix la Chapelle, which was made on the principle of the status antc bellum, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favour of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining, in the possession of Indians.

§ 24. "After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New-England, Nova Scotia, and that part of Canada, which adjoined those colonies, but embraced our whole western country also. France contended not only, that the St. Lawrence was to be considered as the center of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops in a war with some southern Indians. This river was comprehended in the chartered limits of Virginia; but,

though the right of England to a reasonable extent of country, in virtue of her discovery of the seacoast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the

country washed by the Atlantic, might, without derogating from the principle, recognized by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to strengthen her original title to the lands in controversy, by insisting, that it had been acknowledged by France in the 15th article of the treaty of Utrecht. The dispute respecting the construction of that article has no tendency to impair the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

§ 25. "These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guarantied to Great Britain all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed, that the boundaries between the territories of the two nations in America should be irrecoverably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country on the English side of the dividing, line between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed, that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to pur-

chase it from the Indians would have been considered and treated as an invasion of the territories of France.

§ 26. "By the 20th article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or southeast of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

§ 27. "By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied, chiefly, by the Indians.

§ 28. "Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

§ 29. "By the treaty, which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the ' propriety and territorial rights of the United States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring, independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that, which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclu-

sive power to extinguish that right was vested in that government, which might constitutionally exercise it.

§ 30. "Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act, in the year 1779, declaring her ' exclusive right of pre-emption from the Indians of all the lands within the limits of her own chartered territory, and that no persons whatsoever have, or ever had, a right to purchase any lands within the same from any Indian nation, except only persons duly authorized to make such purchase, formerly for the use and benefit of the colony, and lately for the Commonwealth.' The act then proceeds to annul all deeds made by Indians to individuals for the private use of the purchasers.

§ 31. "Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle, which had always been maintained, that the exclusive right to purchase from the Indians resided in the government.

§ 32. "In pursuance of the same idea, Virginia proceeded, at the same session, to open her land-office for the sale of that country, which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage, as was ever manifested by any people.
§ 33. "The States having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on

conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that ' all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation,' &c. 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.' The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.
§ 34. "After these States became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.
§ 35. "The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country would be considered as an aggression, which would justify war.

§ 36. "Our late acquisitions from Spain are or the same character; and the negotiations, which preceded those acquisitions, recognize and elucidate the principle, which has been received as the foundation of all European title in America.
§ 37. "The United States, then, have unequivocally acceded to that great and broad rule, by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title, by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
§ 38. "The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right, which may conflict with and control it. An absolute title to Lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title, which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."

CHAPTER II.

ORIGIN AND SETTLEMENT OF VIRGINIA.

§ 39. Having thus traced out the origin of the title to the soil of America asserted by the European nations, we may now enter upon a consideration of the manner, in which the settlements were made, and the political constitutions, by which the various Colonies were organized and governed.
§ 40. For a long time after the discoveries of Cabot were made, England from various causes remained in a state of indifference or inactivity in respect to the territory thus subjected to her sway.l Nearly a century elapsed before any effectual plan for planting any colony was put into operation; and indeed the ill success, not to say entire failure, of the first expedition was well calculated to abate any undue confidence in the value of such enterprises. In 1578 Sir Humphrey Gilbert, having obtained letters patent from Queen Elizabeth,2 granting him and his heirs any lands discovered by him, attempted a settlement on the cold and barren shores of Cape Breton and the adjacent regions, and exhausted his fortune, and lost hi s life in the fruitless labour.3 The brilliant genius of Sir Walter Raleigh was captivated by the allurements of any scheme, which gave play to his romantic temper; and unmindful of the disastrous fate of his half brother, or gathering fresh courage from the consciousness of difficulties, eagerly

1 Robertson's Americn, B.9; Doug. Summ. 110, &c. 2 1 Haz. Coll. 24. 3 Marshall's Colon. 15,16; Robertson's America, B.9.

followed up the original plan under a new patent from the crown.1 To him we are indebted for the first plantations in the South;2 and such was the splendor of the description of the soil and climate and productions of that region given by the first adventurers, that Elizabeth was proud to bestow upon it the name of Virginia, and thus to connect it with the reign of a virgin Queen.3 But notwithstanding, the bright prospects thus held out, three successive attempts under the auspices of Raleigh ended in ruinous disaster, and seemed but a presage of the hard fate and darkened fortunes of that gallant, but unfortunate gentleman.4

§ 41. The first permanent settlement made in America under the auspices of England was under a charter granted to Sir Thomas Gates and his associates by James the First, in the fourth year after his accession to the throne of England5 (in 1605.) That charter granted to them the territories in America, then commonly called Virginia, lying on the sea-coast between the 34th and the 45th degrees of north latitude and the islands adjacent within 100 miles, which were not belonging to or possessed by any Christian prince or people. The associates were divided into two companies, one of which was required to settle between the 34th and 41st degrees of north latitude, and the other between the 38th and 45th degrees of north latitude, but not within 100 miles of the prior colony. By degrees, the name of Virginia was confined to the first or south colony.6 The second assumed the name of the Plymouth

1 1 Haz. Coll. 33; Robertson's America, B.9. 2 1 Haz. Coll. 38-40; 2 Doug. Summ. 338. 3 Marsh. Colon. 17; Robertson's Americn, B.9. 4 Robertson's America.B.9. 5 Marsh. Colon. 25; 1 Haz. Coll. 50; Robertson's America, B.9. 6 I Haz. Coll. 99; Robertson's America, B.9.

Company, from the residence of the original grantees; and New-England was founded under their auspices.1 Each colony had exclusive propriety in all the territory within fifty miles from the first seat of their plantation.2

§ 42. Some of the provisions of this charter deserve a particular consideration from the light they throw upon the political and civil condition of the persons, who should become inhabitants of the colonies. The companies were authorized to engage as colonists any of the subjects of England, who should be disposed to emigrate. All persons, being English subjects and inhabiting, in the colonies, and every of their children born therein, were declared to have and possess all liberties, franchises, and immunities, within any other of the dominions of the crown, to all intents and purposes, as if they had been abiding and born within the realm of England, or any other dominions of the crown. The patentees were to hold the lands, &c. in the colony, of the king, his heirs and successors, as of the manor of East Greenwich in the county of Kent, in free and common soccage only, and not in capite; and were authorized to grant the same to the inhabitants of the colonies in such manner and form and for such estates, as the council of the colony should direct.3

§ 43. In respect to political government, each colony was to be governed by a local council, appointed and removable at the pleasure of the crown, according to the royal instructions and ordinances from time to time promulgated. These councils were to be under the superior management and direction of another council sitting in England. A power was given to expel all in-

1 Robertson's America, B.9. 2 1 Haz. Coll. 50. 3 1 Haz. Coll. 50; Marsh. Colon. 25, 26; Robertson's Amer. B.9.

truders, and to lay a limited duty upon all persons trafficking with the colony; and a prohibition was imposed upon all the colonists against trafficking with foreign countries under the pretense of a trade from the mother country to the colonies.1

§ 44. The royal authority soon found a gratifying employment in drawing up and establishing a code of fundamental regulations for these colonies, in pursuance of the power reserved in the charter. A superintending council was created in England. The legislative and executive powers were vested in the president and councils of the colonies; but their ordinances were not to touch life nor limb, and were in substance to conform to the laws of England, and were to continue in force only until made void by the crown, or the council in England. Persons committing high offenses were to be sent to England for punishment; and subordinate offenses were to be punished at the discretion of the president and council. Allegiance to the crown was strictly insisted on; and the Church of England established.2 The royal authority was in all respects made paramount; and the value of political liberty was totally overlooked, or deliberately disregarded.

§ 45. The charter of the first or Virginia colony was successively altered in 1609 and 1612,3 without any important change in its substantial provisions, as to the civil or political rights of the colonists. It is surprising, indeed, that charters securing such vast powers to the crown, and such entire dependence on the part of the emigrants, should have round any favor in the eyes _____

1 1 Haz. Coll. 50; Marsh. Colon.26. 2 Marsh. Colon. 27, 28. 3 I Haz.Coll. 58,72; Marsh. Colon. 44,45,47; Robertson's America, B.9.

either of the proprietors, or of the people. By placing the whole legislative and executive powers in a council nominated by the crown, and guided by its instructions, every person settling, in America seems to have been bereaved of the noblest privileges of a free man. But without hesitation or reluctance, the proprietors of both colonies prepared to execute their respective plans; and under the authority of a charter, which would now be rejected with disdain as a violent invasion of the sacred and inalienable rights of liberty, the first permanent settlements of the English in America were established. From this period the progress of the two provinces of Virginia and New-England form a regular and connected story. The former in the South, and the latter in the North may be considered as the original and parent colonies, in imitation of which, and under whose shelter all the others have been successively planted and reared.1

§ 46. The settlements in Virginia were earliest in point of date, and were fast advancing under a policy, which subdivided the property among the settlers, instead of retaining it in common, and thus gave vigor to private enterprise. As the colony increased, the spirit of its members assumed more and more the tone of independence; and they grew restless and impatient for the privileges enjoyed under the government of their native country. To quiet this uneasiness, Sir George Yeardley, then the governor of the colony, in 1619, called a general assembly, composed of representatives from the various plantations in the colony, and permitted them to assume and exercise the high func- _____

1 I quote the very words of Dr. Robertson throughout this passage for its spirit and general truth. Robert. Hist. of America, B.9.

tions of legislation.1 Thus was formed and established the first representative legislature, that ever sat in America And this example of a domestic parliament to regulate all the internal concerns of the countrywas never lost sight of, but was ever afterwards cherished throughout America, as the dearest birth-right of freemen. So acceptable was it to the people, and so indispensable to the real prosperity of the colony, that the council in England were compelled, In 1621, to issue an ordinance, which gave it a complete and permanent sanction.2 In imitation of the constitution of the British parliament,the legislative power was lodged partly in the governor, who held the place of the sovereign; partly in a council of state named by the company; and partly in an assembly composed of representatives freely chosen by the people. Each branch of the legislature might decide by a majority of voices, and a negative was reserved to the governor. But no law was to be in force, though approved by all three of the branches of the legislature, until it was ratified by a general court of the company, and returned under its seal to the colony.3 The ordinance further required the general assembly, as also the council of state, "to imitate and follow the policy of the form of government, laws, customs, and manner of trial and other administration of justice used in the realm of England, as near as may be." The conduct of the colonists, as well as the company, soon afterwards gave offense to King James; and the disasters, which accomplished an almost total destruction of the colony

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1 Robertson's America, B.9. Marsh. Colon. Ch. 2, p. 54. 2 1 Henning, Stat.III; Smith's Virg App. No.4,p. 32; I Chalm. Annals, 54. 3 Roberton's America, B.9; Marsh. Colon. ch. 2, p. 56; I Haz. Coll. 131.

by the successful inroads of the Indians, created much discontent and disappointment among the proprietors at home. The king found it no difficult matter to satisfy the nation, that an inquiry into their conduct was necessary. It was accordingly ordered; and the result of that inquiry, by commissioners appointed by himself, was a demand on the part of the crown of a surrender of the charters.1 The demand was resisted by the company; a quo warrato was instituted against them, and it terminated, as in that age it might well be supposed it would, in a judgment, pronounced in 1624 by judges holding their offices during his pleasure, that the franchises were forfeited and the corporation should be dissolved.2

§ 47. It does not appear that these proceedings, although they ha e met with severe rebuke in later times, attracted any indignation or sympathy for the sufferers on this occasion. The royal prerogative was then viewed without jealousy, if not with favor; and the rights of Englishmen were ill defined and ill protected under reign remarkable for no great or noble objects. Dr. Robertson has observed, that the company, like all unprosperous societies, fell

unpitied;3 and the nation were content to forget the prostration of private rights, under the false encouragements held out of aid to the colony from the benignant efforts and future counsels of the crown.

§ 48. With the fall of the charter the. colony came under the immediate, government and control of the crown itself; and the king issued a special commission

1 In 1623. See 1 Haz. Coll. 155. 2 Robertson's America, B.9; 1 Haz. Coll. 183; Marsh. Colon. ch. 2 P.60,62; Chalmers's Annals. 3 Robertson's America,B.9.

appointing a governor and twelve counselors, to whom the entire direction of its affairs was committed.1 In this commission no representative assembly was mentioned; and there is little reason to suppose that James, who, besides his arbitrary notions of government, imputed the recent disasters to the existence of such an assembly, ever intended to revive it. While he was yet mediating upon a plan or code of government, his death put an end to his projects, which were better calculated to nourish his own pride and conceit, than to subserve the permanent interests of the province.2 Henceforth, however, Virginiacontinued to be a royal province until the period of the American Revolution.3

§ 49. Charles the First adopted the notions and followed out in its full extent the colonial system of his father.4 He declared the colony to be apart of the empire annexed to the crown, and immediately subordinate to its jurisdiction. During the greater part of his reign, Virginia knew no other law, than the will of the sovereign, or his delegated agents; and statutes were passed and taxes imposed without the slightest effort to convene a colonial assembly. It was not until the murmurs and complaints, which such a course of conduct was calculated to produce, had betrayed the inhabitants into acts of open resistance to the governor, and into a firm demand of redress from the crown against his oppression, that the king was brought to more considerate measures. He did not at once yield

1 I Haz. Coll. 189. 2 Marsh. Colon. ch. 2, p.63,64; I Haz. Coll. 189. 3 I Haz. Coll. 220,225. 4 It seems that a charter was subsequently granted by Charles the Second on the 10th of October, 1676,but it contained little more than an acknowledgment of the colony as an immediate dependency of the crown. 2 Henning Stat 531, 532.

to their discontents; but pressed, as he was, by severe embarrassments at home, he was content to adopt a policy, which would conciliate the colony and remove some of its just complaints. He accordingly soon afterwards appointed Sir William Berkeley governor, with powers and instructions, which breathed a far more benign spirit. He was authorized to proclaim, that in all its concerns, civil as well as ecclesiastical, the colony should be governed according to the laws of England. He was directed to issue writs for electing representatives of the people, who with the governor and council should form a general assembly clothed with supreme legislative authority; and to establish courts of justice, whose proceedings should be guided by the forms of the parent country. The rights of Englishmen were thus in a great measure secured to the colonists; and under the government of this excellent magistrate, with some short intervals of interruption, the colony nourished with a vigorous growth for almost forty years.1 The revolution of 1688 found it, if not in the practical possession of liberty, at least with forms of government well calculated silently to cherish its spirit.

§ 50. The laws of Virginia, during its colonial state, do not exhibit as many marked deviations, in the general structure of its institutions and civil polity, from those of the parent country, as those in the northern colonies. The common law was recognized as the general basis of its jurisprudence; and the legislature, with some appearance of boast, stated, soon after the restoration of Charles the Second, that they had " endeav-

1 Robertson's America, B.9.; Marsh. Amer. Col. ch. 2, p. 65,66, note. I have not thought it necessary to advert particularly to the state of things during the disturbed period of the commonwealth. Henning, Virg. Stat. Introduction, p. 13, 14.

oured, in all things, as near as the capacity and constitution of this county would admit, to adhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence."1 The prevalence of the common law was also expressly provided for in all the charters successively granted, as well as by the royal declaration, when the colony was annexed as a dependency to the crown. Indeed, there is no reason to suppose, that the common law was not in its leading features vary acceptable to the colonists; and in its general policy the colony closely followed in the steps of the mother country. Among the earliest acts of the legislature we find the Church of England established as the only true church; and its doctrines and discipline were strictly enforced. All nonconformists were at first compelled to leave the colony; and a spirit of persecution was

exemplified not far behind the rigor of the most zealous of the Puritans. The clergy of the established church were amply provided for by glebes and tithes, and other aids. Non-residence was prohibited, and due performance of parochial duties peremptorily required. The laws, indeed, respecting the church, made a very prominent figure during the first fifty years of the colonial legislation. The first law allowing toleration to protestant dissenters was in the year 1699, and merely adopts that of the statute of the 1st of William and Mary. Subject to this, the church of England seems to have maintained as exclusive su-

1 2 Henning, Stat.43. Sir William Bardley, in his answer to the questions of the Lords commissioners in 1671. "Contrary to the laws of England we never did, nor dare to make any [law] only this, that no sale of land is good and legal, unless within three months after the conveyance it be recorded."

premacy down to the period of the American Revolution. Marriages, except in special cases, were required to be celebrated in the parish church, and according to the rubric in the common prayer book. The law of inheritance of the parent country was silently maintained down to the period of the American Revolution; and the distribution of intestate estates was closely fashioned upon the same general model. Devises also were regulated by the law of England;1 and no colonial statute appears to have been made on that subject until 1748 when one was enacted, which contains a few deviations from it, probably arising from local circumstances.2 One of the most remarkable facts in the juridical history of the colony is the steady attachment of the colony to entails. By an act passed in 1705 was provided, that estates tail should no longer be docked by fines or recoveries, but only by an act of the legislature in each particular case. And though this was afterwards modified, so as to allow entails to be destroyed in another manner, where the estate did not exceed L200 sterling in value,3 yet the general policy continued down to the American Revolution. In this respect the zeal of the colony to secure entials and perpetuate inheritances in the same family outstripped that of the parent country.

§ 51. At a very early period the acknowledgment and registry of deeds and mortgages of real estate were provided for; and the non-registry was deemed a badge of fraud.4 The trial by jury although privi-

1 1 refer upon these subjects to Henning, Stat. 122, 123, 144, 149, 155, 180, 240, 268, 277, 434, 2 Hen. Stat. 48, 50; 3 Hen.Stat. 150, 170, 360, 441. 2 5 Henning, Stat. 456. 3 3 Henning, Stat. 320, 516; 4 Henning, Stat. 400; 5 Henning, Stat. 414; 1 Tuck. Black. Comm. App. 4 1 Henning. Stat. 248; 2 Henning, Stat. 98; 3 Henning. Stat. 321.

lege resulting from their general rights, was guarded by special legislation. There was also an early declaration, that no taxes could be levied by the Governor without the consent of the General Assembly; and when raised, they were to be applied according to the appointment of the Legislature. The burgesses also during their attendance upon the assembly were free from arrest. In respect to domestic trade, a general freedom was guarantied to all the inhabitants to buy and sell to the greatest advantage, and all engrossing was prohibited.1 The culture of tobacco seems to have been a constant object of solicitude; and it was encouraged by a long succession of Acts sufficiently evincing the public feeling, and the vast importance of it to the prosperity of the colony.2 We learn from Sir William Berkeley's answers to the Lords Commissioners in 1671, that the population of the colony was at that time about 40,000; that the restrictions of the navigation act, cutting off all trade with foreign countries, were very injurious to them, as they were obedient to the laws. And "this (says he) is the cause, why no small or great vessels are built here; for we are most obedient to all laws, whilst the New-England men break through, and men trade to any place, that their interest leads them." This language is sufficiently significant of the restlessness of New-England under these restraints upon its commerce. But his answer to the question respecting religious and other instruction in the colony would in our times create universal astonishment,--"I thank God (says he) there are no

1 1 Henning, Stat. 290. 2 See I Hen. Stat. 126, and Index, tit. Tobacco, in that and the subsequent volumes; 2 Henning, Stat. 514.

free schools nor printing; and I hope we shall not have these hundred years; for learning has brought disobedience and heresy and sects into the world; and printing has divulged them, and libels against the best government. God keep us from both."1 In 1680 a remarkable change was made in the colonial jurisprudence, by taking all judicial power from the assembly, and allowing an appeal from the judgments of the General Court to the King in Council.2

1 2 Hen. Stat. 511, 512, 514, 517; 1 Chalm. Annals, 328; 3 Hutch. Collect. 496. 2 Marsh. Colon. ch. 5, p. 163; 1 Chalm. Annals, 325.

CHAPTER III.

ORIGIN AND SETTLEMENT OF NEW-ENGLAND.

§ 52. We may now advert in a brief manner to the history of the Northern, or Plymouth Company. That company possessed fewer resources and less enterprise than the Southern; and thought aided by men of high distinction, and among others by the public spirit and zeal of Lord Chief Justice Popham, its first efforts for colonization were feeble and discouraging. Capt. John Smith, so well known in the History of Virginia by his successful adventures under their authority, lent a transient luster to their attempts; and his warm descriptions of the beauty and fertility of the country procured for it from the excited imagination of the Prince, after King Charles the First, the flattering name of New-England, a name, which effaced from it that of Virginia, and which has since become dear beyond expression to the inhabitants of its harsh but salubrious climate.1

§ 53. While the company was yet languishing, an event occurred, which gave a new and unexpected aspect to its prospects. It is well known, that the religious dissensions consequent upon the reformation, while they led to a more bold and free spirit of discussion, failed at the same time of introducing a correspondent charity for differences of religious opinion. Each successive sect entertained not the slightest doubt of its

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1 Robertson's America, B.10; Marsh. Amer. Col. ch. 3, p. 77, 78; 1 Haz.Coll. 103, 147, 404; 1 Belknap's New-Hampshire, ch 1.

own infallibility in doctrine and worship, and was eager to obtain proselytes, and denounce the errors of its opponents. If it had stopped here, we might have forgotten, in admiration of the sincere zeal for Christian truth, the desire of power, and the pride of mind, which lurked within the inner folds of their devotion. But unfortunately the spirit of intolerance was abroad in all its stern and unrelenting severity. To tolerate errors was to sacrifice Christianity to mere temporal interests. Truth, and truth alone, was to be followed at the hazard of all consequences; and religion allowed no compromises between conscience and worldly comforts. Heresy was itself a sin of a deadly nature, and to extirpate it was a primary duty of all, who were believers in sincerity and truth. Persecution, therefore, even when it seemed most to violate the feelings of humanity and the rights of private judgment, never wanted apologists among those of the purest and most devout lives. It was too often receive with acclamations by the crowd, and found an ample vindication from the learned and thedogmatists; from the policy of the civil magistrate, and the blind zeal of the ecclesiastic. Each sect, as it attained power, exhibited the same unrelenting firmness in putting down its adversaries.1 The papist and the

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1 Dr. Robertson has justly observed, that not only the idea of toleration, but even the word itself in the sense now affixed to it, was then unknown.* Sir James Mackintosh, a name equally glorious in judicial and ethical philosophy, has remarked, that this giant evil (the suppression of the right of private judgment in matters of religion) had received a mortal wound from Luther, who in his warfare with Rome had struck a blow against all human authority, and unconsciously disclosed to mankind, that they were entitled, or rather bound to form and utter their own opinions and most of all on the most deeply interesting subjects.+

*** The whole passage deserves commendation for its catholic spirit. Robertson's America, B.10.**

+ Mackintosh's dissertation on the Progress of Ethical Philisophy, (Phila. 1832,) p.36.

perlate, the Puritan and the Presbyterian, felt no compunctions in the destruction of dissentients from their own faith. They uttered, indeed, loud complaints of the injustice of their enemies, when they were themselves oppressed, but it was not from any abhorrence of persecution itself, but of the infamous errors of the persecutors. There are not wanting on the records of the history of these times abundant proofs, how easily sects, which had borne every human calamity with unshrinking fortitude for conscience' sake, could turn upon their inoffensive, but, in their judgment, erring neighbors, with a like infliction of suffering.1 Even adversity sometimes fails of producing its usual salutary effects of moderation and compassion, when a blind but honest zeal has usurped dominion over the mind. If such a picture of human infirmity may justly add to our humility, it may also serve to admonish us of the Christian duty of forbearance. And he, who can look with an eye of exclusive censure on such scenes, must have forgotten, how many bright examples they have afforded of the liveliest virtue, the most persuasive fidelity, and the most exalted piety.

§ 54. Among others, who suffered persecutions from the haughty zeal of Elizabeth, was a small sect, called from the name of their leader, Brownists, to whom × e owe the foundation of the now wide spread sect of Congregationalists or Independents. After sufferings of an aggravated nature, they were compelled to take refuge in Holland under the care of their pastor, Mr. John Robinson, a man distinguished for his piety, his benevolence, and his intrepid spirit.2 After remaining there _____

1 Robertson's America, B.10; I Belknap's New-Hampshire, ch. 3; l Chalm. Annnls, p.143, 145, 169, 189, 190, 191; 3 Hutch. Hist.42. 2 Belknap's New-Hampshire, ch. 3; 1 Doug. Summ. 369.

some years, they concluded to emigrate to America in the hope, that they might thus perpetuate their religious discipline, and preserve the purity of an apostolical church.1 In conjunction with other friends in England they embarked on the voyage with a design of settlement on Hudson's river in New-York. But against their intention they were compelled to land on the shores of Cape Cod in the depth of winter, and the place of their landing, was called Plymouth, which has since become so celebrated as the first permanent settlement in New-England.2 Not having contemplated any plantation at this place, they had not taken the precaution to obtain any charter from the Plymouth Company. The original plan of their colony, however, is still preserved;3 and it was founded upon the basis of a community of property, at least for a given space of time, a scheme, as the event showed, utterly incompatible with the existence of any large and flourishing colony. Before their landing they drew up and signed a voluntary compact of government, forming, if not the first, at least the best authenticated case of an original social contract for the establishment of a nation, which is to be found in the annals of the world. Philosophers and jurists have perpetually resorted to the theory of such a compact, by which to measure the rights and duties of governments and subjects; hut for the most part it has been treated as an effort of imagination, unsustained by the history or practice of nations, and furnishing little of solid instruction for the actual concerns of life. It was little dreamed of, that America should furnish an _____

1 Morton's Mem. 1 to 30. 2 Robertson's America, B. 10; Marsh. Amer. Col. ch. 3, p. 79, 80; Morton's Mem. 31 to 35. 3 I Haz.Coll. 87, 88; Morton's Mem. App. 373.

example of it in primitive and almost patriarchal simplicity.

§ 55. On the 11th of November, 1620, these humble but fearless adventurers, before their landing, drew up and signed an original compact, in which, after acknowledging themselves subjects of the crown of England, they proceed to declare: "Having undertaken for the glory of God and the advancement of the Christian faith and the honor of our king and country, a voyage to plant the first colony in the northern parts of Virginia, we do by these presents solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a civil body politic, far our better ordering and preservation and furtherance of the ends aforesaid. And by virtue hereof do enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and officers from time to time as shall be thought most meet and convenient for the general good of the colony; unto which we promise all due submission and obedience." This is the whole of the compact, and it was signed by forty-one persons.1 It is in its very essence a pure democracy; and in pursuance of it the colonists proceeded soon afterwards to organize the colonial government, under the name of the Colony of New Plymouth, to appoint a governor and other officers, and to enact laws. The governor was chosen annually by the freemen, and had at first one assistant to aid him in the discharge of his trust.2 Four others were soon afterwards added, and finally the number was in-

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1 1 Haz. Coll. 119; Morton's Mem. 37; Marsh. Colon. ch. 3, p. 80; Robertson's America, B.10; 2 Hutch. Hist. 455. 2 Plymouth Laws, (1685); I Haz. Coll. 404, 408.

creased to seven.1 The supreme legislative power resided in, and was exercised by the whole body of the male inhabitants, every freeman, who was a member of the church, being admitted to vote in all public affairs.2 The number of settlements having increased, and being at a considerable distance from each other, a house of representatives was established in 1639;3 the members of which, as well as all other officers, were annually chosen. They adopted the common law of England as the general basis of their jurisprudence, varying it however from time to time by municipal regulations better adapted to their situation, or conforming more exactly to their stern notions of the absolute authority and universal obligation of the Mosaic Institutions.4

§ 56. The Plymouth Colonists acted, at first, altogether under the voluntary compact and association already mentioned. But they daily felt embarrassments from the want of some general authority, derived directly or indirectly from the crown, which should recognize their settlement and confirm their legislation. After several ineffectual attempts made for this purpose, they at length succeeded in obtaining, in January, 1629, a patent from the

council established at Plymouth, in England, under the charter of King James of 1620.5 This patent, besides a grant of the territory upon the terms and tenure of the original patent of 1620, _____

1 Morton's Mem. 110; Prince's Annals, 225; 2 Hutch. Hist. 463, 465; 1 Haz. Coll. 404, 408, 411, 412. 2 Robertson's America, B. 10; 2 Hutch. Hist. 467; I Haz. Coll. 408, 411, 412,114. 3 2 Hutch. Hist. 463. 4 Robertson's America, B. 10; 2 Hutch. Hist. 462, 463, 464; Hubbard's Hist. ch. 10, p. 62; Chalmers's Annals, p. 88. 5 2 Hutch. Hist. 464, 479; 1 Haz. Collec. 298, 404, 468; 1 Chalm. Annals, 97, 98; 1 Holmes' Annals, 201.

included an authority to the patentee (William Bradford) and his associates, "to incorporate by some usual or fit name and title him or themselves, or the people there inhabiting under him or them, and their successors, from time to time, to frame and make orders, ordinances, and constitutions, as well for the better government of their affairs here, and the receiving or admitting any into his or their society, as also for the better government of his or their people, or his or their people at sea in going thither or returning from thence; and the same to put or cause to be put in execution, by such officers and ministers as he or they shall authorize and depute; provided, that the said laws and orders be not repugnant to the laws of England or the frame of government by the said president and council [of Plymouth Company] hereafter to be established." 1

§ 57. This patent or charter seems never to have been confirmed by the crown;2 and the colonists were never, by any act of the crown, created a body politic and corporate with any legislative powers. They, therefore, remained in legal contemplation a mere voluntary association, exercising the highest powers and prerogatives of sovereignty, and yielding obedience to the laws and magistrates chosen by themselves.3

§ 58. The charter of 1629 furnished them, however, with the colour of delegated sovereignty, of which they did not fail to avail themselves. They assumed under it the exercise of the most plenary executive, legislative, and judicial powers with but a momentary _____

1 1 Haz. Coll. 298, 404. 2 Chalmers says,(l Chalm. Annals,97,) that "this patent was not confirmed by the crown, though the contrary has been affirmed by the colonial historians." See also Marsh. Hist.of the Colonies,ch.3.82, 83. 3 Marsh. Hist. Colon. ch. 3, p 82; I Chalm. Annals, 87, 88, 97.

scruple as to their right to inflict capital punishments.1 They were not disturbed in the free exercise of these powers, either through the ignorance or the connivance of the crown, until after the restoration of Charles the Second. Their authority under their charter was then questioned; and several unsuccessful attempts were made to procure a confirmation from the crown. They continued to cling to it, until, in the general shipwreck of charters in 1684, theirs was overturned. An arbitrary government was then established over them in common with the other New-England colonies; and they were finally incorporated into a province with Massachusetts under the charter granted to the latter by William and Mary in 1691.2

§ 59. It may not be without use to notice a few of the laws, which formed, what may properly be deemed, the fundamentals of their jurisprudence. After providing for the manner of choosing their governor and legislature, as above stated, their first attention seems to have been directed to the establishment of " the free liberties of the free-born people of England." It was therefore declared,3 almost in the language of Magna Charta, that justice should be impartially administered unto all, not sold, or denied; that no person should suffer " in respect to life, limb, liberty, good name, or estate, but by virtue or equity of some express law of the General Court, or the good and equitable laws of our nation suitable for us, in matters which are of a civil nature, (as by the court here hath been accustomed,) wherein we have no particular law of our own;" and none should suffer

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1 2 Hutch. Hist. 464, 465, 467; Chalm. Annals, 88. 2 Hutch. Hist. 479, 480; Chalm. Annals, 97, 98. 3 In 1636. See 1 Haz.Coll. 404, 408; Id. 178, Plymouth Colony Laws (edit. 1685;) 1 Haz. Coll. 411, 414, 419.

without being brought to answer by due course and process of law; that in criminal and civil cases there should be a trial by jury at all events upon a final trial on appeal; with the right to challenge for just cause; and in capital cases a peremptory right to challenge twenty jurors as in England; that no party should be cast or condemned, unless upon the testimony of two sufficient witnesses, or other sufficient evidence or circumstances, unless otherwise specially provided by law; that all persons of the age of twenty-one years, and of sound memory, should have power to make wills and other lawful alienations of their estate, whether they were condemned, or excommunicated or other; except that in treason their personal estate should be forfeited; but their real estate was still to be at their disposal. All processes were directed to be in the king's name.1 All trials in respect to land were to be in the county, where it lay; and all personal actions, where one of the parties lived; and lands and goods were liable to attachment to answer the judgment rendered in any action. All lands were to descend according to the free tenure of lands of East

Greenwich, in the county of Kent; and all entailed lands according to the law of England. All the sons were to inherit equally, except the eldest, who was to have a double share. If there were no sons, all the daughters were to inherit alike. Brothers of the whole blood were to inherit; and if none, then sisters of the whole blood. All conveyances of land were to be by deed only, acknowledged before some magistrate, and recorded in the public records. Among capital offenses were enumerated, without any discrimination, idolatry, blasphemy, treason, murder, _____

1 1 Haz Coll. 473; Plymouth Col. Laws, (1688,) p. 16.

witchcraft, bestiality, sodomy, false witness, man-stealing, cursing or smiting father or mother, rape, willful burning of houses and ships, and piracy; while certain other offenses of a nature quite as immoral and injurious to society received a far more moderate punishment. Undoubtedly a reverential regard for the Scriptures placed the crimes of idolatry, blasphemy, and false witness, and cursing and smiting father and mother, among the capital offenses. And, as might well be presumed from the religious sentiments of the people, ample protection was given to the church; and the maintenance of a public orthodox ministry and of public schools were carefully provided for.1

§ 60. Compared with the legislation of some of the colonies during an equal period, the laws of the Plymouth colony will be found few and brief This resulted in some measure from the narrow limits of the population and business of the colony; but in a greater measure from their reliance in their simple proceedings upon the general principles of the common law. _____

1 More ample information upon all these subjects will be furnished by an examination of the Plymouth Colony Laws, first printed in 1685.

CHAPTER IV.
MASSACHUSETTS.

§ 61. About the period when the Plymouth colonists completed their voyage, James the First, with a view to promote more effectually the interests of the second or northern company, granted1 to the Duke of Lenox and others of the company a new charter, by which its territories were extended in breadth from the 40th to the 48th degree of north latitude; and in length by all the breadth aforesaid throughout the main land from sea to sea, excluding however all possession of any other Christian prince, and all lands within the bounds of the southern colony.2 To the territory thus bounded he affixed the name of New-England, and to the corporation itself so created, the name of "The Council established at Plymouth in the county of Devon, for the planting, ruling, ordering, and governing of New-England in America"3 The charter contains the names of the persons, who were to constitute the first council, with power to fill vacancies, and keep up a perpetual succession of counselors to the number of forty. The power to purchase, hold, and sell lands, and other usual powers of corporations are then conferred on them, and special authority to make laws and ordinances, to regulate the admission and trade of all persons with the plantation; to dispose of their lands; to appoint and remove governors and other officers of the plantation; to establish all manner of orders, laws

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1 Nov. 3, 1620; I Doug. Summ. 406, &c. 2 1 Haz. Coll. 103, 105, &c. 3 1 Haz. Coll. 99, 103, 106, 110, 111.

and directions, instructions, forms and ceremonies of government and magistracy, so that the same be not contrary to the laws and statutes of England; to correct, punish, pardon, govern, and rule all inhabitants of the colony by such laws and ordinances, and in defect thereof, in cases of necessity, according to the good discretions of their governors and officers respectively, as well in cases capital and criminal as civil, both marine and others, so always that the same ordinances and proceedings be, as near as conveniently may be, agreeable to the laws, statutes, government, and policy of England; and finally to regulate trade and traffic to and from the colony, prohibiting the same to all persons not licensed by the corporation.1 The charter further contains some extraordinary powers in cases of rebellion, mutiny, misconduct, illicit trade, and hostile invasions, which it is not necessary to particularize. The charter also declares, that all the territory shall beholden of the crown, as of the royal manor of East Greenwich, in Kent county, in free and common soccage, and not in capite, nor by knight service;2 and that all subjects, inhabitants of the plantation, and their children and posterity born within the limits thereof, shall have and enjoy all liberties and franchises and immunities of free denizens and natural subjects within any other of the dominions of the crown, to all intents and purposes, as if they had been abiding and born within the kingdom of England, or any other dominions of the crown.3

§ 62. Some of the powers granted by this charter were alarming to many persons, and especially those,

1 1 Haz. Coll. 109, 110,112,113,114. 2 1 Haz. Coll. 111. 3 1 Haz. Coll. 117.

which granted a monopoly of trade.1 The efforts to settle a colony within the territory were again renewed and again were unsuccessful.2 The spirit of religion, however, soon effected, what the spirit of commerce had failed to accomplish. The Puritans, persecuted at home, and groaning under the weight of spiritual bondage, cast a longing eye towards America, as an ultimate retreat for themselves and their children. They were encouraged by the information, that the colonists at Plymouth were allowed to worship their Creator according to the dictates of their consciences, without molestation. They opened a negotiation, through the instrumentality of a Ml White, a distinguished nonconforming minister, with the council established at Plymouth; and in March, 1627, procured from them a grant to Sir Henry Rosewell and others of all that part of New-England lying three miles south of Charles river and three miles north of Merrimack river, and extending from the Atlantic to the South Sea.3

§ 63. Other persons were soon induced to unite with them, if a charter could be procured from the crown, which should secure to the adventurers usual powers of government. Application was made for this purpose to King Charles, who, accordingly, in March 1628, granted to the grantees and their associates the most ample powers of government. The charter confirmed to them the territory already granted by the council established at Plymouth, to beholden of the crown,

1 Marsh. Colon. ch. 3, p. 83; Chalm. Annals, p. 81, 83. 2 Robertson's America, B. 10; Chalm. Annals, 90. 3 These are not the descriptive words of the grant, but a statement of the substance of it. The grant is recited in the charter in Hutchinson's collection, p. 1, &c. and in the Colonial and Province laws of Massachusetts, printed in 1814.

as of the royal manor of East Greenwich, "in free and common soccage, and not in capite, nor by knight's service," yielding to the crown one fifth part of all ore of gold and silver, &c. with the exception, however, of any part of the territory actually possessed or inhabited by any other Christian prince or state, or of any part of it within the bounds of the southern colony [of Virginia] granted by King James. It also created the associates a body politic by the name of " The Governor and Company of the Massachusetts Bay in New-England," with the usual powers of corporations. It provided, that the government should he administered by a governor, a deputy governor, and eighteen assistants, from time to time elected out of the freemen of the company, which officers should have the care of the general business and affairs of the lands and plantations, and the government of the people there; and it appointed the first governor, deputy governor, and assistants by name. It further provided, that a court or quorum for the transaction of business should consist of the governor, or the deputy governor, and seven or more assistants, which should assemble as often as once a month for that purpose, and also, that four great general assemblies of the company should be held in every year. In these great and general assemblies (which were composed of the governor, deputy, assistants, and freemen present,) freemen were to be admitted free of the company, officers were to be elected, and laws and ordinances for the good and welfare of the colony made; "so as such laws and ordinances be not contrary or repugnant to the laws and statutes of this our realm of England." At one of these great and general assemblies held in Easter Term, the governor, deputy, and assistants, and other officers were to be annually chosen by the company present.

The company were further authorized to transport any subjects or strangers willing to become subjects of the crown to the colony, and to carry on trade to and from it, without custom or subsidy for seven years, and were to be free of all taxation of imports or exports to and from the English dominion for the space of twenty one years, with the exception of a five per cent duty. The charter further provided, that all subjects of the crown, who should become inhabitants, and their children born there, or on the seas going or returning, should enjoy all liberties and immunities of free and natural subjects, as if they and every of them were born within the realm of England. Full legislative authority was also given, subject to the restriction of not being contrary to the laws of England, as also for the imposition of fines and mulcts "according to the course of other corporations in England."1 Many other provisions were added, similar in substance to those found in the antecedent colonial charters of the crown.

§ 64. Such were the original limits of the colony of Massachusetts Bay, and such were the powers and privileges conferred on it. It is observable, that the whole structure of the charter presupposes the residence of the company in England, and. the transaction of all its business there. The experience of the past had not sufficiently instructed the adventurers, that settlements in America could not be well governed by corporations resident abroad;2 or if any of

them had arrived at such a conclusion, there were many reasons for presuming, that the crown would be jealous of granting powers of so large a nature, which were to he exercised at such

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1 Hutch. Collection, page 1 to 23; 1 Haz. Coll. 239; I Chalmers's Annals, p. 137. 2 Chalmers's Annals, 81; Robertson's Hist. Amer. B.10.

a distance, as would render any control or responsibility over them wholly visionary. They were content therefore to get what they could, hoping, that the future might furnish more ample opportunities for success; that their usurpations of authority would not be closely watched; or that there might be a silent indulgence, until the policy of the crown might feel it a duty to yield, what it was now useless to contend for, as a dictate of wisdom and justice.1 The charter did not include any clause providing for the free exercise of religion or the rights of conscience, (as has been often erroneously supposed;) and the monarch insisted upon an administration of the oath of supremacy to every person, who should inhabit in the colony; thus exhibiting a fixed determination to adhere to the severe maxims of conformity so characteristic of his reign.2 The first emigrants, however, paid no attention to this circumstance; and the very first church planted by them was independent in all its forms, and repudiated every connection with Episcopacy, or a liturgy.3

§ 65. But a bolder step was soon afterwards taken by the company itself. It was ascertained, that little success would attend the plantation, so long as its affairs were under the control of a distant government, knowing little of its wants and insensible to its difficulties.4 Many persons, indeed, possessed of fortune and character, warmed with religious zeal, or suffering under religious intolerance, were ready to embark in the enterprise, if the corporation should be removed, so that the powers of government might be exercised by the

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1 Robertson's America, B.10; 1 Chalmers's Annals, 141. 2 Robertson's America, B.10, and note. 3 Robertson's America, B.10; 3 Hutch. Coll. 201. 4 l Chalmers's Annals, 94, 95.

actual settlers.1 The company had already become alarmed at the extent of their own expenditures, and there were but faint hopes of any speedy reimbursement. They entertained some doubts of the legality of the course of transferring the charter. But at length it was determined in August, 1629, "by the general consent of the company, that the government and patent should be settled in New-England."2 This resolution infused new life into the association; and the next election of officers was made from among those proprietors, who had signified an intention to remove to America. The government and charter were accordingly removed; and henceforth the whole management of all the affairs of the colony was confided to persons and magistrates resident within its own bosom. The fate of the colony was thus decided; and it grew with a rapidity and strength, that soon gave it a great ascendancy among the New-England settlements, and awakened the jealousy, distrust, and vigilance of the parent country.

§ 66. It has been justly remarked, that this transaction stands alone in the history of English colonization.3 The power of the corporation to make the transfer has been seriously doubted, and even denied.4 But the boldness of the step is not more striking, than the silent acquiescence of the king in permitting it to take place. The proceedings of the royal authority a few years after sufficiently prove, that the royal acquiescence was not intended as any admission of light. The subsequent struggles between the crown and the colony, down to

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1 1 Hutch. Hist. 12,13; 1 Chalm. Ann. 150,151. 2 1 Hutch. Host. 13; 3 Hutch. Coll. 25, 26; Robertson's America, B.10; Marsh. Colonies, ch. 3, p. 89; Holmes's Annals, 197; I Chalm. Annals, 150 3 Robertson's America,B.10. 4 See I Hutch. Hist. 410, 415; I Chalmers's Annals, 139, 141, 142, 148, 151, 173.

the overthrow of the charter, under the famous quo war-ranto proceedings in 1684, manifest a disposition on the part of the colonists to yield nothing, which could be retained; and on the part of the crown to force them into absolute subjection.

§ 67. The government of the colony immediately after the removal of the charter was changed in many important features; but its fundamental grants of territory, powers, and privileges were eagerly maintained in their original validity.1 It is true, as Dr. Robertson has observed,2 that as soon as the Massachusetts emigrants had landed on these shores, they considered themselves for many purposes as a voluntary association, possessing the natural rights of men to adopt that mode of government, which was most agreeable to themselves, and to enact such laws, as were conducive to their own welfare. They did not, indeed, surrender up their charter, or cease to recognize its obligatory force.3 But they extended their acts far beyond its expression of powers; and while they boldly claimed protection

from it against the royal demands and prerogatives, they nevertheless did not feel, that it furnished any limit upon the freest exercise of legislative, executive, or judicial functions. They did not view it, as creating an English corporation under the narrow construction of the common law; but as affording the means of founding a broad political government, subject to the crown of England, but yet enjoying many exclusive privileges.4

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1 1 Hutch. Hist. 25; 3 Hutch. Coll, 199, 200, 203, 205, 207. 2 Robertson's America, B. 10., 3 3 Hutch. Coll. 199, 203. 4 1 Hutch. Hist 35, 36, 37, 410, 507, 529; 3 Hutch. Coll. 106, 199, 200, 203, 205, 207, 329, 330, 417, 418, 420, 477; I Hutch. Hist. 410, 415; 1 Chalmers's Annals, 151, 153, 157, 161; Robertson's America, B. 10; Marsh. Hist. Colon. ch. 5. 139.

§ 68. The General Court in their address to Parliament in 1646, in answer to the remonstrance of certain mal-contents, used the following language:1 "For our government itself, it is framed according to our charter, and the fundamental and common laws of England, and carried on according to the same (taking the words of eternal truth and righteousness along with them, as that rule, by which all kingdoms and jurisdictions must render account of every act and administration in the last day) with as bare allowance for the disproportion between such an ancient, populous, wealthy kingdom, and so poor an infant, thin colony, as common reason can afford." And they then proceeded to show the truth of their statement, by drawing a parallel, setting down in one column the fundamental and common laws and customs of England, beginning with Magna Charta, and in a corresponding column their own fundamental laws and customs. Among other parallels, after stating, that the supreme authority in England is in the high court of Parliament, they stated: "The highest authority here is in the general court both by our charter and by our own positive laws."

§ 69. For three or four years after the removal of the charter, the governor and assistants were chosen and all the business of the government was transacted by the freemen assembled at large in a general court. But the members having increased, so as to make a general assembly inconvenient, an alteration took place, and in 1634, the towns sent representatives to the general court. They drew up a general declaration, that the general court alone had power to make and establish laws, and to elect officers, to raise monies and taxes, and to

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1 1 Hutch, Hist. 145, 146; 3 Hutch. Coll. 199, &c.

sell lands; and that therefore every town might choose persons as representatives, not exceeding two, who should have the full power and voices of all the freemen, except in the choice of officers and magistrates, where in every freeman was to give his own vote.1 The system, thus proposed, was immediately established by common consent,2 although it is nowhere provided for in the charter. and thus was formed the second house of representatives (the first being in Virginia) in any of the colonies.3 At first, the whole of the magistrates (or assistants) and the representatives sat together, and acted as one body, in enacting all laws and orders. But at legth in 1644 they separated into two distinct and independent bodies, each of which possessed a negative upon the acts of the other.4 This course of proceeding continued until the final dissolution of the charter.

§ 70. It may be well to state in this connection, that the council established at Plymouth in a very short period after the grant of the Massachusetts charter (in 1635) finally surrendered their own patent back to the crown. They had made other grants of territory, which we shall hereafter have occasion to notice, which had greatly diminished the value, as well as importance of their charter. But the immediate cause of the surrender was the odious extent of the monopolies granted to them, which roused the attention of Parliament, and

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1 Robertson's America, B. 10; 1 Hutch. Hist. 35, 36, 203; 1 Haz. Coll. 320. 2 Col. and Province Laws, (1814,) ch. 35, p. 97; 3 Hutch. Coll. 203, &c.; 1 Hutch. 449. 3 1 Hutch. Hist. 35, 36, 37, 94, note, 449; 1 Holmes's Annals, 222; 1 Haz. Coll. 321, 321; 1 Chalmers's Annals, 157. 4 I Hutch. Hist. 449; 1 Chalmers's Annals, 166; Col. and Province Laws, (1814,) ch. 31, p. 88; 3 Hutch. Coll. 205; 1 Doug. Summ. 431.

of the nation at large, and compelled them to resign, what they could scarcely maintain against the strong current of public opinion. The surrender, so far from working any evil, rather infused new life into the colonies, which sprung from it, by freeing them from all restraint and supervision by a superior power, to which they might perhaps have been held accountable.1 Immediately after this surrender legal proceedings were instituted against the proprietors of the Massachusetts charter. Those who appeared were deprived of their franchises. But fortunately the measure was not carried into complete execution against the absent proprietors acting under the charter in America.2

§ 71. After the fall of the first colonial charter in 1684,3 Massachusetts remained for some years in a very disturbed state under the arbitrary power of the crown. At length a new charter was in 1691 granted to the colony by William and Mary; and it henceforth became known as a province, and continued to act under this last charter until after the Revolution. The charter comprehended within its territorial limits all the old colony of the Massachusetts Bay, the colony of New Plymouth, the Province of Maine, the territory called Acadia, or Nova Scotia, and all the lands lying between Nova Scotia and Maine; and incorporated the whole into one Province by the name of the Province of the Massachusetts Bay in New-England, to be holden as of the royal manor of East Greenwich, in the county of Kent. It confirmed all prior grants made of lands to all persons,

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1 1 Holmes's Annals, 227; 1 Haz. Coll. 390, 393; I Chalmers's Annals, 94, 95, 99. 2 1 Holmes's Annals, 227; 3 Hutch Coll. 101, 104; 1 Haz. Coll. 423, 425; I Chalmers's Annals, 161. 3 1 Holmes's Annals, 412.

corporations, colleges, towns, villages, and schools. It reserved to the crown the appointment of the Governor, and Lieut. Governor, and Secretary of the province, and all the officers of the Court of Admiralty. It provided for the appointment annually of twenty-eight Counselors, who were to be chosen by the General Court, and nominated the first board. The Governor and Counsellors were to hold a council for the ordering and directing of the affairs of the Province. The Governor was invested with the right of nominating and with the advice of the council of appointing all military officers, and all sheriffs, provosts, marshals, and justices of the peace, and other officers of courts of justice. He had also the power of calling the General Court, and of adjourning, proroguing, and dissolving it. He had also a negative upon all laws passed by the General Court. The General Court was to assemble annually on the last Wednesday of May, and was to consist of the Governor and Council for the time being, and of such representatives being freeholders as should be annually elected by the freeholders in each town, who possessed a freehold of forty shillings annual value, or other estate to the value of forty pounds. Each town was entitled to two representatives; but the General Court was from time to time to decide on the number, which each town should send. The General Court was invested with full authority to erect courts, to levy taxes, and make all wholesome laws and ordinances, "so as the same be not repugnant or contrary to the laws of England;" and to settle annually all civil officers, whose appointment was not otherwise provided for all laws, however, were to be sent to England for approbation or disallowance; and if disallowed, and so signified under the sign manual and signet, within three

years, the same thenceforth to cease and become void; otherwise to continue in force according to the terms of their original enactment. The General Court was also invested with authority to grant any lands in the colonies of Massachusetts, New Plymouth, and Province of Maine, with certain exceptions. The Governor and Council were invested with full jurisdiction as to the probate of wills and granting administrations. The Governor was also made commander in chief of the militia, with the usual martial powers; but was not to exercise martial law without the advice of the Council. In case of his death, removal, or absence, his authority was to devolve on the Lieut. Governor, or, if his office was vacant, then on the Council. With a view also to advance the growth of the Province by encouraging new settlements, it was expressly provided, that there should be "a liberty of conscience allowed in the worship of God to all Christians, except Papists;" and that all subjects inhabiting in the Province and their children born there, or on the seas going or returning, should have all the liberties and immunities of free and natural subjects, as if they were born within the realm of England. And in all cases an appeal was allowed from the judgments of any courts of the Province to the King in the Privy Council in England, where the matter in difference exceeded three hundred pounds sterling. And finally there was a reservation of the whole admiralty jurisdiction to the crown; and of a right to all subjects to fish on the coasts.1 Considering the

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1 The Charter will be found at large in the Colony and Province Laws of Massachusetts, printed in 1814. Its substance is well summed up in 1 Holmes's Annals, 436.

Under the first charter the admiralty jurisdiction was exercised by the Colonial Common Law Courts, even in capital cases. 1 Hutch. 451.

spirit of the times, it must be acknowledged, that, on the whole, this charter contains a liberal grant of authority to the Province; and a reasonable reservation of the royal prerogative. It was hailed with sincere satisfaction by the colony after the dangers, which had for so long a time menaced its liberties and its peace.1

§ 72. In reviewing the laws passed by the Legislature of Massachusetts during its colonial state, the first and most important consideration is the early care, with which the public rights of the inhabitants were declared and established. No man's life, person, honor, or good name was to be affected; no man was to be deprived of his wife

or children, or estate, unless by virtue or equity of some express law of the General Court, "or in case of a defect of a law in any particular case, by the word of God; and in capital cases, or in cases of dismembering or banishment according, to that word, to be judged of by the General Court."2 No persons but church members were allowed to become freemen; and all persons of twenty-one years of age were allowed to dispose of their estate by will or any proper conveyance.3 All conveyances were to be by deed acknowledged and recorded in the public records.4 All lands and hereditaments were declared free from all fines and forfeitures. Courts of law were established, and local processes provided for.5 The trial by jury in civil and criminal cases as secured.6 Wager at law was not allowed but ac-

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1 1 Hutch. Hist. 415,416. 2 3 Hutch. Coll. 201 3 Ant. Col. and Prov. Laws, ch. 4, p. 44: ch. 104. p. 204. 4 Ant. Col. and Prov. Laws, ch. 1, p. 41; ch. 28, p. 85; 1 Hutch. Coll. 455 5 3 Hutch. Coll. 203. 205. 6 1 Hutch. 450; 3 Hutch. Coll. 203, 205.

cording to law, and according to the precept in Exodus [xxii. 8.]. Difficult cases of law were finally determinable in the Court of Assistants or in the General Court, by appeal or petition. In criminal cases where the law prescribed no penalty, the judges had power to inflict penalties "according to the rule of God's word."1 Treason, murder, poisoning, arson, witchcraft, sodomy, idolatry, blasphemy, manstealing, adultery, false witness, conspiracy and rebellion, cursing, smiting of parents-by children, being a stubborn or rebellious son, burglary, and rape (in particular circumstances) were offenses punishable with death.2 For the severity of some of these punishments the General Court expressly justified themselves by the language of the Scriptures. But theft was not punished with death, because, as they said, " we read otherwise in the Scriptures;"3 and many other crimes of a heinous nature were suffered to pass with a moderate punishment.4 Hutchinson has well observed, that "in punishing offenses they professed to be governed by the judicial laws of Moses, but no further than those laws were of a moral nature."5 Marriages were celebrated exclusively by magistrates during the first charter; though afterwards there was a concurrent power given to the clergy.6 Divorces a mensa et thoro seem not to have been in use during the period of the first charter; but for the same causes, for which such a divorce might be granted by the spiritual courts, a divorce a vinculo was

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1 3 Hutch. Coll. 205. 2 Ant. Col. and Prov. Laws, ch. 18, p. 58,59,60; 1 Hutch. Hist. 440, 441, 442; 1 Belk. New Hampshire, ch. 4, p. 66. 3 3 Hutch. Coll. 205. 4 1 Hutch. Hist. 442,443,444; Ant. Col. and Prov. Laws ch. 17, p. 56. 5 1 Hutch. Hist. 435,439. 6 I Hutch. Hist. 444.

granted. Female adultery was a sufficient cause; but male adultery not.1 In tenderness to the marriage state, a man, who struck his wife, or a woman her husband, was liable to a fine.2

§ 73. In the beginning the county courts had jurisdiction of the testamentary matters; and real estate was at first treated as mere bona in the civil law. When a positive rule was made, all the estate was (apparently with some reference to the Mosaic Law) made subject to distribution; the widow had such part of the estate, as the court held just and equal; and the rest was divided among the children or other heirs,, the eldest son having a double portion.3 and the daughters, where there were no sons, inheriting as coparceners, unless the court otherwise should determine.4 If the party died insolvent, his estate was distributed among all his creditors, there not being any preference of any debts by judgment or specialty.5

The law of inheritance was thus, as we see, altered from that of England from the beginning; and yet, strangely enough, the General Court, in their answer in 1646, considered their canon of descent as parallel to the English law, and expounded it by the same terms, " the eldest son is preferred before the younger in the ancestor's inheritance,"6 when in reality he had only a doubleportion, and the estate was partible among all the children. Their lands being, by the charter held, as of the manor of East Greenwich, in free and common soccage, they attributed to it the gavelkind quality of

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1 1 Hutch. Hist. 445. 2 1 Hutch. Hist. 445. 3 I Hutch. Hist. 446. 4 Ant. Col. and Prov. Laws, ch. 101, p. 205. 5 1 Hutch. Hist. 446. 6 3 Hutch. Coll. 207; 1 Hutch Coll. 447; Ant. Col. and Prov. Laws, ch. 104, p. 205.

not being forfeited for felony or treason; and the convict might therefore, even after sentence, dispose of it by will.1 Estates tail were recognized, and in such cases the heir took per formam doni, according to the common law, and not all the children as one heir.2

§ 74. In respect to ecclesiastical concerns they made ample provision for their own church, (meaning the Congregational Church,) exclusive of all others. In their parallel in 1646, they quote the provision of Magna Charta, that " the church shall enjoy all her liberties," and dropping all suggestion of the real differences of their own church establishment from that of England, they quote their own provision, that "all persons orthodox in judgment, and not scandalous in life, may gather into a church state according to the rules of the gospel," as of similar import.3 They gave to their own churches, when organized, full power and authority to inflict ecclesiastical censures, and even to expel members. But they reserved to the civil authority the further power to punish offenses, and " the liberty to see the peace, ordinances, and rules of Christ observed."4 Every church had liberty to elect its own officers, and " no injunction was to be put upon any church, church officer, or member in point of doctrine, worship, or discipline, whether for substance or circumstance, besides the institution of the Lord."5 But the general court, with the assistance of the clergy, were in the habit of judging of all such matters with supreme authority, and of con-

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1 1 Hutch. Hist. 447. 2 1 Hutch. Hist. 447. 3 3 Hutch. Collect. 201; Ant.Colon. and Prov. Laws, ch.39, p.100; 1 Haz. Coll. 488. 4 Ant. Col. and Prov. Laws, ch. 30, p. 100, 101. 5 1 Hutch. Hist. 420, 421, 422, 423, 424, 434; 1 Belk. New Hamp. ch.4, p.70, 71.

demning errors with no sparing hand. They had not the slightest scruple of punishing heresies with fines and banishment, and even, in obstinate cases, with death.1 Ministers were maintained, and public worship provided for by taxes assessed upon the inhabitants of each parochial district; and an attendance upon public worship was required of all persons under penalties, as a solemn duty.2 So effectual were the colonial laws in respect to conformity, and so powerful the influence of the magistrates and the clergy, that Hutchinson informs us, that there was not "any Episcopal church in any part of the colony until the charter was vacated."3

§ 75. But the most striking as well as the most important part of their legislation is in respect to education. As early as 1647, the General Court, "to the end," as the preamble of the act declares,4 " that learning may not be buried in the graves of our forefathers in church and commonwealth," provided, under a penalty, that every township of fifty householders "shall appoint a public school for the instruction of children in writing and reading, and that every town of one hundred householders "shall set up a grammar school, the master thereof being able to instruct youth so far as may be fitted for the university." This law has, in substance, continued down to the present times; and it has contributed more than any other circumstance to give that peculiar character to the inhabitants and institutions of Massachusetts, for which she, in common with the

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1 Robertson's America. B.10; 1 Belk. New-Hamp. ch.4, p.70 to 77; Ant. Col. and Prov. Laws, ch. 57, p. 120, &e.; 3 Hutch. Coll. 215, 216; l Hutch. Hist. 431; 3 Hutch. Hist. 42;1 Haz. Coll. 538; 1 Chalmers's Annals, 163, 164, 165, 169, 189, 190, 191, 194. 2 l Hutch. Hist. 427; Ant. Col. and Prov. Laws, ch. 39, p. 103, 104. 3 I Hutch. Hist. 431. 4 Ant. Col. and Prov. Laws, ch. 88, p. 186.

other New-England states, indulges an honest, and not unreasonable pride.

§ 76. After the grant of the provincial charter, in 1691, the legislation of the colony took a wider scope, and became more liberal, as well as more exact. At the very first session an act passed, declaring the general rights and liberties of the people, and embracing the principal provisions of Magna Charta on this subject. Among other things, it was declared, that no tax could be levied but by the General Court; that the trial by jury should be secured to all the inhabitants; and that all lands shall be free from escheats and forfeitures, except in cases of high treason.1 A habeas corpus act was also passed at the same session; but it seems to have been disallowed by the crown.2 Chalmers asserts, that there is no circumstance in the history of colonial jurisprudence better established than the fact, that the habeas corpus act was not extended to the plantations until the reign of Queen Anne.3

§ 77. It does not seem necessary to go into any minute examination of the subsequent provincial legislation. In its general character it did not materially vary from that antecedently adopted, except so far as the charter required, or a progressive spirit of improvement invited a change. Lands were made liable to the payment of debts; the right of choosing their ministers was, after some struggles, secured in effect to the concurrent vote of the church and congregation in each parish; and the spirit of religious intolerance was in some measure checked, if not entirely subdued. Among the earliest acts of

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1 2 Hutch. Hist. 64, Ant. Col. and Prov. Laws, ch. 2, p. 214. 2 2 Hutch. Hist. 64.
3 1 Chalm. Annals, 56, 74.

the provincial legislature, which were approved, were an act for the prevention of frauds and perjuries, conformable to that of Charles the Second; an act for the observance of the Lord's day; an act for solemnizing marriages by a minister or a justice of the peace; an act for the support of ministers and schoolmasters; an act for regulating towns and counties; and an act for the settlement and distribution of the estates of persons dying intestate.1 These and many other acts of general utility have continued substantially in force down to our day. Under the act for the distribution of estates the half blood were permitted to inherit equally with the whole blood.2 Entails were preserved and passed according to the course of descents of the common law; but the general policy of the state silently reduced the actual creation of such estates to comparatively narrow limits.

1 2 Hutch. Hist. 65, 66. 2 2 Hutch. Hist. 66.

CHAPTER V.
NEW-HAMPSHIRE.

§ 78. Having gone into a full consideration of the origin and political organization of the primitive colonies in the South and North, it remains only to take a rapid new of those, which were subsequently established in both regions. An historical order will probably be found as convenient for this purpose, as any, which could be devised. **§ 79.** In November, 1629, Capt. John Mason obtained a grant from the council of Plymouth of all that part of the main land in New-England "lying upon the seacoast, beginning from the middle part of Merrimack river, and from thence to proceed northwards along the sea-coast to Piscataqua river, and so forwards up within the said river and to the furthest head thereof; and from thence northwestwards until three score miles be finished from the first entrance of Piscataqua river; and also from Merrimack through the said river and to the furthest head thereof, and so forwards up into the lands westwards, until three score miles be finished; and from thence to cross over land to the three score miles and accounted from Piscataqua river, together with all islands and islets within five leagues distance of the premises."1 This territory was afterwards called NewHampshire. The land so granted was expressly subjected to the conditions and limitations in the original

1 1 Haz. Coll. 289; I Holmes's Annals 199; 1 Belk. N. Hamp. ch.1, p. 18.

patent; and there was a covenant on the part of Mason, that he would establish such government therein, and continue the same, " as shall be agreeable, as near as may be, to the laws and customs of the realm of England;" and that if charged with neglect, he would reform the same according to the discretion of the president and council; or in default thereof, that the aggrieved inhabitants, or planters, tenants of the lands, might appeal to the chief court of justice of the president and council. A further grant was made to Mason by the council of Plymouth about the time of the surrender of their charter, (22 April, 1635,) "beginning from the middle part of Naumkeag river [Salem], and from thence to proceed eastwards along the sea-coast to Cape Ann and round about the same to Piscataqua harbour; and then covering much of the land in the prior grant, and giving to the whole the name of NewHampshire."1 This grant included a power of judicature in all cases, civil and criminal, " to be exercised and executed according to the laws of England as near as may be," reserving an appeal to the council. No patent of confirmation of this grant appears to have been made by the crown after the surrender of the Plymouth patent.2

§ 80. Various detached settlements were made within this territory; and so ill defined were the boundaries, that a controversy soon arose between Massachusetts and Mason in respect to the right of sovereignty over it.3 In the exposition of its own charter Massa-

1 1 Haz. Coll. 383, 384, 385; 1 Chalm. Annals, 472, 473, 477; 1 Belk. N. Hamp. ch. 1, p. 27. 2 1 Hutch. Hist. 313, 314; Marsh. Colon. ch. 3, p. 97. 3 1 Hutch. Hist. 101, 108, 109, 311, 312, to 318.

chusetts contended, that its limits included the whole territory of New-Hampshire; and being at that time comparatively strong and active, she succeeded in establishing her jurisdiction over it, and maintained it with unabated vigilance for forty years.1 The controversy was finally brought before the king in council; and in 1679 it was solemnly adjudged against the claim of Massachusetts. And it being admitted, that Mason, under his grant, had no right to exercise any powers of government, a commission was, in the same year, issued by the crown for the government of New-Hampshire.2 By the form of government, described in this commission, the whole executive power was vested in a president and council appointed by the crown, to whom also was confided the judiciary power with an appeal to England. In the administration of justice it was directed, that " the form of proceedings in

such cases, and the judgment thereon to be given, be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid, and the circumstances of the place will admit."3 The legislative power was entrusted to the president, council, and burgesses, or representatives chosen by the towns; and they were authorized to levy taxes and to make laws for the interest of the province; which laws being approved by the president and council were to stand and be in force, until the pleasure of the king should

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1 Chalm. Annals, 477, 484, 485, 504, 505; Marsh. Colon. ch. 4, p. 109, ch. 6, p. 167, 168; 3 Hutch. Coll. 422; 1 Belk. N. Hamp.ch. 2, p. 49, 50. 2 1 Chalm. Annals, 489, 490; 1 Hutch. Hist. 319; 1 Holme's Annals, 395; Marsh. Colon. ch. 6, p. 168; Robert. America, B. 10; I Belk. N. Hamp. ch. 6, p. 137,138; 1 Doug. Summ. 28; N. Hamp. Prov. Laws, Edit. 1771, p. 1, &c. 3 N. Hamp. Prov. Laws (Edit. 1771,) p. 1, 3.

be known, whether the same laws and ordinances should receive any change or confirmation, or be totally disallowed and discharged. And the president and council were required to transmit and send over the same by the first ship, that should depart thence for England after their making. Liberty of conscience was allowed to all Protestants, those of the Church of England to be particularly encouraged. And a pledge was given in the commission to continue the privilege of an assembly in the same manner and form, unless by inconvenience arising, therefrom the crown should see cause to alter the same.1 A body of laws was enacted in the first year of their legislation, which, upon being sent to England, was disallowed by the crown.2 NewHampshire continued down to the period of the Revolution to be governed by commission as a royal province; and enjoyed the privilege of enacting her own laws through the instrumentality of a general assembly, in the manner provided by the first commission.3 Some alterations were made in the successive commissions; but none of them made any substantive change in the organization of the Province. The judicial power of the governor and council was subsequently, by law, confined to the exercise of appellate jurisdiction from the inferior courts; and in the later commissions a clause was inserted, that the colonial statutes should "not be repugnant to, but as near as may be agreeable, to the laws and statutes of the realm of England."4

§ 81. The laws of New-Hampshire, during its pro-

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1 1 Chalm. Annals, 489, 90: 1 Holmes's Annals, 395; 1 Belk. N. Hamp. ch. 6, p. 138, 139; 2 Belk. N. Hamp. Preface; N. Hamp. Prov. Laws, (Edit. 1771,) p. 5. 2 Ibid. 3 1 ChaIm. Annals, 491, 492, 493, 508. 4 N. Hamp. Prov Laws, (Edit 1771,) p. 61, and Id.

vincial state, partook very much of the character of those of the neighbouring Province of Massachusetts. Those regulating the descent and distribution of estates, the registration of conveyances, the taking of depositions to be used in the civil courts, for the maintenance of the ministry, for making lands and tenements liable for the payment of debts, for the settlement and support of public grammar schools, for the suppression of frauds and perjuries, and for the qualification of voters, involve no important differences, and were evidently framed upon a common model. New-Hampshire seems also to have had more facility, than some other colonies, in introducing into her domestic code some of the most beneficial clauses of the acts of parliament of a general nature, and applicable to its local jurisprudence.2 We also find upon its statute book, without comment or objection, the celebrated plantation act of 7 & 8 William 3, ch. 22, as well as the acts respecting inland bills of exchange, (9 & 10 William 3, ch. 17,) and promissory notes, (4 Ann, ch. 9,) and others of a less prominent character.

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1 N. Hamp. Prov. Laws, (Edit. 1771,) 19, 22, 55, 90, 105, 143, 157, 163, 137, 166. 2 N. Hamp. Prov. Laws, (Edit. 1771,) 209; Gov. Wentworth's Commission in 1766.

CHAPTER VI.

MAINE.

§ 82. IN August, 1622, the council of Plymouth (which seems to have been extremely profuse and inconsiderate in its grants 1) granted to Sir Ferdinando Gorges and Capt. John Mason all the land lying between the rivers Merrimack and Sagadahock, extending back to the great lakes and rivers of Canada; which was called Laconia.2 In April, 1639, Sir Ferdinando obtained from the crown a confirmatory grant of all the land from Piscataqua to Sagadahock and the Kennebeck river, and from the coast into the northern interior one hundred and twenty miles; and it was styled " The Province of Maine."3 Of this province he was made Lord Palatine, with all the powers,

jurisdiction, and royalties belonging to the bishop of the county Palatine of Durham; and the lands were to be holden, as of the manor of East Greenwich. The charter contains a reservation of faith and allegiance to the crown, as having the supreme dominion; and the will and pleasure of the crown is signified, that the religion of the Church of England be professed, and its ecclesiastical government established in the province. It also authorizes the Palatine, with the assent of the greater part of the freeholders of the province, to make laws not repugnant or

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1 1 Hutch. Hist. 6, 104; Robert. America, B. 10; I Doug. Summ. 366, 380, 386. 2 1 Hutch. Hist. 316; 1 Holmes Annals, 180; 1 Belk. N. Hamp. ch. 1, p. 14. 3 1 Holmes's Annals, 254; 1 Chalm. Annals, 472, 473, 471; 1 Doug. Summ. 386, &c.

contrary, but as near as conveniently may be to the laws of England, for the public good of the province; and to erect courts of judicature for the determination of all civil criminal causes with an appeal to the Palatine. But all the powers of government, so granted, were to be subordinate to the "power and regement" of the lords commissioners for foreign plantations for the time being. The Palatine also had authority to make ordinances for the government of the province, under certain restrictions; and a grant of full admiralty powers, subject to that of the Lord High Admiral of England. And the inhabitants, being subjects of the crown, were to enjoy all the rights and privileges of natural born subjects in England.1

§ 83. Under these ample provisions Gorges soon established a civil government in the province, and made ordinances. The government, such as it was, was solely confided to the executive, without any powers of legislation. The province languished in imbecility under his care; and began to acquire vigour only when he ceased to act as proprietary and lawgiver.2 Massachusetts soon afterwards set up an exclusive right and jurisdiction over the territory, as within its chartered limits; and was able to enforce obedience and submission to its power.3 It continued under the jurisdiction of Massachusetts until 1665, when the commissioners of the crown separated it for a short period; but the authority of Massachusetts was soon afterwards re-established.4 The controversy between Massachu-

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1 Haz. Coll. 442 to 445. 2 1 Chalm. Annals, 474, 479; 1 Holmes's Annals, 254, 258, 296. 3 1 Chalm. Annals, 480, 481, 483; 1 Hutch. History, 176, 177, 256; 1 Holmes's Annals, 296; 2 Winthrop's Journ. 38, 42. 4 1 Chalm. Annals, 483, 484; 1 Holmes's Annals, 343, 348; 3 Hutch. Coll. 422

setts and the Palatine, as to jurisdiction over the province, was brought before the privy council at the same time with that of Mason respecting New-Hampshire, and the claim of Massachusetts was adjudged void.1 Before a final adjudication was had, Massachusetts had the prudence and sagacity, in 1677, to purchase the title of Gorges for a trifling sum; and thus to the great disappointment of the crown, (then in treaty for the same object,) succeeded to it, and held it, and governed it as a provincial dependency, until the fall of its own charter; and it afterwards, as we have seen, was incorporated with Massachusetts in the provincial charter of 1691.2

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1 1 Chalmers's Annals, 485, 504, 505; 1 Holmes's Annals, 388. 2 I Chalm. Ann. 486, 487; I Holmes's Ann. 388; 1 Hutch. Hist. 326.

CHAPTER VII.
CONNECTICUT.

§ 84. CONNECTICUT was originally settled under the protection of Massachusetts; but the inhabitants in a few years afterwards (1638) felt at liberty (after the example of Massachusetts) to frame a constitution of government and laws for themselves.1 In 1630 the Earl of Warwick obtained from the council of Plymouth a patent of the land upon a straight line near the seashore towards the southwest, west and by south, or west from Narraganset river forty leagues, as the coast lies, towards Virginia, and all within that breadth to the South sea. In March, 1631, the Earl of Warwick conveyed the same to Lord Say and Seale and others. In April, 1635,2 the same council granted the same territory to the Marquis of Hamilton. Possession under the title of Lord Say and Seale and others was taken of the mouth of the Connecticut in 1635.3 The settlers there were not, however, disturbed; and finally, in 1644, they extinguished the title of the proprietaries, or Lords, and continued to act under the constitution of

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1 1 Hutch. Hist. 98, 99; 2 Hutch. Hist. 202; 1 Hanz. Coll. 321; 1 Holmes's Annals, 269, 220, 228, 231, 232, 251; I Chalm. Annals, 286, 287,289; 2 Doug. Summ. 158, &c.; I Hutch. Hist. 100. The substance of this frame of

government is given in 1 Holmes's Ann. 251; and a full copy in I Haz. Collec. 437, 441. 2 2 Hutch. History, 203; 1 Haz. Coll. 318; 1 Holmes's Annals, 208; I Chalm. Annals, 299. 3 I Chalm. Ann. 288, 289, 290, 300; 2 Hutch. Hist. 203; 1 Haz. Coll. 395,396; 1 Holmes's Ann. 229; 1 Hutch. Hist. 47; 1 Winthrop's Journ. 170, 397; 3 Hutch. Coll. 412, 413.

government, which they had framed in 1638. By that constitution, which was framed by the inhabitants of the three towns of Windsor, Hartford, and Weathersfield, it was provided, that there should be two general assemblies annually; that there should be annually elected, by the freemen, at the court in April, a governor and six assistants, who should "have power to administer justice according to the law here established, and for want thereof according to the rule of the word of God." And that as many other officers should be chosen, as might be found requisite.1 To the general court each of the above named towns was entitled to send four deputies; and other towns, which should be afterwards formed, were to send so many deputies, as the general court should judge meet, according to the apportionment of the freemen in the town. All persons, who were inhabitants and freemen, and who took the oath of fidelity, were entitled to vote in the elections. Church-membership was not, as in Massachusetts, an indispensable qualification. The supreme power, legislative, executive, and judicial, was vested in the general court.2

§ 85. The colony of New-Haven had a separate origin, and was settled by emigrants immediately from England, without any title derived from the patentees. They began their settlement in 1638, purchasing their lands of the natives; and entered into a solemn compact of government.3 By it no person was admitted to any office, or to have any voice at any election, unless he was a member of one of the churches allowed in the

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1 1 Haz. Coll. 437; 1 Holmes's Ann. 251. 2 Ibid. 3 1 Hutch. Hist. 82, 83; 1 Holmes's Ann. 244, 245; 1 Chalm. Ann. 290; Robertson's America, B. 10; 3 American Museum, 523.

dominion. There was an annual election of the governor, the deputy, magistrates, and other officers, by the freemen. The general court consisted of the governor, deputy, magistrates, and two deputies from each plantation;1 and was declared to be "the supreme power, under God, of this independent dominion," and had authority "to declare, publish, and establish the laws of God, the Supreme Legislator, and to make and repeal orders for smaller matters, not particularly determined in Scripture, according to the general rules of righteousness; to order all affairs of war and peace, and all matters relative to the defending or fortifying the country; to receive and determine all appeals, civil or criminal, from any inferior courts, in which they are to proceed according to scripture light, and laws, and orders agreeing therewith."2 Other courts were provided for; and Hutchinson observes, that their laws and proceedings varied in very few circumstances from Massachusetts, except, that they had no jury, either in civil nor criminal cases. all matters of facts were determined by the court.3

§ 86. Soon after the restoration of Charles the Second to the throne, the colony of Connecticut, aware of the doubtful nature of its title to the exercise of sovereignty, solicited and in April, 1662, obtained from that monarch a charter of government and territory.4 The charter included within its limits the whole colony of New-Haven; and as this was done without the consent of the latter, resistance was made to the incorporation, until 1665, when both were indissolubly united,

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1 3 American Museum, 523. 2 1 Hutch. Hist. 83, note. 3 I Hutch. Hist. 84, note; 1 Chalm. Annals, 290. 4 2 Haz. Coll. 586; 1 Chalm. Ann. 292,293; 1 Holmes's Ann. 320; 2 Doug. Summ. 164.

and have ever since remained under one general government.1

§ 87. The charter of Connecticut, which has been objected to-by Chalmers as establishing "a mere democracy, or rule of the people," contained, indeed, a very ample grant of privileges. It incorporated the inhabitants by the name of the Governor and Company of the Colony of Connecticut in New-England, in America. It ordained, that two general assemblies shall be annually held; and that the assembly shall consist of a governor; deputy governor, twelve assistants, and two deputies, from every town or city, to be chosen by the freemen, (the charter nominating the first governor and assistants.) The general assembly had authority to appoint judicatories, make freemen, elect officers, establish laws, and ordinances "not contrary to the laws of this realm of England," to punish offenses " according to the course of other corporations within this our kingdom of England," to assemble the inhabitants in martial array for the common defense, and to exercise martial law in cases of necessity. The lands were to be holden as of the manor of East Greenwich, in free and common soccage. The inhabitants and their children born there were to enjoy and possess all the liberties and immunities of free, natural-born subjects, in the same manner as if born within the realm. The right of general fishery on the coasts was reserved to all subjects; and finally the territory

bounded on the east by the Narragansett river, where it falls into the sea, and on the north by Massachusetts, and on the south by the sea, and in longitude, as the line of the Massachusetts colo-

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1 1 Holmes's Ann. 338; I Chalm. Annals, 296; Marsh. Colon. 134; 1 Chalm. Ann. 294; 2 Doug. Summ. 164,167.

ny running from east to west, that from Narraganset bay to the South sea, was granted and confirmed to the colony.1 The charter is silent in regard to religious rights and privileges.

§ 88. In 1685, a quo warranto was issued by king James against the colony for the repeal of the charter. No judgment appears to have been rendered upon it; but the colony offered its submission to the will of the crown; and Sir Edmund Andros, in 1687, went to Hartford, and in the name of the crown, declared the government dissolved.2 They did not, however, surrender the charter; but secreted it in an oak, which is still venerated; and immediately after the revolution of 1688, they resumed the exercise of all its powers. The successors of the Stuarts silently suffered them to retain it until the American Revolution, without any struggle or resistance.3 The charter continued to be maintained as a fundamental law of the State, until the year 1818, when a new constitution of government was framed and adopted by the people.

§ 89. The laws of Connecticut were, in many respects, similar to those of Massachusetts.4 At an early period after the charter they passed an act, which may be deemed a bill of rights. By it, it was declared, that "no man' s life shall be taken away; no man's honour or good name shall be stained; no man's person shall be arrested, restrained, banished, dismembered, nor any ways punished; no man shall be deprived of his wife

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1 2 Haz. Coll 597 to 605; 1 Holmes's Ann. 320; I Chalm. Annals, 293, 294; Marsh. Colon. ch. 5, p. 134 2 1 Holmes's Ann. 415, 421, 429, 442; 1 Chalm. Ann. 297, 298, 301, 304, 306; 1 Hutch. Hist. 339, 406, note. 3 Idem. 4 2 Doug. Summ. 171 to 176, 193 to 202.

or children; no man's goods or estate shall be taken away from him, nor any way endangered under colour of law, or countenance of authority, unless it be by virtue or equity of some express law of this colony, warranting the same, established by the general court, and sufficiently published; or in case of the defects of a law in any particular case, by some clear and plain rule of the word of God, in which the whole court shall concur."1 The trial by jury, in civil and criminal cases, was also secured; and if the court were dissatisfied with the verdict, they might send back the jury to consider the same a second and third time, but not further.2 The governor was to be chosen, as the charter provided, by the freemen. Every town was to send one or two deputies or representatives to the general assembly; but every freeman was to give his voice in the election of assistants and other public officers.3 No person was entitled to be made a freeman, unless he owned lands in freehold of forty shillings' value per annum, or 40 personal estate.4

§ 90. In respect to offenses, their criminal code proceeded upon the same general foundation, as that of Massachusetts, declaring those capital, which were so declared in the Holy Scriptures, and citing them as authority for this purpose. Among the capital offenses were idolatry, blasphemy of Father, Son, or Holy Ghost, witchcraft, murder, murder through guile by poisoning or other devilish practices, bestiality, sodomy, rape, man-

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1 Colony Laws of Connecticut, edition by Greene, 1715-1718, folio. (New-London,) p. 1. 2 Idem p. 2. -- This practice continued down to the establishment of the new constitution in 1818. 3 Idem. p. 27, 30. 4 Idem. 41.

stealing, false witness, conspiracy against the colony, arson, children cursing, or smiting, father or mother, being a stubborn or rebellious son, and treason.1

§ 91. In respect to religious concerns, their laws provided, that all persons should attend public worship, and that the towns should support and pay the ministers of religion. And at first, the choice of the minister was confided to the major part of the house-holders of the town; the church, as such, having nothing to do with the choice. But in 1708, an act was passed, (doubtless by the influence of the clergy,) by which the choice of ministers was vested in the inhabitants of the town, who were church members; and the same year the celebrated platform, at Saybrook, was approved, which has continued down to our day to regulate, in discipline and in doctrine, the ecclesiastical concerns of the State.2

§ 92. The spirit of toleration was not more liberal here, than in most of the other colonies. No persons were allowed to embody themselves into church estate without the consent of the general assembly, and the approbation of the neighbouring churches, and no ministry or church administration was entertained or authorized separate from, and

in opposition to that openly and publicly observed and dispensed by the approved minister of the place, except with the approbation and consent aforesaid.3 Quakers, Ranters, Adamites, and other notorious heretics (as they were called) were to be committed to prison or sent out of the colony by order of the governor and assistants.4 Nor does the zeal of per-

1 Colony Laws of Connecticut, edition by Greene, 1715-1718, folio. (New London,) p. 12. 2 Id. p. 29, 84, 85, 110, 141.--The Constitution of 1818 has made a great change in the rights and powers of the ministers and parishes in ecclesiastical affairs. 3 Id. p. 29. 4 Id. p. 49.

secution appear at all to have abated until, in pursuance of the statutes of I William and Mary, dissenters were allowed the liberty of conscience without molestation.1

§ 93. In respect to real estate, the descent and distribution was directed to be among all the children, giving the eldest son a double share; conveyances in fraud of creditors were declared void; lands were made liable to be set off to creditors on executions by the appraisement of three appraisers.2

The process in courts of justice was required to be in the name of the reigning king.3 Persons having no estate might be relieved from imprisonment by two assistants; but if the creditor required it, he should satisfy the debt by service.4 Depositions were allowed as evidence in civil suits.5 No person was permitted to plead in behalf of another person on trial for delinquency, except directly to matter of law,6 a provision somewhat singular in our annals, though in entire conformity to the English law in capital felonies. Bills and bonds were made assignable, and suits allowed in the name of the assignees.7

Magistrates, justices of the peace, and ministers were authorized to marry persons; and divorces a vinculo allowed for adultery, fraudulent contract, or desertion for three years. Men and women, having a husband or wife in foreign parts, were not allowed to abide in the colony so separated above two years without liberty from the general court.

1 Colony Laws of Conn. edition by Greene, 1715-1718, folio. (New London,) p. 134. 2 Id.p.33,61,164. 3 Id.p.41. 4 Id.p.26. 5 Id.p.116. 6 Id.p.26. 7 Id.p.7.

Towns were required to support public schools under regulations similar, for the most part, to those of Massachusetts;1 and an especial maritime code was enacted, regulating the rights, and duties, and authorities of ship-owners, seamen, and others concerned in navigation.2

Such are the principal provisions of the colonial legislation of Connecticut.

1 Colony Laws of Conn. edition by Greene, 1715-1718 folio. (New London,) p. 84. 2 Id. p. 70.--A similar code existed in Massachusetts, enacted in 1668.

CHAPTER VIII.
RHODE ISLAND.

§ 94. RHODE ISLAND was originally settled by emigrants from Massachusetts, fleeing thither to escape from religious persecution; and it still boasts of Roger Williams as its founder, and as the early defender of religious freedom and the rights of conscience. One body of them purchased the island, which has given the name to the State, and another the territory of the Providence Plantations from the Indians, and began their settlements in both places nearly at the same period, viz. in 1636 and 1638.1 They entered into separate voluntary associations of government. But finding their associations not sufficient to protect them against the encroachments of Massachusetts, and having no title under any of the royal patents, they sent Roger Williams to England in 1643 to procure a surer foundation both of title and government. He succeeded in obtaining from the Earl of Warwick (in 1643) a charter of incorporation of Providence Plantations;2 and also, in 1644, a charter from the two houses of parliament (Charles the First being then driven from his capital) for the incorporation of the towns of Providence, New-

1 1 Hutch. Hist. 12, 1 Holmes's Annals, 225, 233, 246; 1 Chalm. Annals, 269, 270; 3 Hutch. Coll. 413, 414, 415; Marsh. Colon. ch.3, p. 99; Robertson's America, B. 10; 2 Doug. Summ. 76, to 90; 1 Pitkin's Hist 46; 2 Doug. Summ. 76 to 77; -- Mr. Chalmers say, that Providence was settled in the beginning of 1635; and Dr. Holmes, in 1636. (1 Chalm. Annals, 270; 1 Holmes's Annals,233.) 2 1 Hutch. Hist. 30, note; Walsh's Appeal, 429; 1 Pitk. Hist. 46, 47, 48; 2 Doug. Summ. 80.

port, and Portsmouth, for the absolute government of themselves, but according to the laws of England.1

§ 95 Under this charter an assembly was convened in 1647, consisting of the collective freemen of the various plantations.2 The legislative power was vested in a court of commissioners of six persons, chosen by each of the four towns then in existence. The whole executive power seems to have been vested in a president and four assistants, who were chosen from the freemen, and formed the supreme court for the administration of justice. Every township, forming within itself a corporation, elected a council of six for the management of its peculiar affairs, and for the settlement of the smallest disputes.3 The council of state of the Commonwealth soon afterwards interfered to suspend their government; but the distractions at home prevented any serious interference by parliament in the administration of their affairs; and they continued to act under their former government until the restoration of Charles the Second.4 That event seems to have given great satisfaction to these plantations. They immediately proclaimed the king, and sent an agent to England; and in July, 1663, after some opposition, they succeeded in obtaining a charter from the crown.5

§ 96. That charter incorporated the inhabitants by the name of the Governor and Company of the English Colony of Rhode Island and Providence Plantations in New-England in America, conferring on them the

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1 1 Chalm. 271, 272; 3 Hutch Coll. 415, 416. 2 1 Chalm. Annals, 273; 1 Holmes's Annals, 283; Walsh's Appeal, 429; 2 Doug. Summ. 80 3 1 Chalm. Annals, 273; 1 Holmes's Annals, 283. 4 1 Chalm. Annals, 274; 1 Holmes's Annals, 297; Marsh. Colon. ch. 5, p. 133 5 1 Chalm. Annals, 274; Holmes's Annals, 329.

usual powers of corporations. The executive power was lodged in a governor, deputy governor, and ten assistants, chosen by the freemen.1 The supreme legislative authority was vested in a general assembly, consisting of a governor, deputy governor, ten assistants, and deputies from the respective towns, chosen by the freemen, (six for Newport, four for Providence, Portsmouth, and Warwick, and two for other towns,) the governor or deputy and six assistants being always present. The general assembly were authorized to admit freemen, choose officers, make laws and ordinances, so as that they were "not contrary and repugnant unto, but as near as may be agreeable to, the laws of this our realm of England, considering the nature and constitution of the place and people; to create and organize courts; to punish offences according to the course of other corporations in England; " to array the martial force of the colony for the common defense, and enforce martial law; and to exercise other important powers and prerogatives. It further provided for a free fishery on the coasts; and that all the inhabitants and children born there should enjoy all the liberties and immunities of free and natural subjects born within the realm of England. It then granted and confirmed unto them all that part of the king's dominions in New-England containing the Narraganset bay and the countries and parts adjacent, bounded westerly to the middle of Pawcatuck river, and so along the river northward to the head thereof, thence by a strait line due north, until it meet the south line of Massachusetts, extending easterly three English miles to the most eastern and northeastern parts of Narraganset bay, as the

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1 2 Haz. Coll. 62 to 623; 2 Doug. Summ. 81

bay extendeth southerly unto the mouth of the river running towards Providence and thence along, the easterly side or bank of the said river up to the falls, called Patucket Falls, and thence in a strait line due north till it meetsthe Massachusetts line.1 The territory was to be holden as of the manor of East Greenwich in free and common soccage. It further secured a free trade with all the other colonies.

§ 97. But the most remarkable circumstance in the charter, and that, which exhibits the strong feeling and spirit of the colony, is the provision respecting religious freedom. The charter, after reciting the petition of the inhabitants, " that it is much in their hearts, (if they be permitted,) to hold forth a lively experiment, that a most flourishing civil state may stand, and be best maintained, and that among our English subjects, with a full liberty in religious concernments, and that true piety, rightly grounded upon gospel principles, will give the best and greatest security to sovereignty," proceeds to declare:2 " We being willing to encourage the hopeful undertaking of our said loyal and loving subjects, and to secure them in the free exercise and enjoyment of all their civil and religious rights appertaining, to them as our loving subjects, and to preserve to them that liberty in the true Christian faith and worship of God, which they have sought with so much travel, and with peaceful minds and loyal subjection to our. royal progenitors and ourselves to enjoy; and because some of the people and inhabitants of the same colony cannot, in their private opinion, conform to the public exercise of

1 This is the substance but not the exact words of the boundaries in the charter, which is given at large in 2 Haz. Coll. 612 to 623, and in Rhode Island Laws, editions of 1789 and 1822. 2 2 Haz. Coll. 613.

religion according to the liturgy, form, and ceremonies of the Church of England, or take or subscribe the oaths and articles made and established in that behalf; and for that the same, by reason of the remote distances of these places, will, as we hope, be no breach of the unity and uniformity established in this nation, have therefore thought fit and do hereby publish, grant, ordain, and declare, that our royal will and pleasure is, that no person within the said colony, at any time hereafter, shall be any wise molested, punished, disquieted, or called in question for any differences in opinion in matters of religion; but, that all and every person and persons may, from time to time and at all time hereafter, freely and fully have and enjoy his and their own judgment and consciences in matters of religious concernment throughout the tract of land hereafter mentioned, they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others."1 This is a noble declaration and worthy of any prince, who rules over a free people. It is lamentable to reflect, how little it comports with the domestic persecutions authorized by the same monarch during his profligate reign. It is still more lamentable to reflect, how little a similar spirit of toleration was encouraged either by the precepts or example of any other of the New-England colonies.

§ 98. Rhode Island enjoys the honour of having been if not the first, at least one of the earliest of the colonies, and indeed of modern states, in which the liberty of conscience and freedom of worship were boldly proclaimed among its fundamental laws.2 If at any time

1 2 Haz. Coll. 613. 2 Walsh's Appeal, 429.

afterwards the state broke in upon the broad and rational principles thus established, it was but a momentary deviation from the settled course of its policy.1 At the present day, acting under this very charter, it continues to maintain religious freedom with all the sincerity and liberality and zeal, which belonged to its founder. It has been supposed, that in the laws passed by the general assembly first convened under this charter, (1664,) Roman Catholics were excluded from the privileges of freemen. But this has been very justly doubted; and indeed, if well founded, the act would deserve all the reproach, which has been heaped upon it.2 The first laws, however, declared, that no freeman shall be imprisoned, or deprived of his freehold, but by the judgment of his peers or the laws of the colony; and that no tax should be imposed or required of the colonists, but by the act of the general assembly.3

§ 99. It is said, that the general conduct of Rhode Island seems to have given entire satisfaction to Charles the Second during the residue of his reign.4 Upon the accession of James, the inhabitants were among the first to offer their congratulations; and to ask protection for their chartered rights. That monarch however disregarded their request. They were accused of a violation of their charter, and a quo warranto was filed against them. They immediately resolved, without much hesitation, not to contend with the crown, but to surrender

1 3 Hutch. Coll. 413, 415; 1 Chalm. Annals, 276,284; 1 Holmes's Annals, 336. 2 On this subject, see I Chalmers's Annals, 276, 284; and Doctor Holmes's valuable note to his Annals, vol.l. p. 336, and Id. p. 341; 3 Hutch. Coll. 413, 415; Walsh's Appeal, 429 to 435. 3 1 Chalm. Annals, 276; 1 Holmes's Annals, 336; R. Island Colony Laws, (1744,) p. 3. 4 1 Chalm. Annals, 278.

their charter; and passed an act for that purpose, which was afterwards suppressed.1 In December; 1686, Sir Edward Andros, agreeably to his orders, dissolved their government, and assumed the administration of the colony. The revolution of 1688 put an end to his power; and the colony immediately afterwards resumed its charter, and, though not without some interruptions, continued to maintain and exercise its powers down to the period of the American Revolution.2 It still continues to act under the same charter as a fundamental law, it being the only state in the Union, which has not formed a new constitution of government. It seems, that until the year 1696 the governor, assistants, and deputies of the towns sat together. But by a law then passed they were separated, and the deputies acted as a lower house, and the governor and assistants as an upper house.3

§ 100. In reviewing the colonial legislation of Rhode Island some peculiarities are discernible, though the general system is like that of the other parts of NewEngland.4 No persons but those, who were admitted freemen of the colony, were allowed to vote at elections, and they might do it in person or by proxy; and none but freemen were eligible to office. Wills of real estate were required to have three witnesses. The probate of wills and the granting of

administrations of personal estate were committed to the jurisdiction of the town councils of each town in the colony, with an appeal to the governor and council as supreme ordinary.5

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1 1 Chalm. Annals, 280, 281; 2 Doug. Summ. 85. 2 1 Chalm. Annals, 278,279; 1 Holmes's Annals, 415, 420, 428, 442; 2 Doug. Summ. 85, 377; Dunmer's Defence, 1 American Tracts, 7. 3 R. Island Colony Laws, (1744,) 24. 4 Id. p.1,147. 5 Id. p. 1,4.

Every town was a corporate body, entitled to choose its officers, and to admit persons as freemen.1 Sports and labour on Sunday were prohibited.2 Purchases of land from the Indians were prohibited.3 By a formal enactment in 1700 it was declared, that in all actions, matters, causes, and things whatsoever, where no particular law of the colony is made to decide and determine the same, then in all such cases the laws of England shall be put in force to issue, determine, and decide the same, any usage, custom, or law to the contrary notwithstanding.4 About the same period the English navigation laws were required, by an act of the colonial legislature, to be executed.5 Twenty years' peaceful possession of lands under the claim of a title in fee simple was declared to give a good and rightful title to the fee;6 and thus a just and liberal effect was given to the statute of limitations, not as a bar of the remedy, but of the right. The acknowledgment and registration of conveyances of lands in a public town registry were provided for. The support of the ministry was made to depend upon free contributions. appeals to the king in council, in cases exceeding 300 in value, were allowed.7 A system of redress in cases of abuses of property devoted to charitable uses was established;8 fines and common recoveries were regulated; and the trial by jury established. The criminal code was not sanguinary in its enactments; and did not affect to follow the punishments denounced in the Scripture against particular offences.9 Witchcraft, however, was, as in the common law, punished with death. At a later period, lands of persons living, out of the colony or con-

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1 R. Island Col. Laws,(1744,) p. 9. 2 Id.18. 3 Id.4. 4 Id.28. 5 Id.28. 6 Id.46 7 Id.87,133. 8 Id.108. 9 Id.115.

cealing themselves therein were made liable to the payment of their debts.1 In respect to the descent of real estates, the canons of the common law were adopted, and the eldest son took the whole inheritance by primogeniture. This system was for a short period repealed by an act, (4 & 5 George 1, 1718,) which divided the estate among all the children, giving the eldest son a double share.2 But the common law was soon afterwards (in 1728) reinstated by the public approbation, and so remained to regulate descents until a short period (1770) before the Revolution. Contracts for things above the value of ten pounds were required to be in writing; and conveyances in fraud of creditors were declared void. And we may also trace in its legislation provision respecting, hue and cry in cases of robbery; and of forfeiture in cases of accidental death by way of deodand.3

§ 101. We have now finished our review of all the successive colonies established in New-England. The remark of Chalmers is in general well founded: "Originally settled (says he4) by the same kind of people, a similar policy naturally rooted in all the colonies of New-England. Their forms of government, their laws, their courts of justice, their manners, and their religious tenets, which gave birth to all these, were nearly the same." Still, however, the remark is subject to many local qualifications. In Rhode Island, for instance, the rigid spirit of puritanism softened down (as we have seen) into general toleration. On the other hand the

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1 R. Island Colony Laws, (Edit. 1744) p. 192. 2 Colony Laws of Rhode Island, (Edit. 1719, printed at Boston,) p. 95, 96. 3 Rhode Island Colony Laws, (1719,) p. 5, 8. 4 1 Chalm. Annals,296.

common law rules of decents were adhered to in i s policy with singular zeal down to the year 1770, as necessary to prevent the destruction of family estates, while the neighbouring colonies adopted a rule, dividing the inheritance among all the children.1

§ 102. One of the most memorable circumstances in the history of New-England is the early formation and establishment of a confederation of the colonies for amity, offence, and defence, and mutual advice and assistance. The project was agitated as early as 1637; but difficulties having occurred, the articles of union were not finally adopted until 1643.2 In the month of May of that year the colonies of Massachusetts, Connecticut, New-Haven, and Plymouth formed a confederacy by the name of the United Colonies of NewEngland, and entered into a perpetual league of friendship and amity for offence and defence and mutual advice and succour. The charges of all wars, offensive and defensive, were to be borne in common and according to an apportionment provided for in the articles; and in case of invasion of any colony the others were to furnish a certain proportion of armed men for its assistance.3 Commissioners appointed by each colony were to meet and determineall affairs of war and peace,

leagues, aids, charges, &c. and to frame and establish agreements and orders for other general interests. This union, so important and necessary for mutual defence and assistance during the troubles, which then agitated the parent country, was not objected to by King Charles the Second on his restoration;

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1 Gardner v. Collins;2 Peters's Sup. Rep. 58. 2 1 Holmes's Annals, 269,270; 1 Winthrop's Jour. 237,284. 3 2 Haz. Coll. 1 to 6; 2 Winthrop's Jour. 101 to 106; I Hutch. Hist 124, 126.

and with some few alterations it subsisted down to 1686, when all the charters were prostrated by the authority of King James.1 Rhode Island made application to be admitted into this Union; but was refused upon the ground, that the territory was within the limits of Plymouth colony. It does not appear that subsequently the colony became a party to it.2

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1 1 Holmes's Annals, 270 and note; 1 Hutch. Hist.126 note; 2 Haz. Coll. 7 et seq. 2 1 Holmes's Annals, 287 and note; 1 Hutch Hist. 124; 2 Haz. Coll. 99, 100.

CHAPTER IX.
MARYLAND.

§ 103. THE province of Maryland was included originally in the patent of the Southern or Virginia company; and upon the dissolution of that company it reverted to the crown. King Charles the First, on the 20th June, 1632, granted it by patent to Cecilius Calvert Lord Baltimore, the son of George Calvert Lord Baltimore, to whom the patent was intended to have been made, but he died before it was executed.1 By the charter, the king erected it into a province, and gave it the name of Maryland, in honour of his Queen, Henrietta Maria, the daughter of Henry the Fourth of France, to be held of the crown of England, he yearly, for ever, rendering two Indian arrows. The territory was bounded by a right line drawn from Watkins's Point, on Chesapeake bay, to the ocean on the east, thence to that part of the estuary of Delaware on the north, which lieth under the 40th degree, where New-England is terminated; thence in a right line by the degree aforesaid to the meridian of the fountain of Potomac; thence following its course by the further bank to its confluence with the Chesapeake, and thence to Watkins's Point.2

§ 104. The territory thus severed from Virginia, was made immediately subject to the crown, and was granted in full and absolute propriety to Lord Baltimore and his heirs, saving the allegiance and sovereign dominion

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1 1 Holmes's Ann. 213; 1 Chalm. Annals, 201, 202; Bacon's Laws of Maryland, (1765); 2 Doug. Summ. 353, &c. 2 1 Haz. Coll. 327 to 337; I Chalm. Annals, 202; Charters of N. A. Provinces, 4to, London, 1766.

to the crown, with all the rights, legalities, and prerogatives, which the Bishop of Durham enjoyed in that palatinate, to be held of the crown as of Windsor Castle, in the county of Berks, in free and common soccage, and not in capite or by knights' service. The charter further provided, that the proprietary should have authority by and with the consent of the freemen, or their delegates assembled for the purpose, to make all laws for the province, "so that such laws be consonant to reason, and not repugnant or contrary, but, as far as conveniently might be, agreeable to the laws, statutes, customs, and rights of this our realm of England."1 The proprietary was also vested with full executive power; and the establishment of courts of justice was provided for. The proprietary was also authorized to levy subsidies with the assent of the people in assembly. The inhabitants and their children were to enjoy all the rights, immunities, and privileges of subjects born in England. The right of the advowsons of the churches, according, to the establishment of England, and the right to create manors and courts baron, to confer titles of dignity, to erect ports and other legalities, were expressly given to the proprietary.An exemption of the colonists from all talliages on their goods and estates to be imposed by the crown was expressly covenanted for in perpetuity; an exemption, which had been conferred on other colonies for years only.2 License was granted to all subjects to transport themselves to the province; and its products were to be imported into England and Ireland under such taxes only, as were paid by other

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1 1 Haz. Coll. 327,&c.; 1 Chalm. Annals, 202; Marsh. Colon. ch. 2, p. 69. 2 1 Chalmers's Annals, 203, 204, 205.

subjects. end the usual powers in other charters to repel invasions, to suppress rebellions, &c. were also conferred on the proprietary.

§ 105. Such is the substance of the patent. And Chalmers has with some pride asserted, that "Maryland has always enjoyed the unrivaled honour of being the first colony, which was erected into a province of the English empire, and governed regularly by laws enacted in a provincial legislature."1 It is also observable, that there is no clause in the patent, which required any transmission of the province laws to the king, or providing for his approbation or assent. Under this charter Maryland continued to be governed, with some short intervals of interruption, down to the period of the American Revolution, by the successors of the original proprietary.2

§ 106. The first emigration made under the auspices of Lord Baltimore was in November, 1632, and consisted of about 200 gentlemen of considerable fortune and rank, and their adherents, being chiefly Roman Catholics. "He laid the foundation of this province, (says Chalmers,3) upon the broad basis of security to property, and of freedom of religion, granting in absolute fee fifty acres of land to every emigrant; establishing Christianity agreeably to the old common law, of which it is a part, without allowing preeminence to any particular sect. The wisdom of his choice soon converted a dreary wilderness into a prosperous colony." It is certainly very honourable to the liberality and public spirit of the proprietary, that he should have introduced into his fundamental policy the doctrine of general

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1 1 Chalmers's Annals, 200. 2 1 Chalmers's Annals, 203. 3 1 Chalmers's Annals, 207, 208.

toleration and equality among Christian sects, (for he does not appear to have gone farther;) and have thus given the earliest example of a legislator inviting his subjects to the free indulgence of religious opinion.1 This was anterior to the settlement of Rhode Island; and therefore merits the enviable rank of being the first recognition among the colonists of the glorious and indefeasible rights of conscience. Rhode Island seems without any apparent consciousness of co-operation to have gone farther, and to have protected an universal freedom of religious opinion in Jew and Gentile, in Christian and Pagan, without any distinction, to be found in its legislation.2

§ 107. The first legislative assembly of Maryland, held by the freemen at large, was in 1634-1635 ; but little of their proceedings is known. No acts appear to have been adopted until 1638-1639, when provision was made in consequence of an increase of the colonists for a representative assembly, called the House of Assembly, chosen by the freemen ; and the laws passed by the assembly, and approved by the proprietary or his lieutenant, were to be of full force. The assembly was afterwards divided into an upper and lower house. At the same session, an act, which may be considered as in some sort a Magna Charta, was passed, declaring among other things, that " Holy church within this province shall have all her rights and prerogatives;" "that the inhabitants shall have all their rights and liberties according to the great charter of England;" and that the goods of debtors, if not sufficient to pay their debts, shall be sold and distributed pro rata, saving debts to

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1 1 Chalmers's Annals, 213, 218, 219,363. 2 Walsh's Appeal, 429, Note B.

the proprietary.1 In 1649 an act was passed, punishing blasphemy, or denying the Holy Trinity, with death and confiscation of goods and lands;2 and, strangely enough after such a provision, in the same act, after a preamble, reciting that the confining of conscience in matters of religion hath frequently fallen out to be of dangerous consequence, it is enacted, that no person " professing to believe in Jesus Christ," shall be molested for or in respect to his religion, or the free exercise thereof, nor any way compelled to the belief or exercise of any other religion.3 It seems not to have been even imagined, that a belief in the divine mission of Jesus Christ could, in the eyes of any sect of Christians, be quite consistent with the denial of the Trinity. This act was confirmed among the perpetual laws in 1676.

§ 108. The legislation of Maryland does not, indeed, appear to have afforded an uniform protection in respect to religion, such as the original policy of the founder would seem to indicate. Under the protectorate of Cromwell, Roman Catholics were expressly denied any protection in the province; and all others, " who profess faith in God by Jesus Christ, though differing in judgment from the doctrine, worship, or discipline publicly held forth," were not to be restrained from the exercise of their religion.4 In 1696 the Church of England was established in the province; and in 1702, the liturgy and rites, and ceremonies of the Church of England were required to be pursued in all the churches, with such tol-

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1 Bacon's Laws of Maryland, ch. 2, of 1638; 1650, ch. 1; 1 Marsh. Colon. &c. ch. 2, p. 73; 1 Chalm. Ann. 213, 219, 220, 225. 2 1 Chalm. Annals, 223,365; Bacon's Laws of Maryland, 1649. 3 Bacon's Laws of Maryland, 1649, ch. 1; 1 Chalmers's Annals, 218, 219, 235. 4 Bacon's Laws of Maryland, 1654, ch. 4; Marsh. Colon. ch. 2, p. 75; Chalm. Ann. 218, 235.

eration for Dissenters, however, as was provided for in the act of I William and Mary.1 And the introduction of the test and abjuration acts, in 1716, excluded all Roman Catholics from office.2

§ 109. It appears to have been a policy adopted at no great distance of time after the settlement of the colony to provide for the public registration of conveyances of real estates.3 In the silence of the statute book until 1715, it is to be presumed, that the system of descents of intestate estates was that of the parent country. In that year an act passed,4 which made the estate partible among all the children; and the system thus introduced has, in its substance, never since been departed from. Maryland too, like the other colonies, was early alive to the importance of possessing the sole power of internal taxation; and accordingly, in 1650,5 it was declared, that no taxes should be levied without the consent of the general assembly.

§ 110. Upon the revolution of 1688, the government of Maryland was seized into the hands of the crown, and was not again restored to the proprietary until 1716. From that period no interruption occurred until the American Revolution.6

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1 Bacon's Laws of Maryland, 1702, ch. 1. 2 Bacon's Laws of Maryland, 1716, ch. 5; Walsh's Appeal, 49, 50; 1 Holmes's Annnls, 476, 489. 3 Bacon's Laws of Maryland, 1674. 4 Bacon's Laws of Maryland, 1715, ch. 39. 5 Bacon's Laws of Maryland, 1650, ch. 25; 1 Chalm. Ann. 220. 6 Bacon's Laws of Maryland, 1692,1716.

CHAPTER X.
NEW-YORK.

§ 111. New-York was originally settled by emigrants from Holland. But the English government seems at all times to have disputed the right of the Dutch to make any settlement in America; and the territory occupied by them was unquestionably within the chartered limits of New-England granted to the council of Plymouth.1 Charles the Second, soon after his restoration, instigated as much by personal antipathy, as by a regard for the interest of the crown, determined to maintain his right, and in March, 1664, granted a patent to his brother, the Duke of York and Albany, by which he conveyed to him the region extending from the western bank of Connecticut to the eastern shore of the Delaware, together with Long Island, and conferred on him the powers of government, civil and military.2 Authority was given (among other things) to correct, punish, pardon, govern, and rule all subjects, that should inhabit the territory according to such laws, ordinances, &c. as the Duke should establish, so always that the same "were not contrary, but as near as might be agreeable to the laws and statutes and government of the realm of England," saving to the crown a right to hear and determine all appeals. The usual authority was also given to use and exercise martial law in cases

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1 1 Chalmers's Annals, 569, 570, 572; Marsh. Colon. ch. 5, p. 143; 2 Doug. Summ. 220, &c. 2 Smith's New-Jersey, 35, 59); I Chalmer's Annals, 573; Smith's New-York, p. 31. [10]; Smith's New-Jersey, p. 210 to 215.

of rebellion, insurrection, mutiny, and invasion.1 A part of this tract was afterwards conveyed by the Duke, by deed of lease and release, in June, of the same year, to Lord Berkeley and Sir George Carteret. By this latter grant they were entitled to all the tract adjacent to New-England, lying westward of Long Island, and bounded on the east by the main sea and partly by Hudson's river, and upon the west by Delaware bay or river, and extending southward to the main ocean as far as Cape May at the mouth of Delaware bay, and to the northward as far as the northernmost branch of Delaware bay or river, which is 41 degrees 40 minutes latitude; which tract was to be called by the name of Nova Caesarea or New-Jersey.2 So that the territory then claimed by the Dutch as the New-Netherlands was divided into the colonies of New-York and New-Jersey.

§ 112. In September, 1664, the Dutch colony was surprised by a British armament, which arrived on the coast, and was compelled to surrender to its authority. By the terms of the capitulation the inhabitants were to continue free denizens and to enjoy their property. The Dutch inhabitants were to enjoy the liberty of their conscience in divine worship and church discipline; and their own customs concerning their inheritances.3 The government was instantly assumed by right of conquest in behalf of the Duke of York, the proprietary, and the territory was called New-York. Liberty of conscience was granted to all settlers. No laws con-

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1 I copy from the recital of it in Smith's History of New-Jersey in the surrender of 1702, of the provinces of East and West Jersey. 2 Smith's New-York, 31, 32, [10, 11.]; 1 Chalmers's Annals, 613. 3 Smith's New-York, 44, 45, [19, 20.]; 1 Chalm. Ann. 574; Smith's New-Jersey, 36, 43, 44; 2 Dong Summ. 223.

trary to those of England were allowed; and taxes were to be levied by authority of a general assembly.1 The peace of Breda, in 1667, confirmed the title in the conquerors by the rule of uti possidetis.2 In the succeeding Dutch war the colony was reconquered; but it was restored to the Duke of York upon the succeeding peace of 1674.3

§ 113. As the validity of the original grant to the Duke of York, while the Duch were in quiet possession of the country, was deemed questionable, he thought it prudent to ask, and he accordingly obtained, a new grant from the crown in June, 1674.4 It confirmed the former grant, and empowered him to govern the inhabitants by such ordinances, as he or his assigns should establish. It authorized him to administer justice according to the laws of England, allowing an apical to the king in council.5 It prohibited trade thither without his permission; and allowed the colonists to import merchandise upon paying customs according to the laws of the realm. Under this charter he ruled the province until his accession to the throne.6 No general assembly was called for several years; and the people having become clamorous for the privileges enjoyed by other colonists, the governor was, in 1682, authorized to call an assembly, which was empowered to make laws for the general regulation of the state, which, however, were of no force without the ratification of the proprie-

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1 1 Chalmers's Annals, 575, 577, 579, 597; Smith's New-Jersey, 44, 48.

2 1 Chalmers's Annals, 578; 2 Doug. Summ. 223.

3 1 Chalmers's Annals, 579; 1 Holmes's Annals, 364, 366.

4 Smith's New-York, 61, [32]; 1 Chalm. Annals, 579.

5 1 Chalmers's Annals, 579, 580.

6 1 Chalmers's Annals, 581, 583; Smith's New-York, 123, 125, 126, [72,75]

tary.1 Upon the revolution of 1688, the people of NewYork immediately took side in favour of the Prince of Orange.2 From this era they were deemed entitled to all the privileges of British subjects, inhabiting a dependent province of the state. No charter was subsequently granted to them by the crown; and therefore they derived no peculiar privileges from that source.3

§ 114. The government was henceforth administered by governors appointed by the crown. But no effort was made to conduct the administration without the aid of the representatives of the people in general assembly. On the contrary, as soon as the first royal governor arrived in 1691, an assembly was called, which passed a number of important acts. Among others was an act virtually declaring their right of representation, and their right to enjoy the liberties and privileges of Englishmen by Magna Charta.4 It enacted, that the supreme legislative power shall for ever reside in a governor and council appointed by the crown, and the people by their representatives (chosen in the manner pointed out in the act) convened in general assembly. It further declared, that all lands should be held in free and common soccage according to the tenure of East Greenwich in England; that in all criminal cases there should be a trial by a jury; that estates of femes covert should be conveyed only by deed upon privy

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1 Chalm. Annals, 584,485; Smith's N. York, 127,[75]; 1 Holmes's Annals, 409.--In the year 1683 certain fundamental regulations were passed, by the legislature, which will be found in an Appendix to the second volume of the old edition of the New-York Laws.

2 1 Holmes's Annals, 429; Smith's New-York, 59

3 1 Chalm. Annals,585, 590,591,592.

4 1 Holmes's Annals, 435; Smith's New-York, 127, [75,76]; Acts of 1691.

examination; that wills in writing, attested by three or more credible witnesses, should be sufficient to pass lands; that there should be no fines upon alienations, or escheats and forfeitures of lands, except in cases of treason; that no person should hold any office, unless upon his appointment he would take the oaths of supremacy, and the test prescribed by the act of Parliament;1 that no tax or talliage should be levied but by the consent of the general assembly; and that no person professing faith in Jesus Christ should be disturbed or questioned for different opinions in religion, with an exception of Roman Catholics; The act, however, was repealed by king William, in 1697.2 Another act enabled persons, who were scrupulous of taking oaths, to make in lieu thereof a solemn promise to qualify them as witnesses, jurors, and officers. In the year 1693, an act was passed for the maintenance of ministers and churches of the Protestant religion. New-York (like Massachusetts) seemed at all times determined to suppress the Romish church. In an act passed in the beginning of the last century it was declared, that every Jesuit and Popish Priest, who should continue in the colony after a given day, should be condemned to perpetual imprisonment; and if he broke prison or escaped and was retaken, he was to be put to death. And so little were the spirit of toleration and the rights of conscience understood at a much later period, that one of her historians3 a half

century afterwards gave this exclusion the warm praise of being worthy of perpetual duration. And the constitution of New-York, of 1777,4

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1 1 Holmes's Annals, 435; Smith's New-York, 127, [75, 76]; Prov. Laws of 1691. 2 1 Holmes's Annals, 434; Province Laws of 1691; Smith's N. York, 127, [76]; 2 Kents Comm. Lect. 25, p. 62, 63.
3 Mr. Smith.
4 Art. 42.

required all persons naturalized by the State, to take an oath of abjuration of all foreign allegiance, and subjection in all matters, ecclesiastical as well as civil. This was doubtless intended to exclude all Catholics, who acknowledged the spiritual supremacy of the Pope, from the benefits of naturalization.1 In examining the subsequent legislation of the province, there do not appear to be any very striking deviations from the laws of England; and the common law, beyond all question, was the basis of its Jurisprudence. The common law course of descents appears to have been silently but exclusively followed;2 and perhaps New-York was more close in the adoption of the policy and legislation of the parent country before the Revolution, than any other colony.

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1 2 Kent's Comm. Lect. 25, p. 62, 63.
2 I do not find any act respecting the distribution of intestate estates in the statute book, except that of 1697, which seems to have in view only the distribution of personal estate substantially on the basis of the statute of distribution of Charles the Second.

CHAPTER XI.
NEW-JERSEY.

§ 115. New-Jersey, as we have already seen, was a part of the territory granted to the Duke of York, and was by him granted, in June, 1664, to Lord Berkeley and Sir George Carteret, with all the rights, royalties, and powers of government, which he himself possessed.1 The proprietors, for the better settlement of the territory, agreed in February, 1664-1665 upon a constitution or concession of government, which was so much relished, that the eastern part of the province soon contained a considerable population. By this constitution it was provided, that the executive government should be administered by a governor and council, who should have the appointment of officers; and that there should be a legislative or general assembly, to be composed of the governor and council, and deputies, chosen by the people. The general assembly were to have power to make all laws for the government of the province, so that "the same be consonant to reason, and as near as may be conveniently agreeable to the laws and customs of his majesty's realm of England;" to constitute courts; to levy taxes; to erect manors, and ports, and incorporations.2 The registry of title deeds of land and the granting thereof, as a bounty to planters, were also provided for. Liberty of conscience was allowed, and a freedom from molestation guaranteed on account of any difference in opinion or practice in matters of religious

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1 1 Chalm. Ann. 613; Smith's New-York, p. 31 [11.]; Smith's N. Jersey,60;Marsh.Colon.177 to 180;2 Doug.Summ.220,&c.231,267,&c. 2 Smith's New-Jersey, 6, Appx. 512; 1 Chalm. Annals, 614.

concernments, so always that the civil peace was not disturbed. But the general assembly were to be at liberty to appoint ministers and establish their maintenance, giving liberty to others to maintain what ministers they pleased. Every inhabitant was bound to swear or subscribe allegiance to the king; and the general assembly might grant naturalization.1

§ 116. This constitution continued until the province was divided, in 1676, between the proprietors. By that division East New-Jersey was assigned to Carteret; and West New-Jersey to William Penn and others, who had purchased of Lord Berkeley.2 Carteret then explained and confirmed the former concessions for the territory thus exclusively belonging to himself. The proprietors also of West Jersey drew up another set of concessions for the settlers within that territory. They contain very ample privileges to the people. It was declare, that the common law, or fundamental rights and privileges of West New-Jersey, therein stated, are to be the foundation of government, not alterable by the legislature. Among these fundamentals were the following, "that no man, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matters;"3 that no person shall be any ways called in question, or in the least punished, or either, for the sake of his opinion, judgment, faith, or worship towards God in matters of religion; that there shall be a trial by jury in civil and criminal cases; that there shall be a general

assembly of representatives of the people, who shall have power to provide for the proper administration of the government;

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1 Smith's New-Jersey, 512, 514.

2 Smith's New-Jersey, 61,79,80,87; 1 Chalm. Ann. 617.

3 Smith's New.Jersey, 80, App. 521, &c.

and to make laws, so "that the same be, as near as may be conveniently, agreeable to the primitive, ancient, and fundamental laws of England."1

§ 117. Whether these concessions became the general law of the province seems involved in some obscurity. There were many difficulties and contests for jurisdiction between the governors of the Duke of York and the proprietors of the Jerscys; and these were not settled, until after the Duke, in 1580,2 finally surrendered all right to both by letters patent granted to the respective proprietors.3 In 16&1, the governor of the proprietors of West Jersey, with the consent of the general assembly, made a frame of government embracing some of the fundamentals in the former concessions.4 There was to be a governor and council, and a general assembly of representatives of the people. The general assembly had the power to make laws, to levy taxes, and to appoint officers. Liberty of conscience was allowed, and no persons rendered incapable of office in respect of their faith and worship. West Jersey continued to be governed in this manner until the surrender of the proprietary government, in 1702.5

§ 118. Carteret died in 1679, and being sole proprietor of East Jersey, by his will he ordered it to be sold for payment of his debts; and it was accordingly sold to William Penn and eleven others, who were called the Twelve Proprietors. They afterwards took twelve more into the proprietary ship; and to the twenty-four thus formed, the Duke of York, in March, 1682, made his

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1 Smith's New-Jersey, 80, App. 521, &c.

2 Chalmers says, in 1680. p. 619.--Smith says in 1678, p. 111.

3 Smith's New-Jersey, 110,111; 1 Chalm. Ann. 619, 626.

4 Smith's New-Jersey, 126.

5 Smith's New-Jersey, 154.

third and last grant of East Jersey.1 Very serious dissensions soon arose between the two provinces themselves, as well as between them and New-York; which banished moderation from their councils, and threatened the most serious calamities. A quo warranto was ordered by the crown in 1686, to be issued against both provinces. East Jersey immediately offered to be annexed to West Jersey, and to submit to a governor appointed by the crown. Soon afterwards the crown ordered the Jerseys to be annexed to NewEngland; and the proprietors of East Jersey made a formal surrender of its patent, praying only for a new grant, securing their right of soil. Before this request could be granted, the revolution of 1688 took place, and they passed under the allegiance of a new sovereign.2

§ 119. From this period both of the provinces were in a great state of confusion, and distraction; and remained so, until the proprietors of both made a formal surrender of all their powers of government, but not of their lands, to Queen Anne, in April, 1702. The Queen immediately reunited both provinces into one province; and by commission appointed a governor over them. He was thereby authorized to govern with the assistance of a council, and to call general assemblies of representatives of the people to be chosen by the freeholders, who were required to take the oath of allegiance and supremacy, and the test provided by the acts of Parliament. The general assembly, with the consent of the governor and council, were authorized to make laws and ordinances for the welfare of the people "not

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1 Smith's New-Jersey, 157; 1 Chalmers's Annals, 620, 621, Marshall's Colon. 180.

2 1 Chalm. Ann. 621, 622; Smith's New-Jersey, 209, 210, 211, &c.

repugnant, but, as near as may be, agreeable unto the laws and statutes of this our kingdom of England;" which laws were, however, to be subject to the approbation or dissent of the crown.1 The governor with the consent of the council was to erect courts of justice; to appoint judges and other officers; to collate to churches and benefices; and to command the military force. Liberty of conscience was allowed to all persons but Papists.

§ 120. From this time to the American Revolution the province was governed without any charter under royal commissions, substantially in the manner pointed out in the first. The people always strenuously contended for the

rights and privileges guaranteed to them by the former concessions; and many struggles occurred from time to time between their representatives, and the royal governors on this subject.2

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1 Smith's New-Jersey, 220 to 230, 231 to 261.

2 Smith's New-Jersey, ch.14, and particularly p. 265, &c. p. 269, &c. 275, 292, 304.

CHAPTER XII.
PENNSYLVANIA.

§ 121. PENNSYLVANIA was originally settled by different detachments of planters under various authorities, Dutch, Swedes, and others, which at different times occupied portions of land on South or Delaware river.1 The ascendency was finally obtained over these settlements by the governors of New-York, acting under the charter of 1664, to the Duke of York. Chalmers, however, does not scruple to say, that " it is a singular circumstance in the history of this [then] inconsiderable colony, that it seems to have been at all times governed by usurpers, because their titles were defective."2 It continued in a feeble state, until the celebrated William Penn, in March, 1681, obtained a patent from Charles the Second, by which he became the proprietary of an ample territory, which in honour of his father was called Pennsylvania. The boundaries described in the charter were on the East by Delaware river from twelve miles distance northwards of New-Castle town to the 43d degree of north latitude, if the said river doth extend so far northward; but if not, then by said river so far as it doth extend; and from the head of the river the eastern bounds are to be determined by a meridian line to be drawn from the head of saidriver unto the said 43d degree of north latitude. The said lands to extend westward five degrees in longitude, to be computed from the said eastern bounds, and the

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1 1 Chalm. Annals, 630 to 634; Smith's New-York, [31] 49; I Proud, Penn. 110,111,112,113, 116, 118,119,122; 2 Doug. Summ. 297, &c.

2 1 Chalm. Annals, 634, 635.

said lands to be bounded on the north by the beginning of the 43d degree of north latitude; and on the south by a circle drawn at twelve miles' distance from NewCastle, northward and westward, to the beginning of the 40th degree of northern latitude; and then by a straight line westward to the limits of the longitude above mentioned.1

§ 122. The charter constituted Penn the true and absolute proprietary of the territory thus described, (saving to. the crown the sovereignty of the country, and the allegiance of the proprietary and the inhabitants,) to be holden of the crown as of the-castle of Windsor in Berks, in free and common soccage, and not in capite, or by knight service; and erected it into a province and seignory by the name of Pennsylvania. It authorized the proprietary and his heirs and successors to make all laws for raising money and other purposes, with the assent of the freemen of the country, or their deputies assembled for the purpose.2 But "the same laws were to be consonant to reason, and not repugnant or contrary, but, as near as conveniently may be, agreeable to law and statutes and rights of this our kingdom of England."3 The laws for the descent and enjoyment of lands, and succession to goods, and of felonies, to be according to the course in England, until altered by the assembly. All laws were to be sent to England within five years after the making of them, and, if disapproved of by the crown within six months, to become null and void.4 It also authorized the proprietary to appoint judges and other officers; to pardon and

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1 1 Proud. Penn. 172.

2 1 Proud. Penn. 176; Laws of Pennsyl. Ed. of Franklin, 1742), App. 3 1 Proud. Penn. 175, 176, 177.

4 1 Proud. Penn. 177,178.

reprieve criminals; to establish courts of justice, with a right of appeal to the crown from all judgments; to create cities and other corporations; to erect ports, and manors, and courts baron in such manors. Liberty was allowed to subjects to transport themselves and their goods to the province; and to import the products of the province into England; and to export them from thence within one year, the inhabitants observing the acts of navigation, and all other laws in this behalf made. It was further stipulated, that the crown should levy no tax, custom, or imposition upon the inhabitants or their goods, unless by the consent of the proprietary or assembly, " or by act of Parliament in England." Such are the most important clauses of this charter, which has been deemed one of the best drawn of the colonial charters, and which underwent the revision, not merely of the law officers of the crown, but of the then Lord Chief Justice (North) of England.1 It has been remarked, as a singular omission in this charter, that there is no

provision, that the inhabitants and their children shall be deemed British subjects, and entitled to all the liberties and immunities thereof, such a clause being found in every other charter.2 Chalmers3 has observed, that the clause was wholly unnecessary, as the allegiance to the crown was reserved; and the common law thence inferred, that all the inhabitants were subjects, and of course were entitled to all the privileges of Englishmen.

§ 123. Penn immediately invited emigration to his province, by holding out concessions of a very liberal nature to all settlers;4 and under his benign and enlight-

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1 1 Chalm. Annals, 636, 637.

2 1 Graham's Hist. of Colon. 41, note; 1 Chalm. Annals, 639, 658.

3 1 Chalm. Annals, 639, 658.

4 1 Proud. Penn. 192; 2 Proud. Penn. App. 1; 2 Doug. Summ. 300,301.

ened policy a foundation was early laid for the establishment of n government and laws, which have been justly celebrated for their moderation, wisdom, and just protection of the rights and liberties of the people.1 In the introduction to his first frame of government, he lays down this proposition, which was far beyond the general spirit of that age, that "any government is free to the people under it, whatever be the frame, where the laws rule, and the people are a party to those laws; and more than this is tyranny, oligarchy, or confusion."2 In that frame of government, after providing for the organization of it under the government of a governor, council, and general assembly, chosen by the people, it was declared, that all persons acknowledging one Almighty God, and living peaceably, shall be in no ways molested for their religious persuasion or practice in matters of faith or worship, or compelled to frequent or maintain any religious worship, place, or ministry.3 Provisions were also made securing the right of trial by jury, and the right to dispose of property by will, attested by two witnesses; making lands in certain cases liable to the payment of debts; giving to seven years' quiet possession the efficacy of an unquestionable title; requiring the registry of grants and conveyances; and declaring, that no taxes should be levied but by a law for that purpose made.4 Among other things truly honourable to the memory of this great man, is the tender regard and solicitude, which on all occasions he manifested for the rights of the Indians, and the duties of the settlers towards them. They are exhibited in his original plan of

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1 1 Chalm. Annals; 638. 642; Marsh. Colon. ch. 6, p. 182, 183. 2 1 Proud. Penn. 197, 198; 2 Proud. Penn. App. 7.

3 1 Proud. Penn. 200; 2 Proud. Penn. App. 19.

4 2 Proud. Penn. Appx. 15, 20; 1 Chalm. Annals, 641, 642.

concessions, as well as in various other public documents, and were exemplified in his subsequent conduct.1 In August, 1682, in order to secure his title against adverse claims, he procured a patent from the Duke of York, releasing all his title derived under any of his patents from the crown.2

§ 124. It was soon found, that the original frame of government, drawn up before any settlements were made, was ill adapted to the state of things in an infant colony. Accordingly it was laid aside, and a new frame of government was, with the consent of the General Assembly, established in 1683.3 In 1692 Penn was deprived of the government of Pennsylvania by William and Mary; but it was again restored to him in the succeeding year.4 A third frame of government was established in 1696.5 This again was surrendered, and a new final charter of government was, in October, 1701, with the consent of the General Assembly, established, under which the province continued to be governed down to the period of the American Revolution. It provided for full liberty of conscience and worship; and for the right of all persons, professing to believe in Jesus Christ, to serve the government in any capacity.6 An annual assembly was to be chosen of delegates from each county, and to have the usual legislative authority of other colonial assemblies, and also power to nominate certain persons for office to the governor. The laws were

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1 1 Chalmers's Annals, 644;1 Proud. Penn. 194, 195, 212, 429; 2 Proud. App. 4.

2 1 Proud. Penn. 200.

3 1 Proud. Penn. 239; 2 Proud. Penn. App. 21; 2 Doug. Sumn. 302. 4 1 Proud. Penn. 377, 403.

5 1 Proud. Penn. 415;2 Proud. Penn. App. 30; Marshall, Colon.ch. 6, p. 183.

6 1 Proud. Penn. 443 to 450; 2 Doug. Sumn. 303

to be subject to the approbation of the governor, who had a council of state to assist him in the government.1 Provision was made in the same charter, that if the representatives of the province, and territories (meaning by

territories the three counties of Delaware) should not agree to join together in legislation, they should be represented. in distinct assemblies.2

§ 125. In the legislation of Pennsylvania, early provision was made (in 1683) for the descent and distribution of intestate estates, by which it was to be divided among all the children, the eldest son having a double share; and this provision was never afterwards departed from.3 Notwithstanding the liberty of conscience recognized in the charters, the legislature seems to have felt itself at liberty to narrow down its protection to persons, who believed in the Trinity, and in the divine inspiration of the Scriptures.4

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1 1 Proud. Penn. 450.

2 1 Proud. Penn. 454, 455; 1 Holmes's Annals, 485.

3 Laws of Penn., Ed. of Franklin, 1742, App. 5; Id. p. 60; 1 Chalm Annals, 649.

4 Laws of Penn., Ed. of Franklin, 1742, p. 4. [1705.]

CHAPTER XIII.
DELAWARE.

§. AFTER Penn had become proprietary of Pennsylvania, he purchased of the Duke of York, in 1682, all his right and interest in the territory, afterwards called the Three Lower Counties of Delaware, extending from the south boundary of the Province, and situated on the western side of the river and bay of Delaware to Cape Henlopen, beyond or south of Lewistown; and the three counties took the names of NewCastle, Kent, and Sussex.1 At this time they were inhabited principally by Dutch and Swedes; and seem to have constituted an appendage to the government of New-York.2

§ 127. In the same year, with the consent of the people, an act of union with the province of Pennsylvania was passed, and an act of settlement of the frame of government in a general assembly, composed of deputies from the counties of Delaware and Pennsylvania.3 By this act the three counties were, under the name of the territories, annexed to the province; and were to be represented in the General Assembly, governed by the same laws, and to enjoy the same privileges as the inhabitants of Pennsylvania.4 Difficulties

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1 1 Proud. Penn. 201, 202; 1 Chalm. Annals, 643; 2 Doug. Summ. 297, &c. 2 1 Chalm. Annals, 631, 632, 633, 634, 643; I Holmes's Annals, 295, 404; I Pitk. Hist. 21, 26, 27; 2 Doug Summ. 2 .

3 1 Proud. Penn. 206; 1 Holmes's Annals, 404; I Chalm. Annals, 645, 646. 4 1 Chalm. Annals, 646; 1 Dall. Penn. Laws, App. 24, 26; 2 Colden's Five Nations, App.

soon afterwards arose between the deputies of the Province and those of the Territories; and after various subordinate arrangements, a final separation took place between them, with the consent of the proprietary, in 1703. From that period down to the American Revolution, the territories were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause in the original charter or frame of government.1

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1 1 Proud. Penn. 358, 454; 1 Holmes's Annals, 404, note; 2 Doug. Summ. 297, 298.

CHAPTER XIV.
NORTH AND SOUTH CAROLINA.

§ 128. WE next come to the consideration of the history of the political organization of the Carolinas. That level region, which stretches from the 36th degree of north latitude to Cape Florida, afforded an ample theater for the early struggles of the three great European powers, Spain, France, and England, to maintain or acquire an exclusive sovereignty. Various settlements were made under the auspices of each of the rival powers, and a common fate seemed for a while to attend them all.1 In March, 1662 [April, 1663,] Charles the Second made a grant to Lord Clarendon and others of the territory lying on the Atlantic ocean, and extending from the north end of the island, called Hope island, in the South Virginian seas, and within 36 degrees of north latitude; and to the west as far as the South seas; and so respectively as far as the river Mathias upon the coast of Florida, and within 31 degrees of north latitude; and so west in a direct line to the South seas; and erected it into a province, by the name of Carolina, to be holden as of the manor of East-Greenwich in Kent, in free and common soccage, and not in capite, or by knight service, subject immediately to the crown, as a dependency, for ever.2

§129. The grantees were created absolute Lords Proprietaries, saving the faith, allegiance, and supreme

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1 1 Chalmers's Annals, 313, 514, 515.

2 1 Chalm. Annals, 519; 1 Holmes's Annals, 327, 328; Marsh. Colon. ch. 5, p. 152; 1 Williamson's North Carol. 87, 230; Carolina Charters, London, 4to.

dominion of the crown; and invested with as ample rights and jurisdictions, as the Bishop of Durham possessed in his palatine diocese. The charter seems to have been copied from that of Maryland, and resembles it in many of its provisions. It authorized the proprietaries to enact laws with the assent of the freemen of the colony, or their delegates; to erect courts of judicature; to appoint civil officers; to grant titles of honour; to erect forts; to make war, and in cases of necessity to exercise martial law; to build harbours; to make ports; to erect manors; and to enjoy customs and subsidies imposed with the consent of the freemen.1 And it further authorized the proprietaries to grant indulgences and dispensations in religious affairs, so that persons might not be molested for differences in speculative opinion with respect to religion, avowedly for the purpose of tolerating non-conformity to the Church of England.2 It further required, that all laws should "be consonant to reason, and as near as may be conveniently, agreeable to the laws and customs of this our kingdom of England."3 And it declared, that the inhabitants and their children, born in the province, should be denizens of England, and entitled to all the privileges and immunities of British born subjects.

§ 130. The proprietaries immediately took measures for the settlement of the province; and at the desire of the New-England settlers within it, (whose disposition to emigration is with Chalmers a constant theme of reproach,) published proposals, forming a basis of gov-

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1 1 Holmes's Annals,327,328.--This charter, and the second charter, and the fundamental constitutions made by the Proprietaries is to be found in a small quarto printed in London without date, which is in Harvard College Library.

2 1 Holmes's Annals, 328; 1 Hewatt's South Car. 42 to 47.

3 Carolina Charter, 4to. London.

ernment.1 It was declared, that there should be a governor chosen by the proprietaries from thirteen persons named by the colonists; and a general assembly, composed of the governor, council, and representatives of the people, who should have authority to make laws not contrary to those of England, which should remain in force until disapproved of by the proprietaries.2 Perfect freedom of religion was also promised; and a hundred acres of land offered, at a half penny an acre, to every settler within five years.

§ 131. In 1665, the proprietaries obtained from Charles the Second a second charter, with an enlargement of boundaries. It recited the grant of the former charter, and declared the limits to extend north and eastward as far as the north end of Currituck river or inlet, upon a straight westerly line to Wyonoak creek, which lies within or about 36 degrees 30 minutes of north latitude; and so west in a direct line as far as the South seas; and south and westward as far as the degrees of 29 inclusive of northern latitude, and so west in a direct line as far as the South seas.3 It then proceeded to constitute the proprietaries absolute owners and lords of the province, saving the faith, allegiance, and sovereign dominion of the crown, to hold the same as of the manor of East-Greenwich in Kent, in free a nd common soccage, and not in capite, or by knight service; and to possess in the same all the royalties, jurisdictions, and privileges of the Bishop of Durham in his diocese. It also gave them power to make laws, with the assent of the freemen of the province, or their delegates, pro-

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1 1 Chalm. Annals, 515.

2 1 Chalm. Annals, 518, 553; Marsh. Colon. ch. 5, p. 152. 3 1 Chalm. Annals, 521; 1 Williams's N. Car. 230, 231; 1 Holmes's Annals, 340; Carolina Charters, 4to. London.

vided such laws were consonant with reason, and, as near as conveniently, may be agreeable to the laws and customs of the realm of England.1 It also provided, that the inhabitants and their children should be denizens and lieges of the kingdom of England, and reputed and held as the liege people born within the kingdom; and might inherit and purchase lands, and sell and bequeath the same; and should possess all the privileges and immunities of natural born subjects within the realm. Many other provisions were added, in substance like those in the former charter.2 Several detached settlements were made in Carolina, which were at first placed under distinct temporary governments; one was in Albemarle; another to the south of Cape Fear.3 Thus various independent and separate

colonies were established, each of which had its own assembly, its own customs, and its own laws; a policy, which the proprietaries had afterwards occasion to regret, from its tendency to enfeeble and distract the province.4

§ 132. In the year 1669, the proprietaries, dissatisfied with the systems already established within the province, signed a fundamental constitution for the government thereof, the object of which is declared to be, " that we may establish a government agreeable to the monarchy, of which Carolina is a part, that we may avoid making too numerous a democracy."5 This constitution was drawn up by the celebrated John Locke;

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1 1 Williams's N. Car. 230, 237.

2 1 Holmes's Annals, 340; 1 Chalm. Annals,521,522;1 Williams's N. Car. 230 to 254; Iredell's Laws of N. Car. Charter, p. l to 7.

3 1 Chalm. Annals,519,520,524,525; 1 Williams's N. Car. 88,91,92, 93, 96, 97, 103, 114.

4 1 Chalm. Annals, 521.

5 1 Chalm. Annals, 526,527; 1 Holmes's Annals, 350, 351, and note; Carolina Charters, 4to. London, p. 33.

and his memory has been often reproached with the illiberal character of some of the articles, the oppressive servitude of others, and the general disregard of some of those maxims of religious and political liberty, for which he has in his treatises of government and other writings contended with so much ability and success. Probably there were many circumstances attending this transaction, which are now unknown, and which might well have moderated the severity of the reproach, and furnished, if not a justification, at least some apology for this extraordinary instance of unwise and visionary legislation.

§ 133. It provided, that the oldest proprietary should be the palatine, and the next oldest should succeed him. Each of the proprietaries was to hold a high office. The rules of precedency were most exactly established. Two orders of hereditary nobility were instituted, with suitable estates, which were to descend with the dignity. The provincial legislature, dignified with the name of Parliament, was to be biennial, and to consist of the proprietaries or their deputies, of the nobility, and of representatives of the freeholders chosen in districts. They were all to meet in one apartment, (like the ancient Scottish parliament,) and enjoy an equal vote. No business, however, was to be proposed, until it had been debated in the grand council, (which was to consist of the proprietaries and forty-two counsellors,) whose duty it was to prepare bills. No act was of force longer than until the next biennial meeting of the parliament, unless ratified by the palatine and a quorum of the proprietaries. All the laws were to become void at the end of a century, without any formal repeal. The Church of England (which was declared to be the only true and orthodox religion) was alone to be allow-

ed a public maintenance by parliament. But every congregation might tax its own members for the support of its own minister. Every man of seventeen years of age was to declare himself of some church or religious profession, and to be recorded as such; otherwise he was not to have any benefit of the laws. And no man was to be permitted to be ? freeman of Carolina, or have any estate or habitation, who did not acknowledge a God, and that God is to be publicly worshipped. In other respects there was a guaranty of religious freedom.1 There was to be a public registry of all deeds and conveyances of lands, and of marriages and births. Every freeman was to have "absolute power and authority over his negro slaves, of what opinion or religion soever." No civil or criminal cause was to be tried but by a jury of the peers of the party; but the verdict of a majority was binding. With a view to prevent unnecessary litigation, it was (with a simplicity, which at this time may excite a smile) provided, that "it shall be a base and vile thing to plead for money or reward; "and that since multiplicity of comments, as well as of laws, have great inconveniences, and serve only to obscure and perplex, all manner of comments and expositions on any part of these fundamental constitutions, or on any part of the common, or statute law of Carolina, are absolutely prohibited."2

§ 134. Such was the substance of this celebrated constitution. It is easy to perceive, that it was ill adapted to the feelings, the wants, and the opinions of the colo-

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1 1 Hewatt's South Car. 42 to 47, 321, &c.; Carolina Charters, 4to. London, p. 33, &c.; 1 Chalm. Annals, 526; 1 Holmes's Annals, 350, 351; 1 Williams's N. Car. 104 to 111; Marsh. Colon. ch. 5, p. 154, 156; 1 Ramsay's South Car. 31, 32.

2 Carolina Chartera, 4to. p. 45, § 70, p. 47,§ 80; 1 Hewatt's South Car. 321, &c.

nists. The introduction of it, therefore, was resisted by the people, as much as it could be; and indeed, in some respects, it was found impracticable.1 Public dissatisfaction daily increased; and after a few years' experience of its ill arrangements, and its mischievous tendency, the proprietaries, upon the application of the people, (in 1693,) abrogated the constitution, and restored the ancient form of government. Thus perished the labours of Mr. Locke; and thus perished a system, under the administration of which, it has been remarked, the Carolinians had not known one day of real enjoyment, and that introduced evils and disorders, which ended only with the dissolution of the proprietary government.2 Perhaps in the annals of the world there is not to be found a more wholesome lesson of the utter folly of all efforts to establish forms of governments upon mere theory; and of the dangers of legislation without consulting the habits, manners, feelings, and opinions of the people, upon which they are to operate.

§ 135. After James the Second came to the throne, the same general course was adopted of filing a quo warranto against the proprietaries, as had been successful in respect to other colonies. The proprietaries, with a view to elude the storm, prudently offered to surrender their charter, and thereby gained time.3 Before any thing definitive took place, the revolution of 1688 occurred, which put an end to the hostile proceedings. In April, 1698, the proprietaries made another system of fundamental constitutions, which embraced many of

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1 1 Ramsay's South Car. 39,43,88; 1 Hewatt's South Car. 45; 1 Chalmers's Annals, 527, 528, 529, 530, 532, 550; Marsh. Colon. ch. 5, 156, 157, 159; 1 Williams's N. Car. 122,143.

2 1 Chalmers's Annals, 552.

3 1 Chalmers's Annals, 549; 1 Holmes's Annals, 416.

those propounded in the first, and, indeed, was manifestly a mere amendment of them.

§ 136. These constitutions (for experience does not seem to have imparted more wisdom to the proprietaries on this subject) contained the most objectionable features of the system of government, and hereditary nobility of the former constitutions, and shared a common fate. They were never generally assented to by the people of the colony, or by their representatives, as a body of fundamental laws. Hewatt says,1 that none of these systems ever obtained "the force of fundamental and unalterable laws in the colony.' What regulations the people found applicable, they adopted at the request of their governors; but observed these on account of their own propriety and necessity, rather than as a system of laws imposed on them by British legislators." 2

§ 137. There was at this period a space of three hundred miles between the Southern and Northern settlements of Carolina;3 and though the whole province was owned by the same proprietaries, the legislation of the two great settlements had been hitherto conducted by separate and distinct assemblies, sometimes under the same governor, and sometimes under different governors. The legislatures continued to remain distinct down to the period, when a final surrender of the proprietary charter was made to the crown in 1729.4 The respective territories were de-

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1 Hewatt's South Carol. 45.

2 Dr. Ramsay treats these successive constitutions as of no authority whatsoever in the province, as a law or rule of government. But in a legal point of view the proposition is open to much doubt. 2 Ramsay's South Carol. 121 to 124.

3 1 Williams's N. Car. 155. 4 Marsh. Colon. ch. 9, p. 246, 247; 1 Hewatt's South Carol. 212, 318.

signated by the name of North Carolina and South Carolina, and the laws of each obtained a like appellation. Cape Fear seems to have been commonly deemed, in the commissions of the governor, the boundary between the two colonies.1

§ 138. By the surrender of the charter, the whole government of the territory was vested in the crown; (it had been in fact exercised by the crown ever since the overthrow of the proprietary government in 1720;) and henceforward it became a royal province; and was governed by commission under a form of government substantially like that established in the other royal provinces.2 This change of government was very acceptable to the people, and gave a new impulse to their industry and enterprise. At a little later period [1732], for the convenience of the inhabitants, the province was divided; and the divisions were distinguished by the names of North Carolina and South Carolina.3

§ 139. The form of government conferred on Carolina, when it became a royal province, was in substance this. It consisted of a governor and council appointed by the crown, and an assembly chosen by the people, and these three branches constituted the legislature. The governor convened, prorogued, and dissolved the legislature, and had a negative upon the laws, and exercised the executive authority.4 He possessed also the powers of the court of chancery, of the

1 1 Williams's N. Car. 161, 162; 1 Ramsay's South Carol. 56, &c. 88, 95; 1 Hewatt's South Carol. 212, 318; I Holmes's Annals, 523, 525; Marsh. Colon. ch. 9, p. 246.

2 Marsh. Colon. ch. 9, p. 247.

3 Marsh. Colon. ch. 9, p. 247; 1 Holmes's Annals, 544.

4 2 Hewatt's South Car. ch. 7, p. 1 et seq.; 1 Ramsay's South. Car. ch. 4, p. 95.

admiralty, of supreme ordinary, and of appointing magistrates and militia officers. All laws were subject to the royal approbation or dissent; but were in the mean time in full force.

§ 140. On examining the statutes of South Carolina, a close adherence to the general policy of the English laws is apparent. As early as theyear 1712, a large body of the English statutes were, by express legislation, adopted as part of its own code; and all English statutes respecting allegiance, all the test and supremacy acts, and all acts declaring the rights and liberties of the subjects, or securing the same, were also declared to be in force in the province. All and every part of the common law, not altered by these acts, or inconsistent with the constitutions, customs, and laws of the province, was also adopted as part of its jurisprudence. An exception was made of ancient abolished tenures, and of ecclesiastical matters inconsistent with the then church establishment in the province. There was also a saving of the liberty of conscience, which was allowed to be enjoyed by the charter from the crown, and the laws of the Province.1 This liberty of conscience did not amount to a right to deny the Trinity.2 The Church of England had been previously established in the province [in 1704] and all members of the assembly were required to be of that persuasion.3 Fortunately, Queen Anne annulled these obnoxious laws; and though the Church of England was established, dissenters obtained a toleration, and the law respecting the religious qualification of assembly-men was shortly afterwards repealed.

1 Grimke's South Carolina Laws, (1712,) p. 81, 98, 99, 100.

2 Id. Act of 1703. p. 4.

3 1 Holmes's Annals, 489, 490, 491; 1 Hewatt's South Carol. 166 to 177.

§ 141. The law of descents of intestate real estates, of wills, and of uses, existing in England, thus seem to have acquired a permanent foundation in the colony, and remained undisturbed, until after the period of the American Revolution.1 As in the other colonies, the registration of conveyances of lands was early provided for, in order to suppress fraudulent grants.

§ 142. In respect to North Carolina, there was an early declaration of the legislature [1715] conformably to the charter, that the common law was, and should be in force in the colony. All statute laws for maintaining the royal prerogative and succession to the crown; and all such laws made for the establishment of the church, and laws made for the indulgence to Protestant dissenters; and all laws providing for the privileges of the people, and security of trade; and all laws for the limitation of actions and for preventing vexatious suits, and for preventing immorality and fraud, and confirming inheritances and titles of land, were declared to be in force in the province.2 The policy thus avowed was not departed from down to the period of the American Revolution; and the laws of descents and the registration of conveyances in both the Carolinas was a silent result of their common origin and government.

1 2 Ramsay's South Car. 130.--The descent of estates was not altered until 1791.

2 Iredell's North Car. Laws, 1715, p. 18,19.

CHAPTER XV.
GEORGIA.

§ 143. In the same year, in which Carolina was divided [1732], a project was formed for the settlement of a colony upon the unoccupied territory between the rivers Savannah and Altamaha.1 The object of the projectors was to strengthen the province of Carolina, to provide a maintenance for the suffering poor of the mother country, and to open an asylum for the persecuted protestants in Europe; and in common with all the other colonies to attempt the conversion and civilization of the natives.2 Upon application, George the Second granted a charter to the company, (consisting of Lord Percival and twenty others, among whom was the celebrated Oglethorpe,) and incorporated them by the name of the Trustees for establishing the Colony of Georgia in America.3 The charter conferred the usual powers of corporations in England, and authorized the trustees to hold any territories, jurisdictions, &c. in America for the better settling of a colony there. The affairs of the corporation were to be managed by the

corporation, and by a common council of fifteen persons in the first place, nominated by the crown, and afterwards, as vacancies occurred, filled by the corporation. The number of common-council-men might, with the increase of the corporation, be increased to twenty-four. The charter further granted to the cor-

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1 1 Holmes's Annals, 552; Marsh. Colonies, ch 9, p. 247; 2 Hewatt's South Car. 15, 16; Stokes's Hist. Colonies, 113.

2 1 Holmes's Annals, 552; 2 Hewatt's South Car. 15, 16, 17.

3 Charters of N. A. Provinces, 4to. London, 1766.

poration seven undivided parts of all the territories lying in that part of South Carolina, which lies from the northern stream of a river, there called the Savannah, all along the sea-coast to the southward unto the southernmost stream of a certain other great river, called the Alatamaha, and westward from the heads of the said rivers respectively in direct lines to the South seas, to be held as of the manor of Hampton Court in Middlesex in free and common soccage and not in capite. It then erected all the territory into an independent province by the name of Georgia. It authorized the trustees for the term of twenty-one years to make laws for the province " not repugnant to the laws and statutes of England, subject to the approbation or disallowance of the crown, and after such approbation to be valid. The affairs of the corporation were ordinarily to be managed by the Common Council. It was farther declared, that all persons born in the province should enjoy all the privileges and immunities of natural born subjects in Great Britain. Liberty of conscience was allowed to all inhabitants in the worship of God, and a free exercise of religion to all persons, except Papists. The corporation were also authorized, for the term. of twenty-one years, to erect courts of judicature for all civil and criminal causes, and to appoint a governor, judges, and other magistrates. The registration of all conveyances of the corporation was also provided for. . The governor was to take an oath to observe all the acts of parliament relating to trade and navigation, and to obey all royal instructions pursuant thereto. The governor of South Carolina was to have the chief command of the militia of the province; and goods were

to be imported and exported without touching at any port in South Carolina. At the end of the twenty-one years the crown was to establish such form of government in the province, and such method of making laws therefor, as in its pleasure should be deemed meet; and all officers should be then appointed by the crown.

§ 144. Such is the substance of the charter, which was obviously intended for a temporary duration only; and the first measures adopted by the trustees, granting lands in tail male, to be held by a sort of military service, and introducing other restrictions, were not adapted to aid the original design, or foster the growth of the colony.1 It continued to languish, until at length the trustees, wearied with their own labours, and the complaints of the people, in June, 1 751, surrendered the charter to the crown.2 Henceforward it was governed as a royal province, enjoying the same liberties and immunities as other royal provinces; and in process of time it began to flourish, and at the period of the American Revolution, it had attained considerable importance among the colonies.3

§ 145. In respect to its ante-revolutionary jurisprudence, a few remarks may suffice. The British common and statute law lay at the foundation.4 The same general system prevailed as in the Carolinas, from which it sprung. Intestate estates descended according to the course of the English law. The registration

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1 Marshall's Colon. ch. 9, p. 248, 249, 250; 2 Holmes's Annals, 4-45. 2 Hewatt's South Car. 41, 42, 43.

2 2 Holmes's Annals. 45.

3 Stokes's Hist.of Colonies, 115, 119;2 Hewatt's South Car. 145; 2 Holmes's Annals, 45,117.

4 Stokes's Hist.of Colon. 119, 136.

of conveyances was provided for, at once to secure titles, and to suppress frauds; and the general interests of religion, the rights of representation, of personal liberty, and of public justice, were protected by ample colonial regulations.

Christians, deemed, as if it were inhabited only by brute animals. There is not a single grant from the British crown from the earliest grant of Elizabeth down to the latest of George the Second, that affects to look to any title, except that founded on discovery. Conquest or cession is not once alluded to. And it is impossible, that it should have been; for at the time when all the leading grants were respectively made, there had not been any conquest or cession from the natives of the territory comprehended in those grants. Even in respect to the territory of New-York and New-Jersey, which alone afford any pretence for a claim by conquest, they were. conquered from the Dutch, and not from the natives; and were ceded to England by the treaty of Breda in 1667. But England claimed this very territory, not

by right of this conquest, but by the prior right of discovery.1 The original grant was made to the Duke of York in 1664, founded upon this right, and the subsequent confirmation of his title did not depart from the original foundation.

§ 153. The Indians could in no just sense be deemed a conquered people, who had been stripped of their territorial possessions by superior force. They were considered as a people, not having any regular laws, or any organized government; but as mere wandering tribes.2 They were never reduced into actual obedience, as dependent communities; and no scheme of general legislation over them was ever attempted. For many purposes they were treated as independent communities, at liberty to govern themselves; so always

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1 4 Wheaton, 575,576,568. See also 1 Tuck. Black. Appx. 332. 1 Chalm. Annals, 676.

2 Vattel, B.1, ch. 18, § 208,209; 3 Kent's Comm. 312, 313.

GENERAL REVIEW OF THE COLONIES.

§ 146. We have now finished our survey of the origin and political history of the colonies; and here we may pause for a short time for the purpose of some general reflections upon the subject.

§ 147. Plantations or colonies in distant countries are either, such as are acquired by occupying and peopling desert and uncultivated regions by emigrations from the mother country; **1**. or such as, being already cultivated and organized, are acquired by conquest or cwession under treaties. There is, however, a difference between these two species of colonies in respect to the laws, by whcih they are governed, at least according to the jurisprudence of the common law. If an uninhabited country is discovered and planted by British subjects, the English laws are said to be immediately in force there; for the law is the birthright of every subject. So that wherever they go, they carry their laws with them; and the new found country is governed by them **2**

§ 148. This proposition, however, though laid down in such general terms by very high authority, requires many limitations, and is to be understood with many restrictions. Such colonists do not carry with them the whole body of the English laws, as they then exist; for many of them must, from the nature of the case, be wholly inapplicable to their situation, and

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1 1 Bl. Comm. 107.

2 2 P. Will. 75; 1 Bl. Common. 107; 2 sSalk. 411; Com. Dig. Ley. C.; Rex v Vaughn, 4 Burr. R. 2500; Chitty on Prerog.ch.3, p. 29, & c

inconsistent with their comfort and prosperity. There is therefore, this necessary limitation implied, that they carrywith them all the laws applicable to their situation, and no repugnant to the local and political circumstances, in shich they are placed.

§ 149. Even as thus stated, the proposition is full of vagueness and perplexity; for it must still remain a question of intrinsic difficulty to say, what laws are, or are not applicable to their situation; and whether they are bound by the present state of things, or are at liberty to apply them in future by adoption, as the growth or interests of the colony may dictate. **1** The English rules of inheritance, and of protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples as clear perhaps as any, whcih can be stated, as presumptively adopted, or applicable. And yet in the infancy of a colony some of these very rights, and privileges, and remedies, and rules, may be in fact inapplicable, or inconvenient, and impositic. **2** It is not perhaps easy to settle, what parts of the English laws are or are not in force in any such colonyh, until either by usuage, or judicial determinatination, they have been recognized as of absolute force.

§ 150. In respect to conquered and ceded countries, which have already laws of their own, a different rule prevails. In such cases the crown has a right to abrogate the former laws, and institute new ones. But until such new laws are promulgated, athe old laws and customs of the country remain in full force, unless so

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1 1 Bl. Comm 107; 2 Merivale R. 143, 159

2 1Bl. Comm. 107;l 1 Tucker's Black. note E, 378, 384 et seq.

4 Burr. R. 2500; 2 Merivale R. 143, 157, 158; 2 Wilson' Law Lect. 49 to 54.

as far as they are contrary to our religionk or enact any thing, that is malum in se; for in all such cases the laws of the conquering or acquiring country shall prevail. This qualification of the rule arises from the presumption, that the

crown could never intend to sanction laws contrary to religion or sound morals. **1** But although the king has thus the power to change the laws of ceded and conquered countries, the power is not unlimited. His legislation is subordinate to the aurthority of parliament. He cannot make nay new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion, as for instance from the laws of trade, or from the power of parliament; and he cannot give him priveleges exclusive of other subjects. **2**

§ 151. M. Justice Blackstone, in his Commentaries, insists, that the American colonies are principally to be deemed conquered, or ceded countries. His languageis, " Our American Plantations are principally of this later sort, [i.e. ceded or conquered countries,] being obtained in the last centruy either by right of conquest and driveing out the natives, (with what natural justice I shall not at present inquire,) or by treaties. And, therefdore, the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent cominions," **3**

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1 Blankard v. Galy, 4 Mod. 222; S.C. 2 Salk. 411, 412; 2 peere Will. 75; 1 Black. Comm. 107; Campbell v. Hall, Cow;. R. 204 209, Calvin's case, 7 Co. 1. 17. b; Com. Dig. Navigation, G. 1, 3; Id. Ley. C. 4 Burr. R. 2500; 2 Merivale R. 143, 157, 158

2 Campbell v. Hall, Cow;. R. 204, 209; Chitty on Prerog. ch. 3, p. 29 &c

3 1 Bl. Comm 107; Chitty on Prerog. Ch. 3, p 29.

§ 152. There is great reason to doubt the accuracy of this statement in a legal view. We ahve already seen, that the European nations, by whom America was colonized, treated the subject in a very different manner. **1** They claimed an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by trrhe Indian natives; but as a right acquired by discovery. **2** Som of them, indeed, obtained a sort of confirmatory gran from the papal authority. --But as between themselves they treated the dominion and title of territory as resulting from priority of discovery; **3** and they European power, which had first discovered the country, and set up mark of possession, was deemed to have gained the right, thourgh it had not yet foremed a regular colony there. **4** We have also seen, that the title of the Indians was not treated as a right of propriety and dominion; but as a mere of right of occupancy. **5** As infidels, heathen, and savages, they awere no allowed to possess the prerogatives belonging to absolute, sovereign and independent nations. **6** The territory, over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to

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1 See ante, p. 4 to 20; 1 Chalm. Annals, 676; 3 Wilson's Works, 234

2 Vattel, B. 1, ch. 18, § 205, 206, 207, 208, 209.

3 Johnson v. McIntosh, 8 Wheat. R. 543, 576, 595.

4 Penn v. Lord Baltimore, 1 Vez. 444, 451

5 3 Kent's Comm. 308 to 313; 1 Chalm. Annals, 676, 677; 4 Jefferson's Corresp 478; Worcester v. Georgia, 6 Peters's R. 515

6 To do but justice to those times, it is proper to state, that this pretension diid not obtain universal approbation. On the contrary, it was opposed by some of the most enlightened ecclesiastics and philosophers of thos days, as unjust and absurd; and especially by two Spanish writer of eminent worth, Soto and Victoria. Se Sir James McIntosh's elegant treatise on the Progress of Ethical Philosophyl Philadelphia edit. 1832, p. 49, 50.

Christians, deemed, as if it were inhabiteed only by burute animals. There is not a single grant from the British crown from the earliest grant of Elizabith down to the altest of George othe Second, that affects to look to any title, except that founded on discovery. Conquest or cession is not once alluded to. And it is impossible, that it should have been any conquest or cession from the natives of the territory comprehended in those grants. Even in respect to the territory of New - York and New-Jersey, which alone afford any pretence for a claim by conquest, they were conquered fro the Dutch, and not from the natives; and were ceded to England by the treaty of Breda in 1667. But England claimed this very territroy, not by right of this conquest, but by the prior right of discovery. **1** The original grant was made to the Duke of York in 1664, founded upon this right, and the subsequent confiramtion of his title did not depart from the original foundation.

§ 153. The Indians could in no just sense be deemed a conquered people, who had been stripped of their territorial possessions by superior force. They were considered as a people, no having any regualr laws, or any organized government; but as mere wandering tribes. **2** They were never reduced into actual obediaence, as dependent

communities; and no scheme of gener legislation voer them was ever attempted. For may purposed they were treated as independent communities, at liberty to govern themselves; so always

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1 4 Wheaton, 575, 576, 588. See Aalso 1 Tuck. Black. Appx. 332 1 Chalm. Annals, 676.
2 Vattel, B.1, ch 18, § 208, 209; 3 Ken's Comm. 312, 313.

that they did not interfere with the paramount rights of the European discoverers.1

§ 154. For the most part at the time of the first grants of the colonial charters, there was not any possession or occupation of the territory by any British emigrants. The main objects of these charters, as stated in the preliminary recitals, was to invite emigrations, to people the country, to found colonies, and to christianize the natives. Even in case of a conquered country, where there are no laws at all existing; or none, which are adapted to a civilized community; or where the laws are silent, or are rejected and none substituted; the territory must be governed according to the rules of natural equity and right. And Englishmen removing thither must be deemed to carry with them those rights and privileges, which belong to them in their native country.2

§ 155. The very ground, therefore, assumed by England, as the foundation of its title to America, and the invitations to its own subjects to people it, carry along with them a necessary implication, that the plantations, subsequently formed, were to be deemed a part of the ancient dominions; and the subjects inhabiting them to belong to a common country, and to retain their former rights and privileges. The government in its public policy and arrangements, as well as in its charters, proclaimed, that the colonies were established with a view to extend and enlarge the boundaries of the empire. The colonies,

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1 4 Wheat. R. 590, 591, 596; 1 Grahame's Hist. of America, 44; 3 Kent's Comm. 311; Worcester v. State of Georgia, 6 Peters's Sup. Ct. Rep. 515 2 2 Salk. 411, 412; See also Nall v. Campbell, Cowp. R. 204, 211, 212; 1 Chalm. Ann. 14,15, 678, 679, 689, 690; 1 Chalm. Opinions, 194; 2 Chalm. Opinions, 202; Chitty on Prerog. ch. 2; 2 Wilson's Law Lect. 48, 49.

when so formed, became a part of the state equally with its ancient possessions.1 It is not, therefore, without strong reason, that it has been said, that " the colonists, continuing as much subjects in the new establishment, where they had freely placed themselves, [with the consent of the crown,] as they had been in the old, carried with them their birthright, the laws of their country; because the customs of a free people are a part of their liberty; " and that " the jurisprudence of England became that of the colonies, so far as it was applicable to the situation, at which they had newly arrived, because they were Englishmen residing within a distant territory of the empire."2 And it may be added, that as there were no other laws there to govern them, the territory was necessarily treated, as a deserted and unoccupied country, annexed by discovery to the old empire, and composing a part of it.3 Moreover, even if it were possible to consider the case, as a case of conquest from the Indians, it would not follow, if the natives did not remain there, but deserted it, and left it a vacant territory, that the rule as to conquests would continue to apply to it. On the contrary, as soon as the crown should choose to found an English colony in such vacant territory, the general principle of settlements in desert countries would govern it. It would cease to be a conquest, and become a colony; and as such be affected by the British laws. This doctrine is laid down with great

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1 Vattel, B.1, ch.18, § 209;1 Chalm. Annals, 676, 677, 678, 679; 8 Wheat R. 595; Grotius, B. 2, ch. 9, § 10.
2 1 Chalm Ann 677; Id. 14,1,658; 2 Wilson's Law Lect 48, 49; 3 Wilson's Law Lect. 234, 235.
3 Robertson's v. Row, 1 Atk. R. 543, 544; Vaughan R. 300, 400; Show. Parl. Cas. 31; 8 Wheat. R. 595; 1 Turk. Black. Comm. App. 382, 383; Dummer's Defence, 1 American Tracts, 18.

clearness and force by, Lord Mansfield, in his celebrated judgment in Hall v. Campbell, (Cowp. R. 204, 211, 212.) In a still more recent case it was laid down by Lord Ellenborough, that the law of England might properly be recognised by subjects of England in a place occupied temporarily by British troops, who would impliedly carry that law with them.1

§ 156. The doctrine of Mr. Justice Blackstone, therefore, may well admit of serious doubt upon general principles. But it is manifestly erroneous, so far as it is applied to the colonies and plantations composing our Union. In the charters, under which all these colonies were settled, with a single exception,2 there is, as has been already seen, an express declaration, that all subjects and their children inhabiting therein shall be deemed natural-born subjects, and shall enjoy all the privileges and immunities thereof; and that the laws of England, so far as they are applicable, shall be in force there; and no laws shall be made, which are repugnant to, but as near as may be conveniently, shall

conform to the laws of England. Now this declaration, even if the crown previously possessed a right to establish what laws it pleased over the territory, as a conquest from the natives, being a fundamental rule of the original settlement of the colonies, and before the emigrations thither, was conclusive, and could not afterwards be abrogated by the crown. It was an irrevocable annexation of the colonies to the mother country, as dependencies governed by the same laws, and entitled to the same rights.3

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1 Rex v. Brampton, 10 East R. 22, 288, 289.

2 That of Pennsylvania, 1 Grahame's Hist. 41, note; 1 Chalm. Annals, 14,15, 639, 640,658; 2 Wilson's Law Lect. 48, 49.

3 Stokes's Colon. 30; Hall v. Campbell, Cowp. R. 204. 212; 1 Turk. Black. Comm. App. 383, 384; Chitty Prerog. 32, 33.

§ 157. And so has been the uniform doctrine in America ever since the settlement Of the colonies. The universal principle (and the practice has conformed to it) has been that the common law is our birthright and inheritance and that our ancestors brought hither with them Upon their emigration all of it, which was applicable to their situation. The whole Structure of our present jurisprudence stands upon the original foundations of the common law.1

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1 Notwithstanding the clearness of this doctrine, both from the language of the charters, and the whole course of judicial decisions, Mr. Jefferson has treated it with an extraordinary degree of derision, if not of contempt. "I deride (says he) with you the ordinary doctrine, that we brought with us from England the common law rights. This narrow notion was a favourite in the first moment of rallying to our rights against Great Britain. But it was that of men, who felt their right, before they had thought of their explanation. The truth is, that we brought with us the rights of men, of expatriated men. On our arrival here the question would at once arise, by what law will we govern ourselves? The resolution seems to have been, by that system, with which we are familiar; to be altered by ourselves occasionally, and adapted to our new situation." 4 Jefferson's Corresp. 178.

How differently did the Congress of 1774 think. They unanimously resolved, "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." They further resolved, " that they were entitled to the benefit of such of the English statutes, as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several and local circumstances." They also resolved, that their ancestors at the time of their emigration were " entitled " (not to the rights of men, of expatriated men, but) " to all the rights, liberties, and immunities of free and natural born subjects within the realm of England." Journal of Congress, Declaration of Rights of the Colonies, Oct. 14, 1774, p. 27 to 31.

1 Chalm. Opinion, 202, 220, 295; 1 Chalm. Annals 677, 681, 682; 1 Tuck. Black. Comm. 385; 1 Kent's Comm. 322; Journal of Congress, 1774, p. 28, 29; 2 Wilson's Law Lect. 48, 49, 50; I Tuck. Black. Comm. App. 380 to 384; Van Ness v. Packard, 2 Peters's Sup. R. 137,144.

§158. We thus see in a very clear light the mode, in which the common law was first introduced into the colonies; as well as the true reason of the exceptions to it to be found in our colonial usages and laws.1 It was not introduced, as of original and universal obligation in its utmost latitude; but the limitations contained in the bosom of the common law itself, and indeed constituting a part of the law of nations, were affirmatively settled and recognised in the respective charters of settlement. Thus limited and defined, it has become the guardian of our political and civil rights; it has protected our infant liberties; it has watched over our maturer growth; it has expanded with our wants; it has nurtured that spirit of independence, which checked the first approaches of arbitrary power; it has enabled us to triumph in the midst of difficulties and dangers threatening our political existence and by the goodness of God, we are now enjoying, under its bold and manly principles, the blessings of a free, independent, and united government.2

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1 2 Wilson's Law Lect. 48 to 55; 1 Tuck. Black. Comm. App. 380 to 384; 1 Chalm. Opinions, 220.

2 The question, whether the common law is applicable to the United States in their national character, relations, and government, has been much discussed at different periods Or the government, principally, however, with reference to the jurisdiction and punishment of common law offences by the courts of the United States. It would be a most extraordinary state of things, that the common law should be the basis of the jurisprudence of the States originally composing the Union; and yet a government engrafted upon the existing system should have no jurisprudence at all. If such be the result, there is no guide, and no

rule for the courts of the United States, or indeed, for any other department of government, in the exercise of any of the powers confided to them, except so far as Congress has laid, or shall lay down a rule. In the immense mass of rights and duties, of contracts and claims, growing out of the Constitution and laws of the United States, (upon which positive legislation has hither to done little or nothing,) what is the rule of decision, and interpretation, and restriction? Suppose the simplest case of contract with the government of

the United States, how is it to be construed? How is it to be enforced? What are its obligations? Take an Act of Congress - How is it to be interpreted? Are rules of the common law to furnish the proper guide, or is every court and department to give it any interpretation it may please, according to its own arbitrary will? -- My design is not here to discuss the subject, (for that would require a volume,) but rather to suggest some of the difficulties attendant upon the subject. Those readers, who are desirous of more ample information, are referred to Duponceau on the Jurisdiction of the Courts of the United States; to 1 Tucker's Black. Comm. App. Note E, p. 372; to 1 Kent's Comm. Lect. 16, p. 311 to 322; to the report of the Virginia legislature of 1799-1800; to Rawle on the Constitution, ch. 30, p. 258; to the North American Review, July, 1825; and to Mr. Bayard's speech in the Debates on the Judiciary, in 1802, p. 372,&c. Some other remarks illustrative of it will necessarily arise in discussing the subject of Impeachments.

CHAPTER XVII.
GENERAL REVIEW OF THE COLONIES.

§ 159. IN respect to their interior polity, the colonies have been very properly divided by Mr. Justice Blackstone into three sorts; viz. Provincial, Proprietary, and Charter Governments. First, Provincial Establishments. The constitutions of these depended on the respective commissions issued by the crown to the governors, and the instructions, which usually accompanied those commissions.1 These commissions were usually in one form,2 appointing a governor, as the king's representative or deputy, who was to be governed by the royal instructions, and styling him Captain General and Governor in Chief over the Province, and Chancellor, ViceAdmiral, and Ordinary of the same. The crown also appointed a council, who, besides their legislative authority, were to assist the governor in the discharge of his official duties; and power was given him to suspend them from office, and, in case of vacancies, to appoint others, until the pleasure of the crown should be known. The commissions also contained authority to convene a general assembly of representatives of the freeholders and planters;3 and under this authority provincial assem-

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1 1 Bl. Comm. 108; Stokes's Hist. Colon. 20, 23, 149, 184, 185; Cowper's R. 207, 212; Com. Dig. Navigation, G, l; 2 Doug. Summ 163, note; Id. 251; I Doug. Summ. 207.

2 Stokes's Hist. Colon. 14, 23, 149, 150, 166, 184, 185, 191, 199, 202, 237, 239; 1 Bl. Comm. 108.--Stokes has given, in his History of the Colonies, ch. 4, p. 149, &c. a copy of one of these Commissions. A copy is also prefixed to the Provincial Laws of New Hampshire, Edition of 1767. 3 Stokes's Hist. Colon, 155, 237, 240, 241, 242, 251; 1 Pitk. Hist; 71; 1 Chalmers's Annals, 683.

blies, composed of the governor, the council, and the representatives, were constituted; (the council being a separate branch or upper house, and the governor having a negative upon all their proceedings, and also the right of proroguing and dissolving them;) which assemblies had the power of making local laws and ordinances, not repugnant to the laws of England, but as near as may be agreeable thereto, subject to the ratification and disapproval of the crown. The governors also had power, with advice of council, to establish courts, and to appoint judges and other magistrates, and officers for the province; to pardon offences, and to remit fines and forfeitures; to collate to churches and benefices; to levy military forces for defence; and to execute martial law in time of invasion, war, and rebellion.1 Appeals lay to the king in council from the decisions of the highest courts of judicature of the province, as indeed they did from all others of the colonies. Under this form of government the provinces of New-Hampshire, New-York, New-Jersey, Virginia, the Carolinas, and Georgia, were governed (as we have seen) for a long period, and some of them from an early period after their settlement.2

§ 160. Secondly, Proprietary Governments. These (as we have seen) were granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior royalties, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine.3 Yet still there were these express conditions, that the ends, for which the grant was made, should be substantially pursued; and that nothing

1 Stokes's Hist. of Colonies, 157, 158, 184, 264.

2 Doug. Summ. 207.

3 1 Black. Comm. 108; Stokes's Hist. Colon. 19.

should be done or attempted, which might derogate from the sovereignty of the mother country. In the proprietary government the governors were appointed by the proprietaries, and legislative assemblies were assembled under their authority; and indeed all the usual prerogatives were exercised, which in provincial governments belonged to the crown.1 Three only existed at the period of the American Revolution; viz. the proprietary governments of Maryland, Pennsylvania, and Delaware.2 The former had this peculiarity in its charter, that its laws were not subject to the supervision and control of the crown; whereas in both the latter such a supervision and control were expressly or impliedly provided for.3

§ 161. Thirdly, Charter Governments. Mr. Justice Blackstone describes them, (1 Comm. 108,) as "in the nature of civil corporations with the power of making by-laws for their own internal regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. They have a governor named by the king, (or, in some proprietary colonies, by the proprietor,) who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king, or his representative the governor, make laws suited to their own emergencies." This is by no means a just or accurate description of the charter governments.

1 Stokes's Hist. of Colon. 23

2 Pitk. Hist. 55; Stokes's Hist. of Colon. 19; 2 Doug. Summ. 207. 3 1 Chalmers's Annals, 203, 637.

They could not be justly considered, as mere civil corporations of the realm, empowered to pass by-laws; but rather as great political establishments or colonies, possessing the general powers of government, and rights of sovereignty, dependent, indeed, and subject to the realm of England; but still possessing within their own territorial limits the general powers of legislation and taxation.1 The only charter governments existing at the period of the American Revolution were those of Massachusetts, Rhode-Island, and Connecticut. The first charter of Massachusetts might be open to the objection, that it provided only for a civil corporation within the realm, and did not justify the assumption of the extensive executive, legislative, and judicial powers, which were afterwards exercised upon the removal of that charter to America. And a similar objection might be urged against the charter of the Plymouth colony. But the charter of William and Mary, in 1691, was obviously upon a broader foundation, and was in the strictest sense a charter for general political government, a constitution for a state, with sovereign powers and prerogatives, and not for a mere municipality. By this last charter the organization of the different departments of the government was, in some respects, similar to that in the provincial governments; the governor was appointed by the crown; the council annually chosen by the General Assembly; and the House of Representatives by the people. But in Connecticut and RhodeIsland the charter governments were organized altogether upon popular and democratical principles; the

1 1 Chalmers's Annals. 274, 275, 293, 687; 1 Tuck. Black. Comm. App. 385; 1 Pitk. Hist. 108; 1 Hutch. Hist. No. 13, p. 529; Mass. State Papers 338, 339, 358, 359; Stokes's Hist. of Colon. 21; 1 Doug. Summ. 207.

governor, council, and assembly being annually chosen by the freemen of the colony, and all other officers appointed by their authority.1 By the statutes of 7 & 8 William 3, (ch. 22, § 6,) it was indeed required, that all governors appointed in charter and proprietary governments should be approved of by the crown, before entering upon the duties of their office; but this statute was, if at all, ill observed, and seems to have produced no essential change in the colonial policy.2

§ 162. The circumstances, in which the colonies were generally agreed, notwithstanding the diversities of their organization into provincial, proprietary, and charter governments, were the following.

§ 163. (1.) They enjoyed the rights and privileges of British born subjects; and the benefit of the common laws of England; and all their laws were required to be not repugnant unto, but, as near as might be, agreeable to the laws and statutes of England.3 This, as we have seen, was a limitation upon the legislative power contained in an express

clause of all the charters; and could not be transcended without a clear breach of their fundamental conditions. A very liberal exposition of this clause seems, however, always to have prevailed, and to have been acquiesced in, if not adopted by the crown. Practically speaking, it seems to have been left to the judicial tribunals in the colonies to ascertain, what part of the common law was applicable to the situation of the colonies;4 and of course, from a dif-

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1 1 Chalmers's Annals, 274, 293, 294; Stokes's Hist Colon. 21, 22, 23.

2 1 Chalmers's Annals, 295; Stokes's Hist. Colon. 20.

3 Com. Dig. Navigation, G. I; Id. Ley. C.; 2 Wilson's Law Lect 48, 49, 50, 51, 52.

4 1 Chalm. Annals, 677, 678, 687; 1 Tucker's Black.Comm. 384; 1 Vez. 444, 449; 2 Wilson's Law Lect. 49 to 54; Mass. State Papers, (Ed. 1818,) 375, 390, 391.

ference of interpretation, the common laws actually administered, was not in any two of the colonies exactly the same. The general foundation of the local jurisprudence was confessedly composed of the same materials; but in the actual superstructure they were variously combined, and modified, so as to present neither a general symmetry of design, nor an unity of execution.

§ 164. In regard to the legislative power, there was a still greater latitude allowed; for notwithstanding the cautious reference in the charters to the laws of England, the assemblies actually exercised the authority to abrogate every part of the common law, except that, which united the colonies to the parent state by the general ties of allegiance and dependency; and every part of the statute law, except those acts of Parliament, which expressly prescribed rules for the colonies, and necessarily bound them, as integral parts of the empire, in a general system, formed for all, and for the interest of all.1 To guard this superintending authority with more effect, it was enacted by Parliament in 7 & 8 William 3, ch. 22, "that all laws, by-laws, usages, and customs, which should be in practice in any of the plantations, repugnant to any law made, or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect."2

§ 165. It was under the consciousness of the full possession of the rights, liberties, and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a

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1 1 Chalmers's Annals, 139, 140, 684, 687, 671, 675; 1 Tucker's Black. Comm. 384, App.; 2 Wilson's Law Lect. 49, 50; l Doug. Summ. 213; 1 Pitk. Hist. 108; Mass. State Papers, 315, 346, 347, 351 to 364, 375, 390; Dummer's Defence, 1 American Tracts, 65, &c.

2 Stokes's Colon. 27.

declaratory act, acknowledging and confirming them.1 And for the most part they thus succeeded in obtaining a real and effective magna charta of their liberties. The trial by jury in all cases, civil and criminal, was as firmly, and as universally established in the colonies, as in the mother country.

§ 166. (2.) In all the colonies local legislatures were established, one branch of which consisted of representatives of the people freely chosen, to represent and defend their interests, and possessing a negative upon all laws.2 We have seen, that in the original structure of the charters of the early colonies, no provision was made for such a legislative body. But accustomed as the colonists had been to possess the rights and privileges of Englishmen, and valuing as they did, above all others, the right of representation in Parliament, as the only real security for their political and civil liberties, it was easy to foresee, that they would not long endure the exercise of any arbitrary power; and that they would insist upon some share in framing the laws, by which they were to be governed. We find accordingly, that at an early period [1619] a house of burgesses was forced upon the then proprietors of Virginia.3 In Massachusetts, Connecticut, New-Hampshire, and RhodeIsland, the same course was pursued.4 And Mr. Hutchinson has correctly observed, that all the colonies before the reign of Charles the Second, (Maryland alone excepted, whose charter contained an express provision on the subject,) settled a model of government for themselves, in which the people had a voice, and represen-

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1 1 Pitk. Hist. 88, 89; 3 Hutch. Coll. 201, &c.; 1 Chalmers's Annals, 678; 2 Doug. Summ. 193.

2 1 Doug. Summ. 213 to 215.

3 Robertson's America, B. 9.

4 1 Tucker's Black. Comm. App. 386.

tation in framing the laws and in assenting to burthens to be imposed upon themselves. After the restoration, there was no instance of a colony without a representation of the people, nor any attempt to deprive the colonies of this privilege, except during the brief and arbitrary reign of King James the Second.1

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1 1 Hutch. Hist. Mass. 94, note; 1 Doug. Summ. 213.--Mr. Hutchinson's remarks are entitled to something more than this brief notice, and a quotation is therefore made of the leading passage. "It is observable, that all the colonies before the reign of King Charles the Second, Maryland excepted, settled n model of government for themselves. Virginia had been many years distracted under the government of presidents and governors, with councils, in whose nomination or removal the people had no voice, until in the year 1620 a house of burgesses broke out in the colony; the king nor the grand council at home not having given any powers or directions for it. The governor and assistants of the Massachusetts at first intended to rule the people; and, as we have observed, obtained their consent for it, but this lasted two or three years only; and although there isno colour for it in the charter, yet a house of deputies appeared suddenly in 1634, to the surprise of the magistrates. and the disappointment of their schemes for power. Connecticut soon after followed the plan of the Massachusetts. New-Haven, although the people had the highest reverence for their leaders, and for near thirty years in judicial proceeding submitted to the magistracy, (it must, however, be remembered, that it was annually elected,) without a jury; yet in mutters of legislation the people, from the beginning, would have their share by their representatives.--New-Hampshire combined together under the same form with Massachusetts.--Lord Say tempted the principal men of the Massachusetts, to make them and their heirs nobles and absolute governors of a new colony; but, under this plan, they could find no people to follow them. Barbados and the leeward islands, began in 1625, struggled under governors, and councils, and contending proprietors, for about twenty years. Numbers suffered death by the arbitrary sentences of courts martial, or other acts of violence, as one side, or the other happened to prevail. At length in 1615 the first assembly was called, and no reason given but this, viz.. That, by the grant to the Earl of Carlisle, the inhabitants were to enjoy all the liberties, privileges, and franchises of English subjects; and therefore, as it is also expressly mentioned in the grant, could not legally be bound, or charged by any act without their own consent. This grant, in 1627, was made by Charles the First, a prince not the most tender of the subjects' liberties. After the restoration, there is no instance of a colony settled without a representative of the people, nor any attempt to deprive the colonies of this privilege, except in the arbitrary reign of King James the Second."

§ 167. In the proprietary and charter governments, the right of the people to be governed by laws established by a local legislature, in which they were represented, was recognised as a fundamental principle of the compact. But in the provincial governments it was often a matter of debate, whether the people had a right to be represented in the legislature, or whether it was a privilege enjoyed by the favour and during the pleasure of the crown. The former was the doctrine of the colonists; the latter was maintained by the crown and its legal advisers. Struggles took place from time to time on this subject in some of the provincial assemblies; and declarations of rights were there drawn up, and rejected by the crown, as an invasion of its prerogative.1 The crown also claimed, as within its exclusive competence, the right to decide, what number of representatives should be chosen, and from what places they should come.2 The provincial assemblies insisted upon an adverse claim. The crown also insisted on the right to continue the legislative assembly for an indefinite period, at its pleasure, without a new election; and to dissolve it in like manner. The latter power was admitted; but the former was most stoutly resisted, as in effect a destruction of the popular right of representation, frequent elections being deemed vital to their political safety;--" a right," (as the declaration of independence emphatically pronounces,) " inestimable to them, and formidable to tyrants only."3 In the colony of New-York the crown succeeded at last [1743]4 in establishing septennial assemblies, in imitation of the

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1 1 Pitk. Hist. 85,86,87; 1 Chalm. Opin. 189; 2 Doug Summ. 251, &c.

2 1 Pitk. Hist. 88; 1 Chalm. Opin. 268, 272; 2 Doug. Summ. 37, 38, 39, 40, 41, 73; Chitty Prerog. ch. 3.

3 1 Pitk. Hist. 86, 87.

4 1 Pitk. Hist. 87, 88.

septennial parliaments of the parent country, which was a measure so offensive to the people, that it constituted one of their grievances propounded at the commencement of the American Revolution.1

§168. For all the purposes of domestic and internal regulation, the colonial legislatures deemed themselves possessed of entire and exclusive authority. One of the earliest forms, in which the spirit of the people exhibited itself on this subject, was the constant denial of all power of taxation, except under laws passed by themselves. The propriety of their resistance of the claim of the Crown to tax them seems not to have been denied by the most strenuous of their opponents.2 It was the object of the latter to subject them only to the undefined and arbitrary power of taxation by Parliament. The colonists with a firmness and public' spirit, which strike us with surprise and admiration, claimed for themselves, and their posterity, a total exemption from all taxation not imposed by their own representatives. A declaration to this effect will be round in some of the earliest of colonial legislation; in that of Plymouth, of Massachusetts, of Virginia, of Maryland, of Rhode-Island, of New-York, and indeed of most of the other colonies.3 The general opinion held by them was, that parliament had no authority to tax them, because they were not represented in parliament.4

§ 169. On the other hand, the statute of 6 Geo. 3, ch. 12, contained an express declaration by parliament, that

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1 In Virginia also the assemblies were septennial. The Federalist, No. 52.

2 Chalm. Annals, 658, 681, 683, 686, 687; Stat. 6 Geo. 3, ch. 12.

3 I Pitkin's Hist. 89, 90, 91; 2 Holmes's Annals, 131, 134,135; 2 Doug. Sum. 251; I Doug. Sum. 213; 3 Hutch. Coll. 529, 530.

4 1 Pitkin, 89, &c. 97,127, 129; Marsh. Colon. 352, 353; Appx. 469, 470, 472; Chalm. Annals, 658.

"the colonies and plantations in America have been, are, and of right ought to be subordinate unto and dependent upon the imperial crown and parliament of Great Britain," and that the king with the advice and consent of parliament, "had, hath, and of right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America in all cases whatsoever."1

§ 170. It does not appear, that this declaratory act of 6 Geo. 3, met with any general opposition among those statesmen in England, who were most friendly to America. Lord Chatham, in a speech on the 17th of December, 1765, said, "I assert the authority of this country over the colonies to be sovereign and supreme in every circumstance of government and legislation. But, (he added,) taxation is no part of the governing or legislative power--taxes are the voluntary grant of the people alone."2 Mr. Burke, who may justly be deemed the leader of the colonial advocates, maintain-

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1 6 Geo. 3, ch. 12; Stokes's Colon. 28, 29. See also Marshall on Colon. ch. 13, p. 353; Vaughan R. 300, 400; 1 Pitkins's Hist. 123. 2 Mr. Burke has sketched with a most masterly hand the true origin of this resistance to the power of taxation. The passage is so full of his best eloquence, and portrays with such striking fidelity the character of the colonists, that, notwithstanding its length, I am tempted to lay it before the reader in this note.

"In this character of the Americans, n love of freedom is the predominating feature, which marks and distinguishes the whole; and as an ardent is always a jealous affection, your colonies become suspicious, restive, and untractable, whenever they see the least attempt to wrest from them by force, or shuffle from them by chicane, what they think the only advantage worth living for. This fierce spirit of liberty is stronger in the English colonies probably than in any other people of the earth; and this from a great variety of powerful causes; which, to understand the true temper of their minds, and the direction which this spirit takes, it will not be amiss to lay open somewhat more largely.

"First, the people of the colonies are descendants of Englishmen. England, Sir, is a nation, which still, I hope, respects, and formerly adored, her freedom. The colonists emigrated from you, when this part of

ed the supremacy of parliament to the full extent of the declaratory act, and as justly including the power of taxation.1 But he deemed the power of taxation in

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your character was most predominant; and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles. Abstract liberty, like other mere abstractions, is not to be found. Liberty inheres in some sensible object; and every nation has formed to itself some favourite point, which by way of eminence becomes the criterion of their happiness. It happened, you know, Sir, that the great contests for freedom in this country were from the earliest times chiefly upon the question of taxing. Most of the contests in the ancient commonwealths turned primarily on the right of election of magistrates; or on the balance among the several orders of the state. The question of money

was not with them 80 immediate. But in England it was otherwise. On this point of taxes the ablest pens, and most eloquent tongues, have been exercised; the greatest spirits have acted and suffered. In order to give the fullest satisfaction concerning the importance of this point, it was not only necessary for those, who in argument defended the excellence of the English constitution, to insist on this privilege of granting money as a dry point of fact, and to prove, that the right had been acknowledged in ancient parchments, and blind usages, to reside in a certain body; called an house of commons. They went much further; they attempted to prove, and they succeeded, that in theory it ought to be so, from the particular nature of a house of commons, as an immediate representative of the people; whether the old records had delivered this oracle or not. They took infinite pains to inculcate, as a fundamental principle, that in all monarchies, the people must in effect themselves mediately or immediately possess the power of granting their own money, or no shadow of liberty could subsist.--The colonies draw from you, as with their lifeblood, these ideas and principles. Their love of liberty, 118 with you, fixed and attached on this specific point of taxing. Liberty might be safe, or might be endangered in twenty other particulars,-without their being much pleased or alarmed. Here they felt its pulse; and as they found that beat, they thought themselves sick or sound. I do not say whether they were right or wrong in applying your general arguments to their own case. It is not easy indeed to make a monopoly of theorems and corollaries. The fact is, that they did thus apply those general arguments; and your mode of governing them, whether through

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1 Burke's Speech on Taxation of America in 1774; Burke's Speech on Conciliation with America, 22 March, 1775. See also his Letters to the Sheriffs of Bristol in 1777.

parliament as an instrument of empire, and not as a means of supply; and therefore, that it should be resorted to only in extreme cases for the former pur-

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lenity or indolence, through wisdom or mistake, confirmed them in the imagination, that they, as well as you, had an interest in these common principles.

"They were further confirmed in this pleasing error by the form of their provincial legislative assemblies. Their governments are popular in an high degree; some are merely popular; in all, the popular representative is the most weighty; and this share of the people in their ordinary government never fails to inspire them with lofty sentiments, and with a strong aversion from whatever tends to deprive them of their chief importance.

" If any thing were wanting to this necessary operation of the form of government, religion would have given it a complete effect. Religion, always a principle of energy, in this new people, is no war worn out or impaired; and their mode of professing it is also one main cause of this free spirit. The people are Protestants; and of that kind, which is the most adverse to all implicit submission of mind and opinion. This is a persuasion not only favourable to liberty, but built upon it. I do not think, Sir, that the reason of this averseness in the dissenting churches from all that looks like absolute government is so much to be sought in their religious tenets, as in their history. Every one knows, that the Roman Catholic religion is at least coeval with most of the governments where it prevails; that it has generally gone hand in hand with them; and received great favour and every kind of support from authority. The church of England too was formed from her cradle under the nursing care of regular government. But the dissenting interest have sprung up in direct opposition to all the ordinary powers of the world; and could justify that opposition only on a strong claim to natural liberty. Their very existence depended on the powerful and unremitted assertion of that claim. All protestantism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our northern colonies is a refinement on the principle of resistance; it is the diffidence of dissent; and the protestantism of the Protestant religion. This religion, under a variety of denominations, agreeing in nothing but in the communion of the spirit of liberty is predominant in most of the northern provinces; where the church of England, notwithstanding its legal rights, is in reality no more than a sort of private sect, not composing most probably the tenth of the people. The colonist left England when this spirit was high; and in the emigrants was the highest of all: and even that stream of foreigners, which has been constantly flowing into these colonies, has, for the greatest part, been composed of dissenters from the establishments of their several

pose. With a view to conciliation, another act was passed at a late period, (in 18 Geo. 3, ch. 12,) which declared, that parliament would not impose any duty

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countries, and have brought with them a temper and character far from alien to that of the people, with whom they mixed.

" Sir, I can perceive by their manner, that some gentlemen object to the latitude of this description; because in the southern colonies the church of England forms a large body, and has a regular establishment. It is certainly true. There is however n circumstance attending these colonies, which, in my opinion, fully counterbalances this difference, and makes the spirit of liberty still more high and haughty than in those of the northward. It is that in Virginia and the Carolinas, they have a vast multitude of slaves. Where this is the case in any part of the world, those, who are free, are by far the most proud and jealous of their freedom. Freedom is to them not only an enjoyment, but a hind of rank and privilege. Not seeing there, that freedom, as in countries where it is a common blessing, and as broad and general as the air, may be united with much abject toil, with great misery, with all the exterior of servitude, liberty looks, amongst them, like something that is more noble and liberal. I do not mean, Sir, to commend the superior morality of this sentiment, which has at least as much pride as virtue in it; but I cannot alter the nature of man. The fact is so; and these people of the southern colonies are much more strongly, and with an higher and more stubborn spirit, attached to liberty, than those to the northward. Such were all the ancient commonwealths; such were our Gothic ancestors; such in our days were the Poles; and such will be all masters of slaves, who are not slaves themselves. In such n people the haughtiness of domination combines with the spirit of freedom, fortifies it, and renders it invincible.

"Permit me, Sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit. I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavour to obtain some smattering, in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstones Commentaries in America, as in England. General Gage marks out this disposition very particularly in a letter on your table. He states, that all the people in his government are lawyers, or smatterers in law; and that in Boston they

or tax on the colonies, except for the regulation of commerce; and that the net produce of such duty, or tax, should be applied to the use of the colony, in which it

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have been enabled, by successful chicane, wholly to evade many parts of one of your capital penal constitutions. The smartness of debate will say, that this knowledge ought to teach them more clearly the rights of legislature, their obligations to obedience, and the penalties of rebellion. All this is mighty well. But my honourable and learned friend* on the floor, who condescends to mark what I say for animadversion, will disdain that ground. He has heard, as well as I, that when great honours and great emoluments do not win over this knowledge to the service of the state, it is a formidable adversary to government. If the spirit be not tamed and broken by these happy methods, it is stubborn and litigious. Abeunt studia in mores. This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources. In other countries, the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at n distance; and snuff the approach of tyranny in every tainted breeze.

"The last cause of this disobedient spirit in the colonies is hardly less powerful than the rest, as it is not merely moral, but laid deep in the natural constitution of things. Three thousand miles of ocean lie between you and them. No contrivance can prevent the effect of this distance, in weakening government. Seas roll, and months pass, between the order and the execution; and the want of a speedy explanation of a single point, is enough to defeat a whole system. You have, indeed, winged ministers of vengeance, who carry your bolts in their pounces to the remotest verge of the sea. But there a power steps in, that limits the arrogance of raging, passions and furious elements, and says, ' So far shalt thou go, and no farther.' Who are you, that should fret and rage, and bite the chains of nature ? Nothing worse happens to you, than does to all nations, who have extensive empire; and it happens in all the forms, into which empire can be thrown. In large bodies the circulation of power most be less vigorous at the extremities. Nature has said it. The Turk cannot govern Egypt, and Arabia, and Curdistan, as he governs Thrace; nor has he the same dominion in Crimen and Algiers, which he has at Brusa and Smyrna. Despotism itself is obliged to truck and huckster. The Sultnn gets such obedience as he can. He governs with a loose rein, that he may govern at all; and the whole of the force and vigour of his authority in his centre, is derived

***The Attorney General.**

was levied. But it failed of its object. The spirit of resistance had then become stubborn and uncontrollable. The colonists were awake to a full sense of all their rights; and habit had made them firm, and common sufferings had made them acute, as well as indignant in the vindication of their privileges. And thus the struggle was maintained on each side with unabated zeal, until the American Revolution. The Declaration of Independence embodied in a permanent form a denial of such parliamentary authority, treating it as a gross and unconstitutional usurpation.

§ 171. The colonial legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories. But there was this difference among them, that in Maryland, Connecticut, and Rhode-Island, the laws were not required to be sent to the king for his approval; whereas, in all the other colonies, the king possessed a power of abrogating them, and they were not final in their authority until they had passed under his review.1 In respect to the mode of enacting laws, there were some dif-

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from a prudent relaxation in all his borders. Spain, in her provinces, is, perhaps, not so well obeyed, as you are in yours. She complies too; she submits; she watches times. This is the immutable condition; the eternal law, of extensive and detached empire.

"Then, Sir, from these six capital sources; of descent; of form of government; of religion in the northern provines; of manners in the southern; of education; of the remoteness of situation from the first mover of government; from all these causes a fierce spirit of liberty has grown up. It has grown with the growth of the people in your colonies, and increased with the increase of their wealth; a spirit, that unhappily meeting with an exercise of power in England, which, however lawful, is not reconcilable to any ideas of liberty, much less with theirs, has kindled this flame, that is ready to consume us." 2 Burke's Works, 38 - 45.

1 Chalmers's Annals, 203, 295; 1 Doug. Summ. 207, 208.

ferences in the organization of the colonial governments.1 In Connecticut and Rhode-Island the governor had no negative upon the laws; in Pennsylvania the council had no negative, but was merely advisory to the executive; in Massachusetts, the council was chosen by the legislature, and not by the crown; but the governor had a negative on the choice.

§ 172. (3.) In all the colonies, the lands within their limits were by the very terms of their original grants and charters to be holden of the crown in free and common soccage, and not in capite or by knights service. They were all holden either, as of the manor of East Greenwich in Kent, or of the manor of Hampton Court in Middlesex, or of the castle of Windsor in Berkshire.2 All the slavish and military part of the ancient feudal tenures were thus effectually prevented from taking root in the American soil; and the colonists escaped from the oppressive burdens, which for a long time affected the parent country, and were not abolished until after the restoration of Charles the Second.3 Our tenures thus acquired a universal simplicity; and it is believed, that none but freehold tenures in soccage ever were in use among us. No traces are to be found of copy hold, or gavel kind, or burgage tenures. In short, for most purposes, our lands may be deemed to be perfectly allodial, or held of no superior at all; though many of the distinctions of the feudal law have necessarily insinuated themselves into the modes of acquiring, transferring, and transmitting real estates. One of the most remarkable circumstances in our colonial history is the almost

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1 1 Doug. Summ. 215.

2 1 Grahame's Hist. 43, 44.

3 Stat. 12 Car. 2, ch. 24.

total absence of leasehold estates. The erection of manors with all their attendant privileges, was, indeed, provided for in several of the charters. But it was so little congenial with the feelings, the wants, or the interests of the people, that after their erection they gradually fell into desuetude; and the few remaining in our day are but shadows of the past, the relics of faded grandeur in the last steps of decay, enjoying no privileges, and conferring no power.

§ 173. In fact, partly from the cheapness of land, and partly from an innate love of independence, few agricultural estates in the whole country have at any time been held on lease for a stipulated rent. The tenants and occupiers are almost universally the proprietors of the soil in fee simple. The few estates of a more limited duration are principally those arising from the acts of the law, such as estates in dower, and in curtesy. Strictly speaking, therefore, there has never been in this country a dependent peasantry. The yeomanry are absolute owners of the soil, on which they tread; and their character has from this circumstance been marked by a more jealous watchfulness of their rights, and by a more steady spirit of resistance against every encroachment, than can be found among any other people,

whose habits and pursuits are less homogeneous and independent, less influenced by personal choice, and more controlled by political circumstances.

§ 174. (4.) Connected with this state of things, and, indeed, as a natural consequence flowing from it, is the simplicity of the system of conveyances, by which the titles to estates are passed, and the notoriety of the transfers made. From a very early period of their settlement the colonies adopted an

almost uniform mode of conveyance of land, at once simple and practicable and safe. The differences are so slight, that they became almost evanescent. All lands were conveyed by a deed, commonly in the form of a feoffment, or a bargain and sale, or a lease and release, attested by one or more witnesses, acknowledged or proved before some court or magistrate, and then registered in some public registry. When so executed, acknowledged, and recorded, they had full effect to convey the estate without any livery of seisin, or any other act or ceremony whatsoever. This mode of conveyance prevailed, if not in all, in nearly all the colonies from a very early period; and it has now become absolutely universal. It is hardly possible to measure the beneficial influences upon our titles arising from this source, in point of security, facility of transfer, and marketable value.

§ 175. (5.) All the colonies considered themselves, not as parcel of the realm of Great Britain, but as dependencies of the British crown, and owing allegiance thereto, the king being their supreme and sovereign lord.1 In virtue of its general superintendency the crown constantly claimed, and exercised the right of entertaining appeals from the courts of the last resort in the colonies; and these appeals were heard and finally adjudged by the king in council.2 This right of appeal was secured by express reservation in most of the colonial charters. It was expressly provided for by an early provincial law in New-Hampshire, when the matter in difference exceeded the true value or sum of 300 sterling. So, a like colonial law of Rhode-Island was enacted by its

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1 1 Vez. 444; Vaughan R.300, 400; Shower. Parl. Cases, 30, 31, 32, 33; Mass. State Papers, 359.

2 1 Black. Comm. 231, 232; Chitty on Prerog. 29, 31.

local legislature in 1719.1 It was treated by the crown, as an inherent right of the subject, independent of any such reservation.2 And so in divers cases it was held by the courts of England. The reasons given for the opinion, that writs of error [and appeals] lie to all the dominions belonging to England upon the ultimate Judgments given there, are, (1.) That, otherwise, the law appointed, or permitted to such inferior dominion might be considerably, changed without the assent of the superior dominion; (2.) Judgments might be given to the disadvantage or lessening of the superiority, or to make the superiority of the king only, and not-of the crown of England; and(3.) That the practice has been accordingly.3

§ 176. Notwithstanding the clearness, with which this appellate jurisdiction was asserted, and upheld by the principles of the common law, the exercise of it was not generally assumed until about 1680; and it was not then conceded, as a matter of right in all the colonies.4 On the contrary, Massachusetts resisted it under her first charter; (the right of appeal was expressly reserved in that of 1691;) and Rhode-Island and Connecticut at first denied it, as inconsistent with, or rather as not provided for in theirs.5 Rhode Island soon

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1 New-Hampshire Prov. Laws, edit. 1771, P. 7, Act of 11 Will. 3, ch 4; Rhode-Island Laws, edit. 1744. P. 78.

2 1 P. Will. 323; Chitty on Prerog. ch. 3.

3 Vaughan's Rep. 290, 402; Show. Parl. Cases, 30, 31, 32, 33; 1 Vez. 444; Stokes's Colom. 26, 222, 231; 2 Ld. Raym. 1447, 1448; 1 Chalm. Annals, 139,304, 671, 678, 684; Christian v. Corver, 1 P. Will. R. 329; Att. Gen. v. Stewart,2 Merivale R 143, 156; Res V. Cowle, 2 Burr. 834, 855, 854, 856; Fabrigas v. Mostym,Cowp. 174; 1 Doug. Summ. 216; 3 Wilson's Works, 230; 2 Chalm. Opin. 177, 222.

4 Chitty on Prerog. ch. 3, P. 28, 29; 1 Chalm. Opin. 222; 1 Pitk. Hist. 121, 123, 124, 125, 126; 1 Chalm. Annals, 139, 140, 678; 5 Mass. Hist. Coll.139.

5 1 Chalm. Annals, 277, 280, 297, 304, 411, 446, 462; 2 Doug. Summ. 174; 3 Hutch. Coll. 330, 418, 529; 2 Hutch Hist. 539.

afterwards surrendered her opposition.1 But Connecticut continued it to a later period.2 In a practical sense, however, the appellate jurisdiction of the king in council was in full and undisturbed exercise throughout the colonies at the time of the American Revolution; and was deemed rather a protection, than a grievance.3

§ 177. (6.) Though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connexion with each other. Each was independent of all the

others; each, in a limited sense, was sovereign within its own territory. There was neither alliance nor confederacy between them. The assembly of one province could not make laws for another; nor confer privileges, which were to be enjoyed or exercised in another, farther than they could be in any independent foreign state. As colonies, they were also excluded from all connexions with foreign states. They were known only as dependencies; and they followed the fate of the parent country both in peace and war, without having assigned to them, in the intercourse or diplomacy of nations, any distinct or independent existence.4

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1 2 Doug. Summ. 97; 3 Hutch. Coll. 412, 413.

2 2 Doug. Summ. 194; 1 Pitk. Hist 123 to 125.

3 I have in my possession a printed case Thomas Forsky v. Waddel Cunningham, brought before the governor and council of New-York from the supreme court of that province by appeal in 1764. The great question was, whether an appeal or writ of error lay; and the judges of the supreme court, and the council held, that no appeal lay, for that would be to re-examine facts settled by the verdict of a jury. The lieutenant governor dissented. It was agreed on all sides, that an appeal in matter of law (by way of writ of error) lay to the king in council from all judgments in the colonies; but not as to matters of fact in suits at common law. It was also held, that in all the colonies the subjects carry with them the laws of England, end therefore as well those, which took place after, as those, which were in force before Magna Charta. 4 1 Chalm. Annals, 686, 689, 690.

They did not possess the power of forming any league or treaty among themselves, which should acquire an obligatory force without the assent of the parent state. And though their mutual wants and necessities often induced them to associate for common purposes of defence, these confederacies were of a casual andtemporary nature, and were allowed as an indulgence, rather than as a right. They made several efforts to procure the establishment of some general superintending government over them all; but their own differences of opinion, as well as the jealousy of the crown, made these efforts abortive.1 These efforts, however, prepared their minds for the gradual reconciliation of their local interests, and for the gradual development of the principles, upon which a union ought to rest, rather than brought on an immediate sense Or the necessity, or the blessings of such a general government.

§ 178. But although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony; and as a British subject, he was capable of inheriting lands by descent in every other colony. The commercial intercourse of the colonies, too, was regulated by the general laws of the British empire; and could not be restrained, or obstructed by colonial legislation. The remarks of Mr. Chief Justice Jay on this subject are equally just and striking. " All the people of this country were then subjects of the king of Great Britain, and owed allegiance to him; and all

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1 1 Pitk. Hist. 50, 141, 142, 143, 144, 145, 146, 429;

2 Haz. Coll.; 1 Marsh. Colon. ch. 10, p. 284;

3 Hutch. Hist. 21, 22, 23.

the civil authority then existing, or exercised here, flowed from the head of the British empire. They were, in a strict sense, fellow subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert, that only the same affinity and social connexion subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, to wit, only that affinity and social connexion, which result from the mere circumstance of being governed by the same prince." Different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.1

§ 179. Having considered some of the particulars, in which the political organization, and public rights, and juridical policy of the colonies were nearly similar, it remains to notice a few, in which there were important differences.

(1.) As to the course of descents and distribution of intestate estates. And, here, the policy of different colonies was in a great measure determined by the nature of their original governments and local positions. All the southern colonies, including Virginia, adhered to the course of descents at the common law (as we have had occasion to see) down to the American Revolution. As a natural consequence, real property was in these colonies generally held in large masses by the families of ancient proprietors; the younger branches were in a great measure dependent upon the eldest; and the latter assumed, and supported somewhat of the pre-eminence, which belonged to baronial

possessions in the parent country. Virginia was so tenacious of entails, that she would not even endure the barring of them by the common means of fines and recoveries. New-York

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1 Chisholm v. State of Georgia, 2 Dall. 470.

and New-Jersey silently adhered to the English rule of descents under the government of the crown, as royal provinces. On the other hand, all New-England, with the exception of Rhode Island, from a very early period of their settlements adopted the rule of dividing the inheritance equally among all the children, and other next of kin, giving a double share to the eldest son. Maryland, after 1715, and Pennsylvania almost from its settlement, in like manner distributed the inheritance among all the children and other next of kin. NewHampshire, although a royal province, steadily clung to the system of Massachusetts, which she had received, when she formed an integral part of the latter. But Rhode-Island retained (as we have already seen) its attachment to the common law rule of descents down almost to the era of the American Revolution.1

§ 180. In all the colonies, were the rule of partible inheritance prevailed, estates were soon parcelled out into moderate plantations and farms; and the general equality of property introduced habits of industry and economy, the effects of which are still visible in their local customs, institutions, and public policy. The philosophical mind can scarcely fail to trace the intimate connexion, which naturally subsists between the general equality of the apportionment of property among the mass of a nation, and the popular form of its government. The former can scarcely fail, first or last, to introduce the substance of a republic into the actual administration of the government, though its forms do not bear such an external impress. Our revolutionary statesmen were not insensible to this silent but potent influence; and the fact, that at the present time the law of divisible inher-

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1 To 1770, Garnder v. Collins ,2 Peters's Sup. Ct. R. 58.

itances pervades the Union, is a strong proof Or the general sense, not merely of its equity, but of its political importance.

§ 181. A very curious question was at one time1 agitated before the king in council, upon an appeal from Connecticut, how far the statute Or descents and distributions, dividing the estate among all the children, was conformable to the charter Or that colony, which required the laws to be "not contrary to the laws of the realm of England." It was upon that occasion decided, that the law of descents, giving the female, as well as the male heirs, a part of the real estate, was repugnant to the charter, and therefore void. This determination created great alarm, not only in Connecticut, but elsewhere; since it might cut deep into the legislation of the other colonies, and disturb the foundation of many titles. The decree of the council, annulling the law, was upon the urgent application of some of the colonial agents revoked, and the law reinstated with its obligatory force.2 At a still later period the same question seems to have been presented in a somewhat different shape for the consideration of the law officers of the crown; and it may now be gathered as the rule of construction, that even in a colony, to which the benefit of the laws of England is expressly extended, the law of descents of England is not to be deemed, as necessarily in force there, if it is inapplicable to their situation; or at least, that a change of it is not beyond the general competency of the colonial legislature.3

§182. (2.) Connected with this, we may notice the strong tendency of the colonies to make lands liable to

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1 In 1727.

2 1 Pitk. Hist. 125,126.

3 Att. Gen. v. Stewart, 2 Meriv. R. 143, 157,158,159.

the payment of debts. In some of them, indeed, the English rule prevailed of making lands liable only to an extent upon an elegit. But in by far the greatest number, lands were liable to be set off upon appraisement, or sold for the payment of debts. And lands were also assets, in cases of a deficiency of personal property, to be applied in the course of administration to discharge the debts of the party deceased. This was a natural result of the condition of the people in a new country, who possessed little monied capital; whose wants were numerous; and whose desire of credit was correspondently great. The true policy in such a state of things was to make land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property. It will be found, that the growth of the respective colonies was in no small degree affected by this circumstance. Complaints were made, and perhaps justly, that undue priorities in payment of debts were given to the inhabitants of the colony over all other creditors; and that occasional obstructions were thrown in the way of collecting debts.1 But

the evil was not general in its operation; and the policy, wherever it was pursued, retarded the growth, and stinted the means of the settlements. For the purpose, however, of giving greater security to creditors, as well as for a more easy recovery of debts due in the plantations and colonies in America, the statute of 5 George 2, ch. 7, [1732,] among other things declared, that all houses, lands, negroes, and other hereditaments and real estates in the plantations should be liable to, and chargeable with the debts of the proprietor, and be assets for the satisfaction

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1 1 Chalm. Annals, 692, 693.

thereof, in like manner as real estates are by the law of England liable, to the satisfaction of debts due by bond or other specialty, and shall be subject to like remedies in courts of law and equity, for seizing, extending, selling, and disposing of the same, towards satisfaction of such debts, in like manner as personal estates in any of such plantations are seized, extended, sold, or disposed of, for satisfaction of debts. This act does not seem to have been resisted on the part of any of the colonies, to whom it peculiarly applied.1

§ 183. In respect to the political relations of the colonies with the parent country, it is not easy to state the exact limits of the dependency, which was admitted, and the extent of sovereignty, which might be lawfully exercised over them, either by the crown, or by parliament. In regard to the crown, all of the colonies admitted, that they owed allegiance to the crown, as their sovereign liege lord, though the nature of the powers, which he might exercise, as sovereign, were still undefined.2

§ 184. In the silence of express declarations we may resort to the doctrines maintained by the crownwriters, as furnishing, if not an exact, at least a comprehensive view of the claims of the royal prerogative over the colonial establishments. They considered it not necessary to maintain, that all the royal prerogatives, exercisable in England, were of course exercisable in the colonies; but only such fundamental rights and principles, as constituted the basis of the throne and its authority, and without which the king would cease to be sovereign in all his dominions. Hence the attributes

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1 Telfair v. Stead, 2 Cranch, 407.

2 Marshall's Colon. ch, 13, p. 153;

3 Wilson's Works, 236, 237, 238, 244, 242, 243

of sovereignty, perfection, perpetuity, and irresponsibility, which were inherent in the political capacity of the king, belonged to him in all the territories subject to the crown, whatever was the nature of their laws, and government in other respects. Every where he was the head of the church, and the fountain of justice; every where he was entitled to a share in the legislation, (except where he had expressly renounced it;) every where he was generalissimo of all forces, and entitled to make peace or war. But minor prerogatives might be yielded, where they were inconsistent with the laws or usages of the place, or were inapplicable to the condition of the people. In every question, that respected the royal prerogatives in the colonies, where they were not of a strictly fundamental nature, the first thing to be considered was, whether the charter of the particular colony contained any express provision on the subject. If it did, that was the guide. If it was silent, then the royal prerogatives were in the colony precisely the same, as in the parent country; for in such cases the common law of England was the common law of the colonies for such purposes. Hence, if the colonial charter contained no peculiar grant to the contrary, the king might erect courts of justice and exchequer therein; and the colonial judicatories, in point of law, were deemed to emanate from the crown, under the modifications made by the colonial assemblies under their charters. The king also might extend the privilege of sending representatives to new towns in the colonial assemblies. He might control, and enter a nolle prosequi in criminal prosecutions, and pardon crimes, and release forfeitures. He might present to vacant benefices; and he was entitled to royal monies, treasuretrove, escheats, and forfeitures. No colonial assemblies

had a right to enact laws, except with the assent of the; crown by charter, or commission, or otherwise; and if they exceeded the authority prescribed by the crown, their acts were void. The king might alter the constitution and form of the government of the colony, where there was no charter, or other confirmatory act by the colonial assembly with the assent of the crown; and it rested merely on the instructions and commissions given, from time to time, by the crown to its governors. The king had power also to vest in the royal governors in the colonies, from time to time, such of his prerogatives, as he should please; such as the power to prorogue, adjourn, and dissolve the colonial assemblies; to confirm acts and laws; to pardon offences; to act as captain general of the public forces; to appoint public officers; to act as chancellor and supreme ordinary; to sit in the highest court of appeals and errors; to

exercise the duties of vice-admiral, and to grant commissions to privateers. These last, and some other of the prerogatives of the king, were commonly exercised by the royal governors without objection.

§ 185. The colonial assemblies were not considered as standing on the same footing, as parliament, in respect lo rights, powers, and privileges; but as deriving all their energies from the crown, and limited by the respective charters, or other confirmatory acts of the crown, in all their proceedings. The king might, in respect to a colonial assembly, assent to an act of assembly, before it met, or ratify it, or dissent from it, after the session was closed. He might accept a surrender of a colonial charter, subject to the rights of third persons previously acquired; and give the colony a new charter or otherwise institute therein anew form of government. And it has been even contended, that the

king might, in cases of extraordinary necessity or emergency, take away a charter, where the defence or protection of the inhabitants required it, leaving them in possession of their civil rights.

§186. Such are some of the royal prerogatives, which were supposed to exist by the crown writers in the colonial establishments, when not restrained by any positive charter or bill of rights. Of these, many were undisputed; but others were resisted with pertinacity and effect in the colonial assemblies.1

§187. In regard to the authority of parliament to enact laws, which should be binding upon them, there was quite as much obscurity, and still more jealousy spreading over the whole subject.2 The government of Great Britain always maintained the doctrine, that the parliament had authority to bind the colonies in all cases whatsoever.3 No acts of parliament, however, were understood to bind the colonies, unless expressly named therein.4 But in America, at different times and in different colonies, different opinions were entertained on the subject.5 In fact, it seemed to be the policy of the colonies, as much as possible, to withdraw them-

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1 The reader will find the subject of the royal prerogative in the colonies discussed at large in Chitty on the Prerogatives of the Crown, ch. 3, p. 25 to 40; in Spokes on the Constitution of the Colonies, passim; in Chalmers's Annals of the Colonies; and in Chalmers's Opinions, 2 vols. passim. See also Com. Dig. Prerogative.

2 1 Pitk. Hist. 164 to 169, 186, 198, 199, 200 to 205; App. 448, No. 9; Id. 452, 453; 3 Wilson's Works, 238, 239, 240, 241, 242, 243; 2 Wilson's Works, 54, 55, 58; Mass. State Papers, 338, 339, 344, 352 to 364; 1Pitk. Hist. 255.

3 3 Wilson's Works, 205; I Chalm. Annals, 140, 687, 690; Stokes's Colon. 146.

4 1 Black. Comm. 107,108; Chitty on Prerog. 33.

5 1 Pitk. Hist. 198, 199, 200 to 205, 206, 209; Marshall's Colon. ch. 13, p. 352; 1 Chitty on Prerog. 29; 1 Chalmers's Opinions, 196 to 225; 1 Pitk. Hist. ch. 6, p. 162 to 212.

selves from any acknowledgment of such authority, except so far as their necessities, from time to time, compelled them to acquiesce in the parliamentary measures expressly extending to them. We have already seen, that they resisted the imposition of taxes upon them, without the consent of their local legislatures, from a very early period.1

§ 188. But it was by no means an uncommon opinion in some of the colonies, especially in the proprietary and charter governments, that no act of parliament whatsoever could bind them without their own consent.2 An extreme reluctance was shown by Massachusetts to any parliamentary interference as early as 1640;3 and the famous navigation acts of 1651 and 1660 were perpetually evaded, even when their authority was no longer denied, throughout the whole of New-England.4 Massachusetts, in 1679, in an address to the crown, declared, that she "apprehended them to be an invasion of the rights, liberties, and properties of the subjects of his majesty in the colony, they not being represented in parliament; and, according to the usual sayings of the learned in the law, the laws of England were bounded within the four seas, and did not reach America."5 However, Massachusetts, as well as the other NewEngland colonies, finally acquiesced in the authority of parliament to regulate trade and commerce; but denied it in regard to taxation and internal regulation of the

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1 Marshall's Colon. ch. 13, p. 353; 1 Pitk. Hist. 89, 90, &c. 98; Id. 164, 174,179,182 to 212; Mass. State Papers, 359 to 364.

2 1 Pitk. Hist. 91; 1 Chalm. Annals, 443.

3 2 Winthrop's Jour. 25.

4 1 Chalm. Annals, 277, 280, 407, 440, 443, 448, 452, 460, 462, 639, 668; 3 Hutch. Coll. 496; Mass. State Papers, [1818,] Introduction; Id. 50; 2 Wilson's Works, 62.

5 1 Chalm. Ann. 407; 1 Hutch. Hist. 322; 2 Wilson's Works, 62, 63.

colonies.1 As late as 1757, the general court of Massachusetts admitted the constitutional authority of parliament in the following words: -- "The authority of all acts of parliament, which concern the colonies, and extend to them, is ever acknowledged in all the courts of law, and made the rule of all judicial proceedings in the province. There is not a member of the general court, and we know no inhabitant within the bounds of the government, that ever questioned this authority."2 And in another address in 1761, they declared, that "every act we make, repugnant to an act of parliament extending to the plantations, is ipso facto null and void.3 And at a later period, in 1768, in a circular address to the other colonies, they admitted, "that his majesty's high court of Parliament is the supreme legislative power over the whole empire;" contending, however, that as British subjects they could not be taxed without their own consent.4

§ 189. "In the middle and southern provinces," (we are informed by a most respectable historian,5) "no question respecting the supremacy of parliament in matters of general legislation existed. The authority of such acts of internal regulation, as were made for Amer-

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1 1 Pitk. Hist. 92, 98,181 to 212, 285, 473, 475; 1 Chalm. Annals, 452, 460; 1 Hutch. Hist. 322; 3 Hutch. Hist. 23, 24; Dummer's Defence, 1 American Tracts, 51; Burke's Speech on Taxation in 1774, and on Conciliation in 1775.

2 3 Hutch. Hist. 66; Mass. State Papers,337.

3 3 Hutch. Hist. 92; App. 463; Marshall's Colon.
No. 5, p. 472.

4 Marshall's Colon. ch. 13, p. 371; App. No. 5, p. 472, 473; 1 Pitk. Hist. 186; App. 448, 450, 453, 458.-- This was the ground asserted in Mr. J. Otis's celebrated pamphlet on the Rights of the Colonies. 1 American Tracts, [1766,] 48, 52, 54, 56, 59, 66, 73, 99; and also in Dulany's Considerations on Taxing the Colonies, 1 Amer. Tracts, 14, 18, 36, 52. See also 1 Jefferson's Corresp. 6, 7,12.

5 Marshall's Colon. ch. 13, p. 354. See also 1 Pitk. Hist. 162, 212, 255, 275, 276; 1 Jefferson's Corresp. 6, 7, 104; Id. 117.

ica, as well as those for the regulation of commerce, even by the imposition of duties, provided these duties were imposed for the purpose of regulation, had been at all times admitted. But these colonies, however they might acknowledge the supremacy of parliament in other respects, denied the right of that body to tax them internally." If there were any exceptions to the general accuracy of this statement, they seem to have been too few and fugitive to impair the general result.1 In the charter of Pennsylvania, an express reservation was made of the power of taxation by an act of parliament, though this was argued not to be a sufficient foundation for the exercise of it.2

§190. Perhaps the best general summary of the rights and liberties asserted by all the colonies is contained in the celebrated declaration drawn up by the Congress of the Nine Colonies, assembled at NewYork, in October, 1765.3 That declaration asserted, that the colonists " owe the same allegiance to the crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body, the parliament of Great Britain." That the colonists " are entitled to all the inherent rights and liberties of his [the king's] natural born subjects within the kingdom of Great Britain." "That it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them, but with their own consent, given personally, or by their representatives." That the people of the " colo-

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1 1 Pitk. Hist. 92, 96, 98, 162 to 212; App. No. 4, 448, 450, 453.

2 1 Chalmers's Annals, 638, 658; 2 Amer. Tracts, Rights of Parlia. Vend. 25. 26; 3 Amer. Tracts, App. 51; Id. Franklin's Exam.46

3 The nine states were Massachusetts, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, and South Carolina.

nies are not, and from their local circumstances cannot be represented in the house of commons of Great Britain. That the only representatives of these colonies are persons chosen therein by themselves; and that no taxes ever have been, or can be, constitutionally imposed upon them, but by their respective legislatures. That all supplies of the crown being free gifts from the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution for the people of Great Britain to grant to his majesty the property of the colonies. And that the trial by jury is the inherent and invaluable right of every British subject in these colonies."1

§191. We here observe, that the superintending authority of parliament is admitted in general terms; and that absolute independence of it is not even suggested, although in subsequent clauses certain grievances by the stamp act, and by certain acts levying duties and restraining trade in the colonies, are disapproved of in very strong language.2 In the report of the committee of the same body on the subject of colonial rights, drawn up with great ability, it was stated, " it is acknowledged, that the parliament, collectively considered, as consisting of king, lords, and commons, are the supreme legislature of the whole empire; and as such, have an undoubted jurisdiction over the whole colonies, so far as is consistent with our essential rights, of which also they are and must be the final judges; and even the applications and petitions to the king and parliament to implore relief in our present difficulties, will be an ample recognition of our subjection to, and dependence upon

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1 Marsh. Hist. Colonies, ch. 13, p. 360, 470, 471; 1 Pitk. Hist. 178, 179,180, 446.

2 Marsh. Hist. Colon. p. 471, note 4.

the legislature."1 And they contended, that " there is a vast difference between the exercise of parliamentary jurisdiction in general acts for the amendment of the common law, or even in general regulations of trade and commerce through the empire, and the actual exercise of that jurisdiction in levying external and internal duties and taxes on the colonists, while they neither are, nor can be represented in parliament."2 And in the petition of the same body to the house of commons, there is the following declaration: "We most sincerely recognise our allegiance to the crown, and acknowledge all due subordination to the parliament of Great Britain, and shall always retain the most grateful sense of their assistance and protection."3 But it is added, there is "a material distinction in reason and sound policy between the necessary exercise of parliamentary jurisdiction in general acts for the amendment of the common law, and the regulation of trade and commerce, through the whole empire; and the exercise of that jurisdiction by imposing taxes on the colonies; "4 thus admitting the former to be rightful, while denying the latter.5

§ 192. But after the passage of the stamp act, in 1765, many of the colonies began to examine this subject with more care and to entertain every different opinions, as to parliamentary authority. The doctrines maintained in debate in parliament, as well as the alarming extent, to which a practical application of those doctrines might lead, in drying up the resources, and pros-

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1 Pitk. Hist. 448, 450.

2 1 Pitk. Hist. 453,454.

3 4 Amer. Museum, 89.

4 4 Amer. Museum, 89, 90.

5 The celebrated Declaration of the Rights of the colonies by Congress in 1774 (hereafter cited) contains a summary not essentially different. 1 Journ. of Congress, 27 to 31.

trating the strength and prosperity of the colonies, drove them to a more close and narrow survey of the foundation of parliamentary supremacy. Doubts were soon infused into their minds; and from doubts they passed by an easy transition to a denial, first of the power of taxation, and next of all authority whatever to bind them by its laws.1 One of the most distinguished of our writers2 during the contest admits, that he entered upon the inquiry "with a view and expectation of being able to trace some constitutional line between those cases, in which we ought, and those, in which we ought not to acknowledge the power of parliament over us. In the prosecution of his inquiries he became fully convinced, that such a line does not exist; and that there can be no medium between acknowledging and denying that power in all cases."

§ 193. If other colonies did not immediately arrive at the same conclusion, it was easy to foresee, that the struggle would ultimately be maintained upon the general ground; and that a common interest and a common desire of security, if not of independence, would gradually bring all the colonies to feel the absolute necessity of adhering to it, as their truest and safest defence.3 In 1773, Massachusetts found no difficulty in contending in the broadest terms for an unlimited independence of parliament, and in a bold and decided tone denied all its power of legislation over them. A distinction was taken between subjection to parliament, and allegi-

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1 1 Jefferson's Corresp. 6, 7,12,104 to 116.

2 3 Wilson's Works, 203; Mass. State Papers, 339, 340.

3 3 Wilson's Works, 221, 222, 226, 227, 229, 237, 238; 2 Wilson's Works, 54, 55, 58 to 63; 1 Pitk. Hist. 242, 243, 246, 248, 249, 250; Mass. State Papers, 331, 333, 337, 339, 342 to 364;

4 Debrett's Parl. Debates, 251, &c. note; Marsh. Hist. Colon. ch. 14, p. 412, 483 1 Jefferson's Corresp. 6, 7,12,100,104 to 116.

ance to the crown. The latter was admitted; but the former was resolutely opposed.1 It is remarkable, that the Declaration of Independence, which sets forth our grievances in such warm and glowing colors, does not once mention parliament, or allude to our connexion with it; but treats the acts of oppression therein referred to, as acts of the king, in combination " with others " for the overthrow of our liberties.2

§ 194. The colonies generally did not, however, at this period concur in these doctrines of Massachusetts, and some difficulties arose among them in the discussions on this subject. Even in the declaration of rights 3 drawn up by the continental congress in 1774, and presented to the world, as their deliberate opinion of colonial privileges, while it was asserted, that they were entitled to a free and exclusive power of legislation in their provincial legislatures, in all cases of taxation and internal policy, they admitted from the necessity of the case, and a regard to the mutual interests of both countries, that parliament might pass laws bona fide for the regulation of external commerce, though not to raise a revenue, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members.4 An utter denial of all parliamentary author-

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1 Mass. State Papers, edit. 1818, p. 342 to 365, 383 to 396;1 Pitk.Hist. 250, 251, 453, 454.

2 1 Jefferson's Corresp. 6, 7,12,100 to 116.

3 1 Pitk. Hist. 285, 286, 340, 344; Journ. of Congress, 1774, p. 28, 29; Marsh. Colon. ch. 14, p. 412, 483.

4 As this document is very important, and not easily found, the material clauses will be here extracted. After reciting many acts of grievance, the Declaration proceeds as follows:

" The good people of the several colonies of New-Hampshire, Massachusetts Bay, Rhode-Island and Providence Plantations Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle, Kent, and Sussex on

ity was not generally maintained until after independence was in the full contemplation of most of the colonies.

Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet and sit in general congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties may not be subverted: Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindication their rights and liberties, DECLARE,

"That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS.

"Resolved, N. C. D. 1. That they are entitled to life, liberty, and property; and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

"Resolved, N. C. D. 2. That our ancestors, who first settled these colonies, were, at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural born subjects, within the realm of England.

"Resolved, N. (,. D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

"Resolved, 4. That the foundation of English liberty and of all free government is a right in the people to participate in their legislative council:and as the English colonists arc not represented, and from their local and other circumstances cannot properly be represented in the British parliament, they arc entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner, as has been heretofore used and accustomed. But from the necessity of the case, and a regard to the mutual interests of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country and the commercial benefits of its respective members; excluding every idea of taxation, internal or exter-

§ 195. The principal grounds, on which parliament asserted the right to make laws to bind the colonies in all cases whatsoever, were, that the colonies were originally established under charters from the crown; that the territories were dependencies of the realm, and

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nat, for raising a revenue on the subjects in America without their con- sent.
" Resolved, N. C. D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.
"Resolved, 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.
"Resolved, N. C. D. 7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.
"Resolved, N. C. D. 8. That they have a right peaceably to assemble, consider of their grievances, and petition the king and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.
"Resolved, N. C. D. 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.
"Resolved, N. C. D. 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.
"All, and each of which, the aforesaid deputies in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered, or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures."
The plan of conciliation proposed by the provincial convention of NewYork in 1775, explicitly admits, "that from the necessity of the case Great Britain should regulate the trade of the whole empire for the general benefit of the whole but not for the separate benefit of any particular part." 1 Pitk. Hist. ch. 9, p. 344.

the crown could not by its grants exempt them from the supreme legislative power of parliament, which extended wherever the sovereignty of the crown extended; that the colonists in their new settlements owed the same subjection and allegiance to the supreme power, as if they resided in England, and that the crown had no authority to enter into any compact to impair it; that the legislative power over the colonies is supreme and sovereign; that the supreme power must be entire and complete in taxation, as well as in legislation; that there is no difference between a grant of duties on merchandise, and a grant of taxes and subsidies; that there is no difference between external and internal taxes, and though different in name, they are in effect the same; that taxation is a part of the sovereign power, and that it may be rightfully exercised over those, who are not represented.1
§ 196. The-grounds, on which the colonies resisted the right of taxation by parliament, were, (as we have seen,) that they were not represented in parliament; that they were entitled to all the privileges and immunities of British subjects; that the latter could not be taxed but by their own representatives; that representation and taxation were inseparably connected; that the principles of taxation were essentially distinct from those of legislation; that there is a wide difference between the power of internal and external taxation; that the colonies had always enjoyed the sole right of imposing taxes upon themselves; and that it was essential to their freedom.2

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1 1 Pitk. Hist. 199, 201, 202, 204, 205, 206, 208, 209, 457; Mass. State Papers, 338, 339; 1 Chalm. Annals, 15, 28; 2 Wilson's Law Lect. 54 to 63; Chitty on Prerog. ch. 3; 1 Chalm. Opin. 196 to 225. 2 1 Pitk. Hist.190, 200, 201, 208, 209, 211, 219, 285 to 288, 311, 443,

§ 197. The stamp act was repealed; but within a few years afterwards duties of another sort were laid, the object of which was to raise a revenue from importations into the colonies. These of course became as offensive to the colonies as the prior attempt at internal taxation; and were resisted upon the same grounds of unconstitutionality.1 It soon became obvious, that the great struggle in respect to colonial and parliamentary rights could scarcely be decided otherwise, than by an appeal to arms. Great Britain was resolutely bent upon enforcing her claims by an open exercise of military power; and on the other hand, America scarcely saw any other choice left to her, but unconditional submission, or bold and unmeasured resistance.

446, 447, 448, 453, 458, 459, 467; Mass. State Papers, 344, 345, 346 to 351; 4 Debrett's Parl. Debates, 251, note, &c.; 2 Wilson's Law Lect. 54 to 63.
1 Pitk. Hist. 217,219, &c. ??

BOOK II.
HISTORY OF THE REVOLUTION AND OF THE CONFEDERATION.
CHAPTER I.
THE REVOLUTION.

§ 198. WE have now completed our survey of the origin and political history of the American colonies up to the period of the Revolution. We have examined the more important coincidences and differences in their forms of government, in their laws, and in their political institutions. We have presented a general outline of their actual relations with the parent country; of the rights, which they claimed; of the dependence, which they admitted; and of the controversies, which existed at this period, in respect. to sovereign powers and prerogatives on one side, and colonial rights and liberties on the other.

§ 199. We are next to proceed to an historical review of the origin of that union of the colonies, which led to the declaration of independence; of the effects of that event, and of the subsequent war upon the political character and rights of the colonies; of the formation and adoption of the articles of confederation; of the sovereign powers antecedently exercised by the continental congress; of the powers delegated by the

confederation to the general government; of the causes of the decline and fall of the confederation; and finally, of the establishment of the present constitution of the United States. Having disposed of these interesting and important topics, we shall then be prepared to enter upon the examination of the details of that constitution, which has justly been deemed one of the most profound efforts of human wisdom, and which (it is believed) will awaken our admiration, and warm our affection more and more, as its excellencies are unfolded in a minute and careful survey.

§ 200. No redress of grievances having followed upon the many appeals made to the king, and to parliament, by and in behalf of the colonies, either conjointly or separately, it became obvious to them, that a closer union and co-operation were necessary to vindicate their rights, and protect their liberties. If a resort to arms should be indispensable, it was impossible to hope for success, but in united efforts. If peaceable redress was to be sought, it was as clear, that the voice of the colonies must be heard, and their power felt in a national organization. In 1774 Massachusetts recommended the assembling of a continental congress to deliberate upon the state of public affairs; and according to her recommendation, delegates were appointed by the colonies for a congress, to be held in Philadelphia in the autumn of the same year. In some of the legislatures of the colonies, which were then in session, delegates were appointed by the popular, or representative branch; and in other cases they were appointed by conventions of the people in the colonies.1 The con-

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1 1 Journ. of Cong. 2, 3. &c. 27, 45; 9 Dane's Abridg. App. § 5, p. 16, § 10, p. 21.

gress of delegates (calling themselves in their more formal acts "the delegates appointed by the good people of these colonies") assembled on the 4th of September, 1774;1 and having chosen officers, they adopted certain fundamental rules for their proceedings.

§ 201. Thus was organized under the auspices, and with the consent of the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated in the colonies, the first general or national government, which has been very aptly called "the revolutionary government," since in its origin and progress it was wholly conducted upon revolutionary principles.2 The congress, thus assembled, exercised de facto and de jure a sovereign authority; not as the delegated agents of the governments de facto of the colonies, but in virtue of original powers derived from the people. The revolutionary government, thus formed, terminated only, when it was regularly superceded by the confederated government under the articles finally ratified, as we shall hereafter see, in 1781.3

§ 202. The first and most important of their acts was a declaration, that in determining questions in this congress, each colony or province should have one vote; and this became the established course during the revolution. They proposed a general congress to be held at the same place in May, in the next year. They appointed committees to take into consideration their rights and grievances. They passed resolutions, that "after the 1st of December, 1774, there shall be no importation into

1 All the States were represented, except Georgia.
2 9 Dane's Abridg. App. P. 1, § 5, p. 16, § 13, p. 23.
3 Sergeant on Const Introd. 7, 8, (2d ed.)

British America from Great Britain or Ireland of any goods, &c. or from any other place, of any such goods, as shall have been exported from Great Britain or Ireland;" that "after the 10th of September, 1775, the exportation of all merchandise, &c. to Great Britain, Ireland, and the West Indies ought to cease, unless the grievances of America are redressed before that time."1 They adopted a declaration of rights, not differing in substance from that of the congress of 1765,2 and affirming, that the respective colonies are entitled to the common law of England and the benefit of such English statutes, as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their local and other circumstances. They also, in behalf of themselves and their constituents, adopted and signed certain articles of association, containing an agreement of non-importation, non-exportation, and non-consumption in order to carry into effect the preceding resolves; and also an agreement to discontinue the slave-trade. They also adopted addresses to the people of England, to the neighbouring British colonies, and to the king, explaining their grievances, and requesting aid and redress.

§ 203. In May, 1775, a second congress of delegates met from all the states.3 These delegates were chosen, as the preceding had been, partly by the popular branch of the state legislatures, when in session; but principally by conventions of the people in the various states.4 In a few instances the choice by the legislative body was confirmed by that of a convention,

1 1 Jour. of Cong. 21.
2 See ante, note, p. 179.
3 Georgia did not send delegates until the 15th of July, 1775, who did not take their seats until the 13th of September.
4 See Penhallow v. Doane, 3 Dall. 54, and particularly the opinions of Iredell J. and Blair J. on this point. Journals of 1775, p. 73 to 79.

and e converso.1 They immediately adopted a resolution, prohibiting all exportations to Quebec, Nova-Scotia, St. Johns, Newfoundland, Georgia, except St. Johns Parish, and East and West Florida.2 This was followed up by a resolution, that the colonies be immediately put into a state of defence. They prohibited the receipt and negotiation of any British government bills, and the supply of any provisions or necessaries for the British army and navy in Massachusetts, or transports in their service.3 They recommended to Massachusetts to consider the offices of governor and lieutenant governor of that province vacant, and to make choice of a council by the representatives in assembly, by whom the powers of government should be exercised, until a governor of the king's appointment should consent to govern the colony according to its charter. They authorized the raising of continental troops, and appointed General Washington commander in chief, to whom they gave a commission in the name of the delegates of the united colonies. They had previously authorized certain military measures, and especially the arming of the militia of New-York, and the occupation of Crown Point and Ticonderoga They authorized the emission of two millions of dollars in bills of credit, pledging, the colonies to the redemption thereof. They framed rules for the government of the army. They published a solemn declaration of the causes of their taking up arms, an address to the king, entreating a change of measures, and an address to the people of Great Britain, requesting their aid, and admonishing them of the threatening evils of a separa-

1 Journals of Congress of 1775, p. 73 to 79.
2 Journals of Congress of 1775, p. 103.
3 Journals of Congress of 1775, p. 115.

tion. They erected a general post-office, and organized the department for all the colonies. They apportioned the quota, that each colony should pay of the bills emitted by congress.1

§ 204. At a subsequent adjournment, they authorized the equipment of armed vessels to intercept supplies to the British, and- the organization of a marine corps. They prohibited all exportations, except from colony to colony under the inspection of committees. They recommended to New-Hampshire, Virginia, and South-Carolina, to call conventions of the people to establish a form Or government.2 They authorized the grant of commissions to capture armed vessels and transports in the British service; and recommended the creation of prize courts in each colony,

reserving a right of appeal to congress.3 They adopted rules for the regulation of the navy, and for the division of prizes and prize money.4 They denounced, as enemies, all, who should obstruct or discourage the circulation of bills of credit. They authorized further emissions of bills of credit, and created two military departments for the middle and southern colonies. They authorized general reprisals, and the equipment of private armed vessels against British vessels and property.5 They organized a general treasury department. They authorized the exportation and importation of all goods to and from foreign countries, not subject to Great Britain, with certain exceptions; and prohibited the importation of slaves; and declared a forfeiture of all

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1 Journals of Congress of 1775, p. 177.
2 Journals of Congress of 1775, p. 231, 235, 279.
3 Journals of Congress of 1775, p. 259, 260, &c.
4 Journals of Congress of 1776, p. 13.
5 Journals of Congress of 1776, p. 106, 107,118,119.

prohibited goods.1 They recommended to the respective assemblies and conventions of the colonies, where no government, sufficient to the exigencies, had been established, to adopt such government, as in the opinion of the representatives should best conduce to the happiness and safety of their constituents in particular, and America in general, and adopted a preamble, which stated, " that the exercise of every kind of authority under the crown of Great Britain should be totally suppressed.2

§ 205. These measures, all of which progressively pointed to a separation from the mother country, and evinced a determination to maintain, at every hazard, the liberties of the colonies, were soon followed by more decisive steps. On the 7th of June, 1776, certain resolutions respecting independency were moved, which were referred to a committee of the whole. On the 10th of June it was resolved; that a committee be appointed to prepare a declaration, " that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connexion between them and the state of Great Britain is, and ought to be, dissolved."3 On the 11th of June a committee was appointed to prepare and digest the form of a confederation to be entered into between the colonies, and also a committee to prepare a plan of treaties to be proposed to foreign powers.4 On the 28th of June the committee appointed to prepare a Declaration of Independence brought in a draft. On the 2d of July, congress

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1 Journals of Congress of 1776, p. 122, 123.
2 Journals of Congress of 1776, p. 166, 174.
3 Journals of Congress of 1776, p. 205, 206.
4 Journals of Congress of 1776, p. 207.

adopted the resolution for Independence; and on the 4th of July they adopted the Declaration of Independence; and thereby solemnly published and declared, "That these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connexion between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things, which independent states may of right do."

§ 206. These minute details have been given, not merely, because they present an historical view of the actual and slow progress towards independence; but because they give rise to several very important considerations respecting the political rights and sovereignty of the several colonies, and of the union, which was thus spontaneously formed by the people of the united colonies.

§ 207. In the first place, antecedent to the Declaration of Independence, none of the colonies were, or pretended to be sovereign states, in the sense, in which the term "sovereign" is sometimes applied to states.1 The term "sovereign" or "sovereignty" is used in different senses, which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions. By "sovereignty" in its largest sense is meant, supreme, absolute, uncontrollable power, the jus summi imperii,2 the absolute right to govern. A state or nation is a body politic, or society of men,

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1 3 Dall. 110. Per Blair J.; 9 Dane's Abridg. Appx. § 2, p. 10, § 3, p. 12, § 5, p. 16.
2 1 Bl. Comm. 49; 2 Dall. 471. Per Jay C. J.

united together for the purpose of promoting their mutual safety and advantage by their combined strength.1 By the very act of civil and political association, each citizen subjects himself to the authority of the whole; and the authority of all over each member essentially belongs to the body politic.2 A state, which possesses this absolute power, without any dependence upon any foreign power or state, is in the largest sense a sovereign state.3 And it is wholly immaterial, what is the form of the government, or by whose hands this absolute authority is exercised. It may be exercised by the people at large, as in a pure democracy; or by a select few, as in an absolute aristocracy; or by a single person, as in an absolute monarchy.4 But "sovereignty" is often used in a far more limited sense, than that, of which we have spoken, to designate such political powers, as in the actual organization of the particular state or nation are to be exclusively exercised by certain public functionaries, without the control of any superior authority. It is in this sense, that Blackstone employs it, when he says, that it is of "the very essence of a law, that it is made by the supreme power. Sovereignty and legislature are, indeed, convertible terms; one cannot subsist without the other."5 Now, in every limited government the power of legislation is, or at least may be, limited at the will of the nation; and therefore the legislature is not in an absolute sense sovereign. It is in the same sense, that Blackstone says, "the law ascribes to the

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1 Vattel, B. 1, ch. 1, § 1; 2 Dall. 455. Per Wilson J.
2 Vattel, B. 1, ch. 1, § 2.
3 2 Dall. 456, 457. Per Wilson J.
4 Vattel, B. 1, ch. 1, § 2, 3.
5 1 Bl. Comm. 16. See also 1 Tucker's Black. Comm. App. note A., a commentary on this clause of the Author's text.

king of England the attribute of sovereignty or preeminence,"1 because, in respect to the powers confided to him, he is dependent on noman, and accountable to no man, and subjected to no superior jurisdiction. Yet the king of England cannot make a law; and his acts, beyond the powers assigned to him by the constitution, are utterly void.

§ 208. In like manner the word "state" is used in various senses. In its most enlarged sense it means the people composing a particular nation or community. In this sense the state means the whole people, united into one body politic; and the state, and the people of the state, are equivalent expressions.2 Mr. Justice Wilson, in his Law Lectures, uses the word "state" in its broadest sense. "In free states," says he, "the people form an artificial person, or body politic, the highest end noblest, that can be known. They form that moral person, which in one of my former lectures,3 I described, as a complete body of free, natural persons, united together for their common benefit; as having an understanding and a will; as deliberating, and resolving, and acting; as possessed of interests, which it ought to manage; as enjoying rights, which it ought to maintain; and as lying under obligations, which it ought to perform. To this moral person, we assign, by way of eminence, the dignified appellation of STATE."4 But there is a more limited sense, in which the word is often used, where it expresses merely the

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1 1 Bl. Comm. 241.
2 Penhallow v. Doane, 1 Peters's Cond. Rep. 37, 38, 39; 3 Dall. R. 93, 94. Per Iredell J. Chisholm v. Georgia, 2 Dall. 455. Per Wilson J. S. C. 2 Cond. Rep. 656, 670; 2 Wilson's Lect. 120; Dane's Appx. § 50, p. 63.
3 1 Wilson's Lect. 304, 305.
4 2 Wilson's Lect. 120, 121.

positive or actual organization of the legislative, executive, or judicial powers.1 Thus, the actual government of a state is frequently designated by the name of the state. We say, the state has power to do this or that; the state has passed a law, or prohibited an act, meaning no more than, that the proper functionaries, organized for that purpose, have power to do the act, or have passed the law, or prohibited the particular action. The sovereignty of a nation or state, considered with reference to its association, as a body politic, may be absolute and uncontrollable in all respects, except the limitations, which it chooses to impose upon itself.2 But the sovereignty of the government, organized within the state, may be of a very limited nature. It may extend to few, or to many objects. It may be unlimited, as to some; it may be restrained, as to others. To the extent of the power given, the government may be sovereign, and its acts may he deemed the sovereign acts of the state. Nay the state, by which we mean the people composing the state, may divide its sovereign powers among various functionaries, and each in the limited sense would be sovereign in respect to the powers, confided to each; and dependent in all other cases.3 Strictly speaking, in our republican

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1 Mr. Madison, in his elaborate Report in the Virginia legislature in January, 1800, adverts to the different senses, in which the word "state" is used. He says, "It is indeed true, that the term "states" is sometimes used in a vague sense, and sometimes in different senses, according to the subject, to which it is applied. Thus it sometimes means the separate sections of territory, occupied by the political societies within each; sometimes the particular governments established by those societies; sometimes those societies, as organized into those particular governments; and lastly, it means the people, composing those political societies in their highest sovereign capacity." 2 2 Dall. 433; Iredell J. Id. 455, 456. Per Wilson J.
3 3 Dall. 93. Per Iredell J. 2 Dall. 455, 457. Per Wilson J.

forms of government, the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state.1

§ 209. There is another mode, in which we speak of a state as sovereign, and that is in reference to foreign states. Whatever may be the internal organization of the government of any state, if it has the sole power of governing itself and is not dependent upon any foreign state, it is called a sovereign state; that is, it is a state having, the same rights, privileges, and powers, as other independent states. It is in this sense, that the term is generally used in treatises and discussions on the law of nations. A full consideration of this subject will more properly find place in some future page.2

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1 2 Dall. 471, 472. Per Jay C. J.
Mr. J. Q. Adams, in his Oration on the 4th of July, 1831, published after the preparation of these Commentaries, uses the following language: " It is not true, that there must reside in all governments an absolute, uncontrollable, irresistible, and despotic power; nor is such power in any manner essential to sovereignty. Uncontrollable power exists in no government on earth. The sternest despotisms in any region and in every age of the world, are and have been under perpetual control. Unlimited power belongs not to man; and rotten will be the foundation of every government, leaning upon such a maxim for its support. Least of all can it be predicated of a government, professing to be founded upon an original compact. The pretence of an absolute, irresistible, despotic power, existing in every government somewhere, is incompatible with the first principles of natural right."
2 Dr. Rush, in a political communication, in 1786, uses the term "sovereignty" in another, and somewhat more limited sense.* He says, " The people of America have mistaken the meaning of the word ' sovereignty.' Hence each state pretends to be sovereign. In Europe it is applied to those states, which possess the power of making war and peace of forming treaties, and the like. As this power belongs only to congress, they are the only sovereign power in the United States. We commit a similar mistake in our ideas of the word 'independent.' No * 1 Amer. Museum, 8, 9.

§ 210. Now it is apparent, that none of the colonies before the Revolution were, in the most large and general sense, independent, or sovereign communities. They were all originally settled under, and subjected to the British crown.1 Their powers and authorities were derived from, and limited by their respective charters. All, or nearly all, of these charters controlled their legislation by prohibiting them from making laws repugnant, or contrary to those of England. The crown, in many of them, possessed a negative upon their legislation, as well as the exclusive appointment of their superior officers; and a right of revision, by way of appeal, of the judgments of their courts.2 In their most solemn declarations of rights, they admitted themselves bound, as British subjects, to allegiance to the British crown; and as such, they claimed to be entitled to all the rights, liberties, and immunities of free born British subjects. They denied all power of taxation, except by their own colonial legislatures; but at the same time they admitted themselves bound by acts of the British parliament for the regulation of external commerce, so as to secure the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members.3 So far, as respects foreign states, the colonies were not, in the sense of the laws of nations,

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individual state, as such, has any claim to independence. She is independent only in a union with her sister states in congress " Dr. Barton, on the other hand, in a similar essay, explains the operation of the system of the confederation in the manner, which has been given in the text.* 1 2 Dall. 471. Per Jay C. J.
2 See Marshall's Hist. of Colonies, p. 483;Journals of Congress, 1774, p. 29.
3 Journal of Congress 1774 p. 27, 29, 38, 39; 1775, p. 152, 156; Marshall's Hist. of Colonies, ch. 14 p. 412, 483.
*** 1 Amer. Museum, 13, 14**

sovereign states; but mere dependencies of Great Britain. They could make no treaty, declare no war, send no ambassadors, regulate no intercourse or commerce, nor in any other shape act, as sovereigns, in the negotiations usual between independent states. In respect to each other, they stood in the common relation of British subjects; the legislation of neither could be controlled by any other; but there was a common subjection to the British crown.1 If in any sense they might claim the attributes of sovereignty, it was only in that subordinate sense, to which we have alluded, as exercising within a limited extent certain usual powers of sovereignty. They did not even affect to claim a local allegiance.2

§ 211. In the next place, the colonies did not severally act for themselves, and proclaim their own independence. It is true, that some of the states had previously formed incipient governments for themselves; but it was done in compliance with the recommendations of congress.3 Virginia, on the 29th of June, 1776, by a convention of delegates, declared " the government of this country, as formerly exercised under the crown of Great Britain, totally dissolved;" and proceeded to form a new constitution of government. New-Hampshire also formed a government, in December, 1775, which was manifestly intended to be temporary, "during (as they said) the unhappy and unnatural contest with Great Britain."4 New-Jersey, too, established a frame

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1 1 Chalmers's Annals, 686, 678; 2 Dall. 470. Per Jay C. J.

2 Journal of Congress, 1776, p. 282; 2 Haz. Coll. 591; Marsh. Colonies, App. No. 3, p. 469.

3 Journal of Congress, 1775, p. 115, 231, 235, 279; 1 Pitk. Hist. 351, 355; Marsh. Colon. ch. 14. p. 441, 447; 9 Hening. Stat. 112, 113; 9 Dane's Abridg. App. § 5, p. 16).

4 2 Belk. N. Hamp. ch. 25, p. 306, 308, 310; 1 Pitk. Hist. 351, 355.

of government, on the 2d of July, 1776; but it was expressly declared, that it should be void upon a reconciliation with Great Britain.1 And South Carolina, in March, 1776, adopted a constitution of government; but this was, in like manner, " established until an accommodation between Great Britain and America could be obtained."2 But the declaration of the independence of all the colonies was the united act of all. It was "a declaration by the representatives of the United States of America in congress assembled;" "by the delegates appointed by the good people of the colonies," as in a prior declaration of rights they were called.3 It was not an act done by the state governments then organized; nor by persons chosen by them. It was emphatically the act of the whole people of the united colonies, by the instrumentality of their representatives, chosen for that, among other purposes.4 It was an act not competent to the state governments, or any of them, as organized under their charters, to adopt. Those charters neither contemplated the case, nor provided for it. It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness. So the declaration of independence treats it. No state had presumed of itself to form a new government, or to provide for the exigencies of the times, without consulting congress on the subject; and when they acted, it was in pursuance of the recommendation

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1 Stokes's Hist. Colon. 51,75.

2 Stokes's Hist. Colon. 105; 1 Pitk. Hist. 355.

3 Journal, 1776, p. 241; Journal, 1774, p. 27, 45.

4 2. Dall. 470, 471. Per Jay C. J.; 9 Dane's Abridg. App. § 12, 13, p. 23, 24.

of congress. It was, therefore, the achievement of the whole for the benefit of the whole. The people of the united colonies made the united colonies free and independent states, and absolved them from all allegiance to the British crown. The declaration of independence has accordingly always been treated, as an act of paramount and sovereign authority, complete and perfect per se, and ipso facto working an entire dissolution of all political connexion with and allegiance to Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.1

§ 212. In the debates in the South Carolina legislature, in January 1788, respecting the propriety of calling, a convention of the people to ratify or reject the constitution, a distinguished statesman2 used the following language: "This admirable manifesto (i. e. the declaration of independence) sufficiently refutes the doctrine of the individual sovereignly and independence of the several states. In that declaration the several states are not even enumerated; but after reciting, in nervous language, and with convincing arguments our right to independence, and the tyranny which compelled us to assert it, the declaration is made in the following, words: "We, therefore, the representatives of the United States, &c. do, in the name, &c. of the good people of these colonies, solemnly publish, &c. that these

united colonies are, and of right ought to be, free and independent states.' The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots, who framed this declaration. The several states are not even mentioned by name in any part, as

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1 2 Dallas R. 470.

2 Mr. Charles Cotesworth Pinckney.

if it was intended to impress the maxim on America, that our freedom and independence arose from our union, and that without it we could never be free or independent. Let us then consider all attempts to weaken this union by maintaining, that each state is separately and individually independent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distresses."1

§ 213. In the next place we have seen, that the power to do this act was not derived from the state governments; nor was it done generally with their cooperation. The question then naturally presents itself, if it is to be considered as a national act, in what manner did the colonies become a nation, and in what manner did congress become possessed of this national power? The true answer must be, that as soon as

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1 Debates in South Carolina, 1788, printed by A. E. Miller, Charleston, 1831, p. 43, 44.--Mr. Adams, in his oration on the 4th of July, 1831, which is valuable for its views of constitutional principles, insists upon the same doctrine at considerable length. Though it has been published since the original preparation of these lectures, I gladly avail myself of an opportunity to use his authority in corroboration of the same views "The union of the colonies had preceded this declaration, [of independence,] and even the commencement of the war. The declaration was joint, that the united colonies were free and independent states, but not that any one of them was a free and independent state, separate from the rest." "The declaration of independence was a social compact, by which the whole people covenanted with each citizen, and each citizen with the whole people, that the united colonies were, and of right ought to be free and independent states. To this compact union was as vital, as freedom or independence." "The declaration of independence announced the severance of the thirteen united colonies from the rest of the British Empire, and the existence of their people from that day forth as an independent nation. The people of all the colonies, speaking by their representatives, constituted themselves one moral person before the face of their fellow men." "The declaration of independence was not a declaration of liberty merely acquired, nor was it a form of government. The people of the colonies were already free, and their forms of government were various. They were all colonies of a monarchy. The king of Great Britain was their common sovereign."

congress assumed powers and passed measures, which were in their nature national, to that extent the people, from whose acquiescence and consent they took effect, must be considered as agreeing to form a nation.1 The congress of 1774, looking at the general terms of the commissions, under which the delegates were appointed, seem to have possessed the power of concerting such measures, as they deemed best, to redress the grievances, and preserve the rights and liberties of all the colonies. Their duties seem to have been principally of an advisory nature; but the exigencies of the times led them rather to follow out the wishes and objects of their constituents, than scrupulously to examine the words, in which their authority was communicated.2 The congress of 1775 and 1776 were clothed with more ample powers, and the language of their commissions generally was sufficiently broad to embrace the right to pass measures of a national character and obligation. The caution necessary at that period of the revolutionary struggle rendered that language more guarded, than the objects really in view would justify; but it was foreseen, that the spirit of the people would eagerly second every measure adopted to further a general union and resistance against the British claims. The congress of 1775 accordingly assumed at once (as we have seen) the exercise of some of the highest functions of sovereignty. They took measures for national defence and resistance; they followed up the prohibitions upon trade and intercourse with Great Britain; they raised a national army and navy, and authorized limited national hostilities against Great Britain; they raised money, emitted bills of credit, and contracted debts upon national account;

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1 3 Dall. R. 80, 81, 90, 91, 109, 110, 111, 117.

2 3 Dall. R. 91.

they established a national post-office; and finally they authorized captures and condemnation of prizes in prize courts, with a reserve of appellate jurisdiction to themselves.

§ 214. The same body, in 1776, took bolder steps, and exerted powers, which could in no other manner be justified or accounted for, than upon the supposition, that a national union for national purposes already existed, and that the congress was invested with sovereign power overall the colonies for the purpose of preserving the common rights and liberties of all. They accordingly authorized general hostilities against the persons and property of British subjects; they opened an extensive commerce with foreign countries, regulating the whole subject of imports and exports; they authorized the formation of new governments in the colonies; and finally they exercised the sovereign prerogative of dissolving the allegiance of all colonies to the British crown. The validity of these acts was never doubted, or denied by the people. On the contrary, they became the foundation, upon which the superstructure of the liberties and independence of the United States has been erected. Whatever, then, may be the theories of ingenious men on the subject, it is historically true, that before the declaration of independence these colonies were not, in any absolute sense, sovereign states; that that event did not find them or make them such; but that at the moment of their separation they were under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all the states.1

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1 This whole subject is very amply discussed by Mr. Dane in his Appendix to the 9th volume of his Abridgment of the Laws; and many of

§ 215: From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation de facto, having a general government over it created, and acting by the general consent of the people of all the colonies. The powers of that government were not, and indeed could not be well defined. But still its exclusive sovereignty, in many cases, was firmly established; and its controlling power over the states was in most, if not in all national measures, universally admitted.1 The articles of confederation, of which we shall have occasion to speak more hereafter, were not prepared or adopted by congress until November, 1777;2 they were not signed or ratified by any of the states until July, 1778; and they were not ratified, so as to become obligatory upon all the states, until March, 1781. In the intermediate time, congress continued to exercise the powers of a general government, whose acts

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his views coincide with those stated in the text. The whole of that Appendix is worthy of the perusal of every constitutional lawyer, even though he might differ from some of the conclusions of the learned author. He will there find much reasoning from documentary evidence of a public nature, which has not hitherto been presented in a condensed or accurate shape.

Some interesting views of this subject are also presented in President Monroe's Message on Internal Improvements, on the 4th of May, 1822, appended to his Message respecting the Cumberland Road. See, especially, pages 8 and 9. When Mr. Chief Justice Marshall, in Ogden v. Gibbons,(9 Wheat. R. 187,) admits, that the states, before the formation of the constitution, were sovereign and independent, and were connected with each other only by a league, it is manifest, that he uses the word " sovereign " in a very restricted sense. Under the confederation there were many limitations upon the powers of the states.

1 See Penhallow v. Doane, 3 Dall. R. 54; Ware v. Hylton, 3 Dall. 199, per Chase J. See the Circular Letter of Congress, 13th Sept. 1779; 5 Jour. Cong. 341, 348, 349.

2 Jour. of Cong. 1777, p. 502.

were binding on all the states. And though they constantly admitted the states to be "sovereign and independent communities;"1 yet it must be obvious, that the terms were used in the subordinate and limited sense already alluded to; for it was impossible to use them in any other sense, since a majority of the states could by their public acts in congress control and bind the minority. Among the exclusive powers exercised by congress, were the power to declare war and make peace; to authorize captures; to institute appellate prize courts; to direct and control all national, military, and naval operations; to form alliances, and make treaties; to contract debts, and issue bills of credit upon national account. In respect to foreign governments, we were politically known as the United States only; and it was in our national capacity, as such, that we sent and received ambassadors, entered into treaties and alliances, and were admitted into the general community of nations, who might exercise the right of belligerents, and claim an equality of sovereign powers and prerogatives.2

§ 216. In confirmation of these views, it may not be without use to refer to the opinions of some of our most eminent judges, delivered on occasions, which required an exact examination of the subject. In Chisholm's Executors v. The State of Georgia,(3 Dall. 419, 470,3) Mr. Chief Justice Jay, who was equally distinguished as a

revolutionary statesman and a general jurist, expressed himself to the following effect: "The revolution, or rather the declaration of independence, found the people already united for general purposes, and at

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1 See Letter of 17th Nov. 1777, by Congress, recommending the articles of confederation; Journal of 1777, p.513, 514.

2 1 Amer. Museum, 15; I Kent. Comm. 197, 198, 199.

3 S. C. 1 Peters's Cond. R. 635.

the same time providing for their more domestic concerns by state conventions, and other temporary arrangements. From the crown of Great Britain the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states, within whose limits they were situated, but to the whole people. On whatever principle this opinion rested, it did not give way to the other; and thirteen sovereignties were considered as emerging from the principles of the revolution, combined by local convenience and considerations. The people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly." In Penhallow v. Doane, (3 Dall. R. 54,1) Mr. Justice Patterson (who was also a revolutionary statesman) said, speaking of the period before the ratification of the confederation: "The powers of congress were revolutionary in their nature, arising out of events adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme, and controlling council of the nation, the centre of the union, the centre of force, and the sun of the political system. Congress raised armies, fitted out a navy, and prescribed rules for their government, &c. &c. These high acts of sovereignty were submitted to, acquiesced in, and approved of by the people of America, &c. &c. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert, or break the violence of the gathering

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1 S. C. 1 Peters's Cond. Rep. 21.

storm. They accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul, &c. &c. The truth is, that the states, individually, were not known, nor recognized as sovereign by foreign nations, nor are they now. The states collectively under congress, as their connecting point or head, were acknowledged by foreign powers, as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested." In Ware v. Hylton, (3 Dall. 199,1) Mr. Justice Chase (himself also a revolutionary statesman) said,: "It has been inquired, what powers congress possessed from the first meeting in September, 1774, until the ratification of the confederation on the 1st of March, 1781. It appears to me, that the powers of congress during that whole period were derived from the people they represented, expressly given through the medium of their state conventions or state legislatures; or, that after they were exercised, they were impliedly ratified by the acquiescence and obedience of the people, &c. The powers of congress originated from necessity, and arose out of it, and were only limited by events; or, in other words, they were revolutionary in their nature. Their extent depended on the exigencies and necessities of public affairs. I entertain this general idea, that the several states retained all internal sovereignty; and that congress properly possessed the rights of external sovereignty. In deciding on the powers of congress, and of the several states before the confederation, I see but one safe rule, namely, that all the powers actually exer-

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1 S. C. 1 Peters's Cond. R. 99.

cised by congress before that period were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the state conventions or state legislatures were also rightfully exercised, on the same presumption of authority from the people."1

§ 217. In respect to the powers of the continental congress exercised before the adoption of the articles of confederation, few questions were judicially discussed during the revolutionary contest; for men had not leisure in the heat of war nicely to scrutinize or weigh such subjects; inter arma silent leges. The people, relying on the wisdom and patriotism of congress, silently acquiesced in whatever authority they assumed. But soon after the organization of the present government, the question was most elaborately discussed before the Supreme Court of the United States, in a case calling for an exposition of the appellate jurisdiction of congress in prize causes before

the ratification of the confederation.2 The result of that examination was, as the opinions already cited indicate, that congress, before the confederation, possessed, by the consent of the people of the United States, sovereign and supreme powers for national purposes; and among others, the supreme powers of peace and war, and, as an incident, the right of entertaining appeals in the last resort in prize causes, even in opposition to state legislation. And that the actual powers exercised by congress, in

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1 See also 1 Kent. Comm. Lect. 10, p. 196; President Monroe's Exposition and Message, 4th of May, 1822, p. 8, 9, 10, 11.

2 Penhallow v. Doane, 3 Dall. 54, 80, 83, 90, 91, 94, 109, 110, 111, 112, 117; Journals of Congress, March, 1779, p. 86 to 88; 1 Kent. Comm. 198, 199.

respect to national objects, furnished the best exposition of its constitutional authority, since they emanated from the representatives of the people, and were acquiesced in by the people.

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§ 218. THE union, thus formed, grew out of the exigencies of the times; and from its nature and objects might be deemed temporary, extending only to the maintenance of the common liberties and independence of the states, and to terminate with the return of peace with Great Britain, and the accomplishment of the ends of the revolutionary contest. It was obvious to reflecting minds, that such a future separation of the states into absolute, independent communities with no mutual ties, or controlling national government, would be fraught with the most imminent dangers to their common safety and peace, and expose them not only to the chance of re-conquest by Great Britain, after such separation in detached contests, but also to all the hazards of internal warfare and civil dissensions. So, that those, who had stood side by side in the common cause against Great Britain, might then, by the intrigues of their enemies, and the jealousies always incident to neighbouring nations, become instruments, in the hands of the ambitious abroad, or the corrupt at home, to aid in the mutual destruction of each other; and thus all successively fall, the victims of a domestic or foreign tyranny. Such considerations could not but have great weight with all honest and patriotic citizens, independent of the real blessings, which a permanent union could not fail to secure throughout all the states.

§ 219. It is not surprising, therefore, that a project, which, even in their colonial state, had been so often attempted by some of them to guard themselves against

the evils incident to their political weakness and their distance from the mother country, and which had been so often defeated by the jealousy of the crown, or of the colonies,1 should have occurred to the great and wise men, who assembled in the Continental. Congress at very early period.

§ 220. It will be an instructive and useful lesson to us to trace historically the steps, which led to the formation and final adoption of the articles of confederation and perpetual union betweenthe United States. It will be instructive, by disclosing the real difficulties attendant upon such a plan, even in times, when the necessity of it was forced upon the minds of men not only by common dangers, but by common protection; by common feelings of affection, and by common efforts of defence. It will be useful, by moderating the ardour of inexperienced minds, which are apt to imagine, that the theory of government is too plain, and the principles, on which it should be formed, too obvious, to leave much doubt for the exercise of the wisdom of statesmen, or the ingenuity of speculatists. Nothing is indeed more difficult to forsee, than the practical operation of given powers, unless it be the practical operation of restrictions, intended to control those powers. It is a mortifying truth, that if the possession of power sometimes leads to mischievous abuses, the absence of it also sometimes produces a political debility, quite as ruinous in its consequences to the great objects of civil government.

§ 221. It is proposed, therefore, to go into an historical review of the manner of the formation and adoption of the articles of confederation. This will be followed by an exposition of the general provisions and distributions

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1 2 Haz. Coll. 1, &c.; Id. 521; 2 Holmes's Annals, 55 and note; Marshall Colon. 284, 285, 464; 1 Kent Comm. 190, 191.

of power under it. And this will naturally lead us to a consideration of the causes of its decline and fall; and thus prepare the way to a consideration of the measures, which led to the origin and final adoption of the present constitution of the United States.1

§ 222. On the 11th of June, 1776, the same day, on which the committee for preparing the declaration of independence was appointed, congress resolved, that "a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies; " and on the next day a committee was accordingly appointed, consisting of a member from each colony.2 Nearly a year before this period, (viz. on the 21st of July, 1775,) Dr. Franklin had submitted to congress a sketch of articles of confederation, which does not, however, appear to have been acted on. These articles contemplated a union, until a reconciliation with Great Britain, and on failure thereof, the confederation to be perpetual.

§ 223. On the 12th of July, 1776, the committee, appointed to prepare articles of confederation, presented a draft,3 which was in the hand-writing of Mr. Dickenson, one of the committee, and a delegate from Pennsylvania The draft, so reported, was debated from the 22d to the 31st of July, and on several days between the 5th and 20th of August, 1776. On this last day, congress, in

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1 The first volume of the United States Laws, published by Bioren & Dunne, contains a summary view of the proceedings in Congress for the establishment of the confederation, and also of the convention for the establishment of the constitution of the United States. And the whole proceedings are given at large in the first volume of the Secret Journals, published by Congress in 1821, p. 283 et seq.

2 Journals of 1776, p. 207.

3 The draft of Dr. Franklin, and this draft, understood to be by Mr. Dickenson, were never printed, until the publication of the Secret Journals by order of Congress in 1821, where they will be found under pages 283 and 290.

committee of the whole, reported a new draft, which was ordered to be printed for the use of the members.1

§ 224. The subject seems not again to have been touched until the 8th of April, 1777, and the articles were debated at several times between that time and the 15th Or November of the same year. On this last day the articles were reported with sundry amendments, and finally adopted by congress. A committee was then appointed to draft, and they accordingly drafted, a circular letter, requesting the states respectively to authorize their delegates in congress to subscribe the same in behalf Or the state. The committee remark in that letter, "that to form a permanent union, accommodated to the opinions 'and wishes of the delegates of so many states, differing in habits, produce, commerce, and internal police, was found to be a work, which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish. Hardly is it to be expected, that any plan, in the variety of provisions essential to our union, should exactly correspond with the maxims and political views of every particular state. Let it be remarked, that after the most careful inquiry and the fullest information, this is proposed, as the best, which could be adopted to the circumstances of all, and as that alone, which affords any tolerable prospect of general ratification. Permit us, then, (add the committee,) earnestly to recommend these articles to the immediate and dispassionate attention of the legislatures of the respective states. Let them be candidly reviewed under a sense of the difficulty of combining, in one general system, the various sentiments and interests of a continent, divided into so many sovereign and independent communities, under

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1 Secret Journals, 1776, p. 304.

a conviction of the absolute necessity of uniting all our councils, and all our strength, to maintain and defend our common liberties, Let them be examined with a liberality becoming, brethren and fellow citizens, surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being for ever bound, and connected together, by ties the most intimate and indissoluble. and finally, let them be adjusted with the temper and magnanimity of wise and patriotic legislators, who, while they are concerned for the prosperity of their own more immediate circle, are capable of rising superior to local attachments, when they may be incompatible with the safety, happiness, and glory of the general confederacy."

§ 225. Such was the strong and eloquent appeal made to the states. It carried, however, very slowly conviction to the minds of the local legislatures. Many objections were stated; and many amendments were proposed. All of them, however, were rejected by congress, not probably because they were all deemed inexpedient or improper in themselves; but from the danger of sending the instrument back again to all the states, for reconsideration. Accordingly, on the 26th of June, 1778, a copy, engrossed for ratification, was prepared, and the ratification begun on the 9th day of July following. It was ratified by all the states, except Delaware and Maryland, in 1778; by Delaware in 1779, and by Maryland on the first of March, 1781, from which last date its final ratification took effect, and was joyfully announced by congress.1

§ 226. In reviewing the objections, taken by the various states to the adoption of the confederation in the

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1 Secret Journals, 401, 418, 423, 424, 426; 3 Kent's Comm. 196, 197.

form, in which it was presented to them, at least so far as those objections can he gathered from the official acts of those states, or their delegates in congress, some of them will appear to be founded upon a desire for verbal amendments conducing to greater accuracy and certainty; and some of them, upon considerations of a more large and important bearing, upon the interests of the states respectively, or of the Union.1 Among the latter were the objections taken, and alterations proposed in respect to the apportionment of taxes, and of the quota of public forces to be raised among the states, by Massachusetts, Connecticut, New- Jersey, and Pennsylvania.2 There was also an abundance of jealousy of the power to keep up a standing army in time of peace.3

§ 227. But that, which seemed to be of paramount importance, and which, indeed, protracted the ratification of the confederation to so late a period, was the alarming controversy in respect to the boundaries of some of the states, and the public lands, held by the crown, within these reputed boundaries. On the one hand, the great states contended, that each of them had an exclusive title to all the lands of the crown within its boundaries; and these boundaries, by the claims under some Or the charters, extended to the South sea, or to an indefinite extent into the uncultivated western wilderness. On the other hand, the other states as strenuously contended, that the territory, unsettled at the commencement of the war, and claimed by the British crown, which was ceded to it by the treaty of

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1 2 Pitk. Hist. ch. 11, p. 19 to 36; 1 Kent's Comm. 197, 198.

2 Secret Journals, 371, 373, 376, 378, 381; 2 Pitk. Hist. ch. 11, p. 19 to 32.

3 Secret Journals, 373, 376, 383; 2 Pitk. Hist. ch. 11, p. 19 to 32.

Paris of 1763, if wrested from the common enemy by the blood and treasure of the thirteen states, ought to be deemed a common property, subject to the disposition of congress for the general good.1 Rhode-Island, Delaware, New-Jersey, and Maryland insisted upon some provision for establishing the western boundaries of the states; and for the recognition of the unsettled western territory, as the property of the Union.

§ 228. The subject was one of a perpetually recurring, interest and irritation; and threatened a dissolution of the confederacy. New-York, at length, in February, 1780, passed an act, authorizing a surrender of a part of the western territory claimed by her. Congress embraced the opportunity, thus afforded, to address the states on the subject of ceding, the territory, reminding them, "how indispensably necessary it is to establish the federal union on a fixed and permanent basis, and on principles, acceptable to all its respective members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils, and the success of our measures; to our tranquility at home, our reputation abroad; to our very existence, as a free, sovereign, and independent people." They recommended, with earnestness, a cession of the western territory; and at the same time, they as earnestly recommended to Maryland to subscribe the articles of confederation.2 A cession was accordingly made by the delegates of New-York on the first of March, 1781, the very day, on which Maryland acceded to the confederation. Virginia had previously acted upon the recommendation of congress; and by subsequent cessions

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1 2 Dall. R. 470, per Jay C. J.; 2 Pitk. Hist. ch. 11, p. 19 to 36.

2 Secret Journals, 6 Sept. 1780, p. 442; 1 Kent's Comm. 197, 198; 2 Pitk. Hist. ch. 11, p. 19 to 36.

from her, and. from the states of Massachusetts, Connecticut, South-Carolina, and Georgia, at still later periods, this great source of national dissension was at last dried up.1

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1 The history of these cessions will be found in the Introduction to the Land Law of the United States, printed by order of congress in 1810, 1817, and 1828; and in the first volume of the Laws of the United States, printed by Bioren and Duane in 1815, p. 452, &c.

CHAPTER III.

ANALYSIS OF THE ARTICLES OF CONFEDERATION.

§ 229. IN pursuance of the design already announced, it is now proposed to give an analysis of the articles of confederation, or, as they are denominated in the instrument itself, the " Articles of Confederation and Perpetual Union between the States," as they were finally adopted by the thirteen states in 1781.

§ 230. The style of the confederacy was, by the first article, declared to be, "The United Sates of America." The second article declared, that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was not by this confederation expressly delegated to the United States, in congress assembled. The third article declared, that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared, that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions, as the inhabitants; that fugitives from justice should, upon demand of the executive of the state, from which they

fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

§ 231. Having thus provided for the security and intercourse of the states, the next article (5th) provided for the organization of a general congress, declaring, that delegates should be chosen in such manner, as the legislature of each state should direct; to meet in congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in congress by less than two, nor more than seven members. No delegate was eligible for more than three, in any term of six years; and no delegate was capable of holding any office of emolument under the United States. Each state was to maintain its own delegates; and, in determining questions in congress, was to have one vote. Freedom of speech and debate in congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

§ 232. By subsequent articles, congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations, as to treaties of commerce;1 of es-

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1 "No treaty of commerce could be made, whereby the legislature power of the states was to be restrained from imposing such imposts and

tablishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

§ 233. Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

§ 234. Congress was also invested with the sole and exclusive right and po wer of regulating the alloy and value of coin struck by their own authority, or that of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided, that the legislative right of any state within its own limits should be not infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all

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duties on foreigners their own people were subjected to, or prohibiting the exportation or importation of any species of goods or commodities whatever."

officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

§ 235. Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to barrow money, and emit bills on credit of the United States; to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislature of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.
§ 236. Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon, when desired by any delegate.
§ 237. Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided, that congress should never engage in a war; nor grant letters of marque or

reprisal in time of peace; nor enter into any treaties or alliances; nor coin money, or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased; or the number of land or sea forces to be raised; nor appoint a commander in chief of the army or navy; unless nine states should assent to the same. And no question on any other point, except for adjourning from day to day, was to be determined, except by the vote of a majority of the states.
§ 238. The committee of the states, or any nine of them, were authorized in the recess of congress to exercise such powers, as congress, with the assent of nine states, should think it expedient to vest them with, except such powers, for the exercise of which, by the articles of confederation, the assent of nine states was required, which could not be thus delegated.
§ 239. It was further provided, that all bills of credit, monies borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner, as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and im-

provements thereon, to be estimated according to the mode prescribed by congress; and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.
§ 240. Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to? or receive an embassy from, or enter into, any treaty with any king, prince, or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office, or title, from any foreign king, prince, or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imports or duties, which might interfere with any then proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence, or trade, nor any body of forces, except such, as should be deemed requisite by congress to garrison its forts, and necessary for its defence. But every state was required always to keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp-equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies, or in danger of invasion by the Indians. Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal, except after a declaration of war by congress, unless such state were infested by pirates, and

then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction could be laid by any state on the property of the United States or of either of them.
§ 241. There was also provision made for the admission of Canada into the union, and of other colonies with the assent of nine states. And it was finally declared, that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that

the union should be perpetual; and that no alterations should be made in any of the articles, unless agreed to by congress, and confirmed by the legislatures of every state.

§ 242. Such is the substance of this celebrated instrument, under which the treaty of peace, acknowledging our independence, was negotiated, the war of the revolution concluded, and the union of the states maintained until the adoption of the present constitution.

§ 243. Any survey, however slight, of the confederation will impress the mind with the intrinsic difficulties, which attended the formation of its principal features. It is well known, that upon three important points, touching the common rights and interests of the several states, much diversity of opinion prevailed, and many animated discussions took place. The first was, as to the mode of voting in congress, whether it should be by states, or according to wealth, or population. The second, as to the rule, by which the expenses of the Union should be apportioned among the states. And the third, as has been already seen, relative to the disposal of the vacant and unappropriated lands in the western territory.1

§ 244. But that, which strikes us with most force, is the unceasing jealousy and watchfulness everywhere betrayed in respect to the powers to be confided to the general government. For this, several causes may be assigned. The colonies had been long engaged in struggles against the superintending authority of the crown, and had practically felt the inconveniences of the restrictive legislation of the parent country. These struggles had naturally led to a general feeling of resistance of all external authority; and these inconveniences to extreme doubts, if not to dread of any legislation, not exclusively originating in their domestic assemblies. They had, as yet, not felt the importance or necessity of union among themselves, having been hitherto connected with the British sove-

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1 2 Pitk. Hist. 16.

reignty in all their foreign relations. What would be their fate, as separate and independent communities; how far their interests would coincide or vary from each other, as such; what would be the effects of the union upon their domestic peace, their territorial interests, their external commerce, their political security, or their civil liberty, were points to them wholly of a speculative character, in regard to which various opinions might be entertained, and various, and even opposite conjectures formed upon grounds, apparently of equal plausibility. They were smarting, too, under the severe sufferings of war; and hardly had time to look forward to the future events of a peace; or if they did, it would be obviously a period for more tranquil discussions, and for a better understanding of their mutual interests. They were suddenly brought together, not so much by any deliberate choice of a permanent union, as by the necessity of mutual co-operation and support in resistance of the measures of Great Britain. They found themselves, after having assembled a general congress for mutual advice and encouragement, compelled by the course of events to clothe that body with sovereign powers in the most irregular and summary manner, and to permit them to assert the general prerogatives of peace and war, without any previous compact, and sanctioned only by the silent acquiescence of the people. Under such circumstances each state felt, that it was the true path of safety to retain all sovereign powers within its own control, the surrender of which was not clearly seen, under existing circumstances, to be demanded by an imperious public necessity.1

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1 Dr. Rush, in apologizing for the defects of the confederation, has observed, -- "The confederation, together with most of our state con-

§ 245. Notwithstanding the declaration of the articles, that the union of the states was to be perpetual, an examination of the powers confided to the general government would easily satisfy us, that they looked principally to the existing revolutionary state of things. The principal powers respected the operations of war, and would be dormant in times of peace. In short, congress in peace was possessed of but a delusive and shadowy sovereignty, with little more, than the empty pageantry of office. They were indeed clothed with the authority of sending and receiving ambassadors; of entering into treaties and alliances, of appointing courts for the trial of piracies and felonies on the high seas; of regulating the public coin; of fixing the standard of weights and measures; of regulating trade with the Indians; of establishing post-offices; of borrowing money, and emitting bills on the credit of the United States; of ascertaining and appropriating the sums necessary for defraying the public expenses, and of disposing of the western territory. and most of these powers required for their exercise the assent of nine states. But they possessed not the power to raise any revenue, to levy any tax, to enforce any law, to secure any right, to

regulate any trade, or even the poor prerogative of commanding means to pay its own ministersat a foreign court. They could contract debts; but they were without means to discharge them. They could

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stitutions, was formed under very unfavorable circumstances. We had just emerged from a corrupted monarchy. Although we understood perfectly the principles of liberty, yet most of us were ignorant of the forms and combinations of power in republics. Add to this the British army in the heart of our country, spreading desolation wherever it went."* The North American Review, for Oct. 1827, contains a summary of some of the prominent defects of the confederation. Art. I. p. 249, &c. *** 1 Amer. Museum, 8. See also, 1 Amer. Museum, 270.**

pledge the public faith; but they were incapable of redeeming it. They could enter into treaties; but every state in the union might disobey them with impunity. They could contract alliances; but could not command men or money to give them vigour. They could institute courts for piracies and felonies on the high seas; but they had no means to pay either the judges, or the jurors. In short, all powers, which did not execute themselves, were at the mercy of the states, and might be trampled upon at will with impunity.

§ 246. One of our leading writers addressed the following strong language to the public:1 "By this political compact the United States in congress have exclusive power for the following purposes, without being able to execute one of them. They may make and conclude treaties; but can only recommend the observance of them. They may appoint ambassadors; but cannot defray even the expenses of their tables. They may borrow money in their own name on the faith of the Union; but cannot pay a dollar. They may coin money; but they cannot purchase an ounce of bullion. They may make war, and determine what number of troops are necessary; but cannot raise a single soldier. In short, they may declare every thing, but do nothing." 2

§ 247. Strong as this language may seem, it has no colouring beyond what the naked truth would justify.3

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1 1 Amer. Mus. 1786, p. 270.

2 Language equally strong, and almost identical in expression, will be found in Mr. Jay's Letter, addressed to the people of New-York, 1787; 3 Amer. Museum, 554, 556.

3 Mr. Justice Patterson, in Hylton v. The United States,* after remarking, that congress, under the confederation, had no coercive author-

*** 3 Dall. 176; 1 Cond. Rep. 83, 88.**

Washington himself, that patriot without stain or reproach, speaks, in 1785, with unusual significance on the same subject. "In a word," says he, "the confederation appears to me to be little more, than a shadow without the substance; and congress a nugatory body, their ordinances being little attended to."1 The same sentiments may be found in many public documents.2 One of the most humiliating proofs of the utter inability of congress to enforce even the exclusive powers vested in it is to be found in the argumentative circular, addressed by it to the several states, in April 1787, entreating them in the most supplicating manner to repeal such of their laws, as interfered with the treaties with foreign nations.3 "If in theory," says the historian of Washington, " the treaties formed by congress were obligatory; yet it had been demonstrated, that in practice that body was absolutely unable to carry them into execution."4

§ 248. The leading defects of the confederation may be enumerated under the following heads:

In the first place, there was an utter want of all coercive authority to carry into effect its own constitutional measures.5 This, of itself, was sufficient to destroy its whole efficiency, as a superintending government, if

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ity, said, " Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional."

1 5 Marshall's Life of Washington, 64. See also 2 Pitk. Hist. 217; North Amer. Rev. Oct. 1827, p. 249, 254, 256, 259. 2 See 1 Amer. Museum, 275, 290, 364, 430, 447, 448, 449. The Federalist, No. 15 to 22; 2 Amer. Museum, 383; Id. 395, &c.; 3 Amer. Museum, 62 to 69; Id. 73; Id. 334 to 338; Id. 342; Id. 348, &c.; Id. 549, &c.; 1 Kent's Comm. 201.

3 1 Amer. Museum, 352.

4 5 Marshall's Life of Washington, 83.

5 1 Jefferson's Corresp. 63.

that may be called a government, which possessed no one solid attribute of power. It has been justly observed, that "a government authorized to declare war, but relying on independent states for the means of prosecuting it; capable

of contracting debts, and of pledging the public faith for their payment; but depending on thirteen distinct sovereignties for the preservation of that faith; could only be rescued from ignominy and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature."1 That is, by supposing a case, in which all human governments would become unnecessary, and all differences of opinion would become impossible. In truth, congress possessed only the power of recommendation.2 It depended altogether upon the good will of the states, whether a measure should be carried into effect or not. And it can furnish no matter of surprise under such circumstances, that great differences of opinion as to measures should have existed in the legislatures of the different states; and that a policy, strongly supported in some, should have been denounced as ruinous in others. Honest and enlightened men might well divide on such matters; and in this perpetual conflict of opinion the state might feel itself justified in a silent, or open disregard of the act of congress.

§ 249. The fact corresponded with the theory. Even during the revolution, while all hearts and hands were engaged in the common cause, many of the measures of congress were defeated by the inactivity of the

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1 5 Marshall's Life of Washington, 31. See also 1 Kent's Comm. 199; 1 Elliot's Debates, 208, 209, 210, 211; North Amer. Rev. Oct. 1827, p. 249, 257, &c.; The Federalist, No. 15.

2 The Federalist, No. 15.

states; and in some instances the exercise of its powers were resisted. But after the peace of 1783, such opposition became common, and gradually extended its sphere of activity, until, in the expressive language already quoted, "the confederation became a shadow without the substance." There were no national courts having original or appellate jurisdiction over cases regarding the powers of the union; and if there had been, the relief would have been but of a very partial nature, since, without some act of state legislation, many of those powers could not be brought into life. **§ 250.** A striking illustration of these remarks may be found in our juridical history. The power of appeal in prize causes, as an incident to the sovereign powers of peace and war, was asserted by congress after the most elaborate consideration, and supported by the voice of ten states, antecedent to the ratification of the articles of confederation.1 The exercise of that power was, however, resisted by the state courts, notwithstanding its immense importance to the preservation of the rights of independent neutral nations. The confederation gave, in express terms, this right of appeal. The decrees of the court of appeals were equally resisted; and in fact, they remained a dead letter, until they were enforced by the courts of the United States under the present constitution.2

§ 251. The Federalist speaks with unusual energy on this subject.3 "The great and radical view in the construction of the confederation is in the principle of legislation for states or governments in their corporate

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I Journals of Congress, 6th of March, 1779, 5th vol. p. 86 &c. to 90.

2 Penhallow v. Doane,3 Dall. 54; Carson v. Jennings, 4 Cranch, 2.

3 The Federalist, No. 15. See also 1 Jefferson's Corresp. 63; President Monroe's Message of May, 1822; 1 Tucker's Black. Comm. App. note D. passim.

or collective capacities, and as contradistinguished from the individuals, of whom they consist. Though this principle does not run through all the powers delegated to the union; yet it pervades and governs those, on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either by regulations extending to the individuals of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union; yet, in practice, they are mere recommendations, which the states observe or disregard at their option." Again. "The concurrence of thirteen distinct sovereignties is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened, as was to have been foreseen. The measures of the Union have not been executed. The delinquences of the state have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration till the states can have time to agree upon a more substantial substitute for the present shadow of a federal government."

§ 252. A farther illustration of this topic may be gathered from the palpable defect in the confederation, of any power to give a sanction to its laws.1 Congress had no power to exact obedience, or punish disobedience to its ordinances. They could neither impose fines,

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1 1 Kent's Comm. 200.

nor direct imprisonment, nor divest privileges, nor declare forfeitures, nor suspend refractory officers. There was in the confederation no express authority to exercise force; and though it might ordinarily be implied, as an incident, the right to make such implication was prohibited, for each state was to " retain every power, right, and jurisdiction, not expressly delegated to congress."1 The consequence naturally was, that the resolutions of congress were disregarded, not only by states, but by individuals. Men followed their interests more than their duties; they cared little for persuasions, which came without force; or for recommendations, which appealed only to their consciences or their patriotism.2 Indeed, it seems utterly preposterous to call that a government, which has no power to pass laws; or those enactments laws, which are attended with no sanction, and have no penalty or punishment annexed to the disobedience of them.3

§ 253. But a still more striking defect was the total want of power to lay and levy taxes, or to raise revenue to defray the ordinary expenses of government.4 The whole power, confided to congress upon this head, was the power "to ascertain the sums necessary to be raised for the service of the United States;" and to apportion the quota or proportion on each state. But the power was expressly reserved to the states to lay and levy the taxes, and of course the time, as well as the mode of payment, was extremely uncertain. The

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1 The Federalist, No. 21.
2 Yates's Minutes, 4 Elliot's Deb. 84.
3 The Federalist, No. 15; 1 Kent Comm. 200, 201.
4 See in 1 U. S. Laws, (Bioren & Duane's Edition, p. 37 to 54,) the proceedings of the old congress on this subject See also The Federalist, No. 21; 1 Tucker's Black. Comm. 235 to 238; The Federalist, No. 22, 32.

evils resulting from this source, even during the revolutionary war, were of incalculable extent;1 and, but for the good fortune of congress in obtaining foreign loans, it is far from being certain, that they would not have been fatal.2 The principle, which formed the basis of the apportionment, was sufficiently objectionable, as it took a standard extremely unequal in its operation upon the different states. The value of its lands was by no means a just representative of the proportionate contributions, which each state ought to make towards the discharge of the common burthens.3

§ 254. But this consideration sinks into utter insignificance, in comparison with others. Requisitions were to be made upon thirteen independent states; and it depended upon the good will of the legislature of each state, whether it would comply at all; or if it did comply, at what time, and in what manner. The very tardiness of such an operation, in the ordinary course of things, was sufficient to involve the government in perpetual financial embarrassments, and to defeat many of its best measures, even when there was the utmost good faith and promptitude on the part of the states in complying with the requisitions. But many reasons concurred to produce a total want of promptitude on the part of the states, and, in numerous instances, a total disregard of the requisitions.4 Indeed, from the moment, that the peace of 1783 secured the country from the distressing calamities of war, a general relaxa-

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1 5 Marshall's Life of Washington, 55; 1 Amer. Museum, 449.
2 2 Pitk. Hist. 158, 159, 160, 163; 1 Tucker's Black. Comm. App. 237, 243 to 246; 1 U. S. Laws, 37 54.
3 The Federalist, No. 21, 30.
4 2 Pitk. Hist. 156, 157. See also Remarks of Patterson J. in Hylton v. United States , 3 Dall. 171; 1 Elliot's Debates, 208; The Federalist No. 21, 31; 3 Dall. 171, 178.

tion took place; and many of the states successively found apologies for their gross neglect in evils common to all, or complaints listened to by all. Many solemn and affecting appeals were, from time to time, made by congress to the states; but they were attended with no salutary effect.1 Many measures were devised to obviate the difficulties, nay, the dangers, which threatened the Union; but they failed to produce any amendments in the confederation.2 An attempt was made by congress, during the war, to procure from the stales an authority to levy an impost of five per cent. upon imported and prize goods; but the assent of all the states could not be procured.3 The treasury was empty; the credit of the confederacy was sunk to a low ebb; the public burthens were increasing; and the public faith was prostrate.

§ 255. These general remarks may be easily verified by an appeal to the public acts and history of the times. The close of the revolution, independent of the enormous losses, occasioned by the excessive issue and circulation, and consequent depreciation of paper money, found the country burthened with a public debt of upwards of forty-two

millions of dollars;4 eight millions of which was due for loans obtained in France or Holland, and the remainder to our own citizens, and principally to those, whose bravery and patriotism had saved their country.5 Congress, conscious of its inability to dis-

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1 See 1 U. S. Laws, (Bioren & Duane's ed. 1815,) from page 37 to 54.
2 5 Marshall's Life of Washington, p: 35, 36, 37.
3 5 Marshall's Life of Washington, 37; Jour. of Congress, 3d Feb. 1781 ,p. 26; Id. l6th Dec. 1782, p. 38; Id. 26th April, 1783, p. 194, 203.
4 The whole expense of the war was estimated at 135 millions of dollars, including the specie value of all treasury bills of the United States, reduced according to the scale of depreciation established by congress. 2 Pitk. Hist. 180.
5 2 Pitk. Hist. 180; 5 Marsh. Life of Wash. 33.

charge even the interest of this debt by its existing means, on the 12th of February, 1783, resolved, that the establishment of permanent and adequate funds, or taxes, or duties throughout the United States, was indispensable to do justice to the publiccreditors. On the 18th of April following, after much debate, a resolution was passed, recommending to the states to vest congress with power to levy certain specified duties on spirits, wines, teas, pepper, sugar, molasses, cocoa, and coffee, and a duty of five per cent. ad valorem on all other imported goods. These duties were to continue for twenty-five years, and were to be applied solely to the payment of the principal and interest of the public debt; and were to be collected by officers chosen by the states, but removable by congress. The states were further required to establish, for the same time and object, other revenues, exclusive of the duties on imports, according, to the proportion settled by the confederation; and the system was to take effect only when the consent of all the states was obtained.1

§ 256. The measure thus adopted was strongly urgde upon the states in an address, drawn up under the authority of congress, by some of our most distinguished statesmen. Whoever reads it, even at this distance of time, will be struck with the force of its style, the loftiness of its sentiments, and the unanswerable reasoning, by which it sustained this appeal to the justice and

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1 2 Pitk. Hist. 180, 181; Marsh Life of Wash. 35, 36; Journals of Congress, 12th Feb. 1783, p. 126; Id. 20th March, 1783, p 154, 157, 158, 160; Id. 18th April, 1783, p. 185 to 189.--An attempt was subsequently made in Congress to procure authority to levy the taxes for the Union separately from other state taxes; and to make the collectors liable to an execution by the treasurer or his deputy, under the direction of congress. But the measure failed of receiving the vote of congress itself. 5 Marsh. Life of Washington, 36, note.

patriotism of the nation.1 It was also recommended by Washington in a circular letter, addressed to the governors of the several states; availing himself of the approaching resignation of his public command to impart his farewell advice to his country. After having stated, that there were, in his opinion, four things essential to the well being and existence of the United States, as an independent power, viz: 1. An indissoluble union of the states under one federal head; 2. A sacred regard to public justice; 3. The adoption of a proper peace establishment; 4. The prevalence of a pacific and friendly disposition of the people of the United States towards each other; he proceeded to discuss at large the first three topics. The following passage will at once disclose the depth of his feelings, and the extent of his fears. "Unless (said he) the states will suffer congress to exercise those prerogatives, they are undoubtedly invested with by the constitution, every thing must very rapidly tend to anarchy and confusion. It is indispensable to the happiness of the individual states, that there should be lodged somewhere a supreme power to regulate and govern the general concerns of the confederated republic, without which the union cannot be of long duration. There must be a faithful and pointed compliance on the part of every state with the late proposals and demands of congress, or the most fatal consequences will ensue. Whatever measures have a tendency to dissolve the Union, or contribute to violate, or lessen the sovereign authority, ought to be considered hostile to the liberty and independence of America, and the authors of them treated accordingly. And lastly; unless we can be enabled by the concurrence of the states to participate of the fruits of the rev-

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1 2 Pitk. Hist. 181, 182; 5 Marsh. Life of Wash. 32, 38, 39.

olution, and enjoy the essential benefits of civil society under a form of government so free and uncorrupted, so happily guarded against the danger of oppression, as has been devised by the articles of confederation, it will be a

subject of regret, that so much blood and treasure have been lavished for no purpose; that somany sufferings have been encountered without compensation; and that so many sacrifices have been made in vain."1

§ 257. Notwithstanding the warmth of this appeal, and the urgency of the occasion, the measure was never ratified. A jealousy began to exist between the state and general governments; and the state interests, as might naturally be presumed, predominated. Some of the states adopted the resolution, as to the imposts, with promptitude; others gave a slow and lingering assent; and others held it under advisement.2 In the mean time, congress was obliged to rely, for the immediate supply of the treasury, upon requisitions annually made, and annually neglected. The requisitions for the payment of the interest upon the domestic debt, from 1782 to 1786, amounted to more than six millions of dollars; and of this sum up to March, 1787, about a million only was paid;3 and from November, 1784, to January, 1786, 483,000 dollars only had been received at the national treasury.4 But for a temporary loan negotiated in Holland, there would have been an utter prostration of the government. In this state of things the

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1 5 Marsh. Life of Wash. 46, 47, 48; 2 Pitk. Hist. 216, 217. See also 2 Amer. Museum, 153 to 158, Mr. Pinckney's Speech. See also 1 Kent. Comm. Lect. 10, p. 212 to 217, (2d edition.)

2 Journal of Congress, 1786, p. 34. See also 2 American Museum, 153.--The Report of a committee of congress of the 15th of February, 1786, contains a detailed statement of the acts of the states relative to the measure. Jour. of Congress, 1786, p. 34; 1 Amer. Museum, 282; 2 Amer. Museum, 153 to 160.

3 2 Pitk. Hist. 184.5 Marsh. Life of Washington, 60.

value of the domestic debt sunk down to about one tenth Or its nominal amount.1

§ 258. February, 1786, congress determined to make another and last appeal to the states upon the subject. The report adopted upon that occasion contains a melancholy picture of the state of the nation. " In the course of this inquiry (said the report) it most clearly appeared, that the requisitions of congress for eight years past have been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in future, as a source, from whence monies are to be drawn to discharge the engagements of the confederation, definite as they are in time and amount, would be no less dishonorable to the understandings of those, who entertained such confidence, than it would be dangerous to the welfare and peace of the Union." "It has become the duty of congress to declare most explicitly, that the crisis has arrived, when the people of these United States, by whose will and for whose benefit the federal government was instituted, must decide, whether they will support their rank, as a nation, by maintaining the public faith at home or abroad; or whether, for want of a timely exertion in establishing a general revenue, and thereby giving strength to the confederacy, they will hazard, not only the existence of the Union, but of those great and invaluable privileges, for which they have so arduously and so honourably contended."2 After the adoption of this report, three states, which had hitherto stood aloof, came into the measure. New-York alone

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1 2 Pitk. Hist. 185.

2 Journals of Congress, 1786, P. 34 to 36; 1 Amer. Museum, 282, &c.--The Committee, who made the Report, were Mr. King, Mr. Pinckney, Mr. Kean, Mr. Monroe, and Mr. Pettit.

refused to comply with it; and after a most animated debate in her legislature, she remained inflexible, and the fate of the measure was sealed forever by her solitary negative.1

§ 259. Independent, however, of this inability to lay taxes, or collect revenue, the want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation. This evil was felt in a comparatively slight degree during the war. But when the return of peace restored the country to its ordinary commercial relations, the want of some uniform system to regulate them was early perceived; and the calamities, which followed our shipping and navigation, our domestic, as well as our foreign trade, convinced the reflecting, that ruin impended upon these and other vital interests, unless a national remedy could be devised. We accordingly find the public papers of that period crowded with complaints on this subject. It was, indeed, idle and visionary to suppose, that while thirteen independent states possessed the exclusive power of regulating commerce, there could be found any uniformity of system, or any harmony and cooperation for the general welfare. Measures of a commercial nature, which were adopted in one state from a sense of its own interests, would be often countervailed or rejected by other states from similar motives.

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1 2 Pitk. Hist. 184, 222; 5 Marsh Life of Washington, 62, 63, 124; 1 Tuck. Black. App. 158.--The speech of Col. Hamilton, the in legislature of New-York, in February, 1787, contains a very powerful argument in favor of the impost; and a statement of the extent, to which each of the states had complied with, or refused

the requisitions of congress. During the past five years, he says, New-Hampshire, North Carolina, South Carolina, and Georgia had paid nothing; Connecticut and Delaware, about one third; Massachusetts, Rhode Island, and Maryland, about one half; Virginia, three fifths; Pennsylvania, near the whole; and New-York, more than her quota. I Amer. Museum, 445, 418.

If one state should deem a navigation act favourable to its own growth, the efficacy of such a measure might be defeated by the jealousy or policy of a neighbouring state. If one should levy duties to maintain its own government and resources, there were many temptations for its neighbours to adopt the system of free trade, to draw to itself a larger share of foreign and domestic commerce. The agricultural states might easily suppose, that they had not an equal interest in a restrictive system with the navigating states. And, at all events, each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. To do otherwise would be to sacrifice its immediate interests, without any adequate or enduring consideration; to legislate for others, and not for itself; to dispense blessings abroad, without regarding the security of those at home.1

§ 260. Such a state of things necessarily gave rise to serious dissensions among the states themselves. The difference of regulations was a perpetual source of irritation and jealousy. Real or imaginary grievances were multiplied in every direction; and thus state animosities and local prejudices were fostered to a high degree, so as to threaten at once the peace and safety of the Union.2

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1 New Jersey early felt the want of a power in congress, to regulate foreign commerce, and made it one of her objections to adopting the articles of confederation, in her representation to congress.--2 Pitk. Hist. 23, 24; I Secret Journ. 375; The Federalist, No. 38.

2 2 Pitk. Hist. 192, 214, 215; 1 Amer. Museum, 272, 273, 281, 282, 288; The Federalist, No. 22.--1 Amer. Mus. 13 to 16; 2 Amer. Mus. 395 to 399; The Federalist, No. 7; 1 Elliot's Debates, 75; 1 Tucker's Black. Comm. App. 159, 248, 249.--Mons. Turgot, the Comptroller General of

§ 261. These evils were aggravated by the situation of our foreign commerce. During the war, our commerce was nearly annihilated by the superior naval power of the enemy; and the return of peace enabled foreign nations, and especially Great Britain, in a great measure to monopolize all the benefits of our home trade. In the first place, our navigation, having no protection, was unable to engage in competition with foreign ships. In the next place, our supplies were almost altogether furnished by foreign importers or on foreign account. We were almost flooded with foreign manufactures, while our own produce bore but a reduced price.1 It was easy to foresee, that such a state of things must soon absorb all our means; and as our industry had but a narrow scope, would soon reduce us to absolute poverty. Our trade in our own ships with foreign nations was depressed in an equal degree; for it was loaded with heavy restrictions in their ports. While, for instance, British ships with their commodities had free admission into our ports, American ships and exports were loaded with heavy exactions, or prohibited from entry into British ports.2 We were, therefore, the victims of our own imbecility, and reduced to a complete subjection to the commercial regula-

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the Finances of France, among other errors in our national policy, observed, that in the several states, " one fixed principle is established in regard to imposts. Each state is supposed to be at liberty to tax itself at pleasure, and to lay its taxes upon persons, consumptions, or importations; that is to say, to erect an interest contrary to that of other states." 1 Amer. Museum, 16. 1 5 Marsh Life of Washington, 69, 72, 75, 79, 80.

2 1 Tuck. Black. App. 157, 159; 5 Marsh. Life of Wash. 77, 78; 2

Pitk. Hist. 186 to 192; 1 Amer. Museum, 282, 288; 2 Amer. Museum, 263 to 276; Id. 371 to 373; 3 Amer. Museum, 551 to 557,562; North American Review, Oct. 1827, p. 249, 257, 258.

tions of other countries, notwithstanding our boasts of freedom and independence. Congress had been long sensible of the fatal effects flowing from this source; but their efforts to ward off the mischiefs had been unsuccessful. Being invested by the articles of confederation with a limited power to form commercial treaties, they endeavoured to enter into treaties with foreign powers upon principles of reciprocity. But these negotiations were, as might be anticipated, unsuccessful, for the parties met upon very unequal terms. Foreign nations, and especially Great Britain, felt secure in the possession of their present command of our trade, and had not the least inducement to part with a single advantage. It was further pressed upon us, with a truth equally humiliating and undeniable, that congress possessed no effectual power to guaranty the faithful observance of and commercial regulations; and there must in

such cases be reciprocal obligations.1 "America (said Washington) must appear in a very contemptible point of view to those, with whom she was endeavouring to form commercial treaties, without possessing the means of carrying them into effect. They must see and feel, that the Union, or the states individually, are sovereign, as best suits their purposes. In a word, that we are a nation to-day, and thirteen to-morrow. Who will treat with us on such terms?"2

§ 262. The difficulty of enforcing even the obligations of the treaty of peace of 1783 was a most serious national evil. Great Britain made loud complaints of infractions thereof on the part of the several states, and

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1 5 Marsh. Life of Wash. 71, 72, 73; 2 Pitk. Hist. 189, 190; 3 Amer. Museum, 62, 64, 65.

2 5 Marsh. Life of Wash. 73; North American Review, Oct. 1827, p. 257, 258; Atcheson's Coll. of Reports, p. 55.

demanded redress. She refused on account of these alleged infractions to surrender up the western ports according to the stipulations of that treaty; and the whole confederacy was consequently threatened with the calamities of Indian depredations on the whole of our western borders, and was in danger of having its public peace subverted through its mere inability to enforce the treaty stipulations. The celebrated address of congress, in 1787, to the several states on this subject, is replete with admirable reasoning, and contains melancholy proofs of the utter inefficiency of the confederation, and of the disregard by the states in their legislation of the provisions of that treaty.1

§ 263. In April, 1784, congress passed a resolution, requesting the states to vest the general government with power, for fifteen years only, to prohibit the importation and exportation of goods in the ships of nations, with which we had no commercial treaties; and also to prohibit the subjects of foreign nations, unless authorized by treaty, to import any goods into the United States, not the produce or manufacture of the dominions of their own sovereign. Although congress expressly stated, that without such a power no reciprocal advantages could be acquired, the proposition was never assented to by the states; and their own countervailing laws were either rendered nugatory by the laws of other states, or were repealed by a regard to their own inter-

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1 Journals of congress, April 13,1787, p. 32; Rawle on Constitution, App. 2, p. 316.--It was drawn up by Mr. Jay, then Secretary of Foreign Affairs, and was unanimously adopted by congress. It however failed of is object. And the treaty of 1783, so far as it respected British debts, was never faithfully executed until after the adoption of the constitution of the United States. See Ware v. Hylton, 3 Dall. R. 199; Hopkins v. Bell, 3 Cranch, 454.

ests.1 At a still later period a resolution was moved in congress, recommending it to the states to vest in the general government full authority to regulate external and internal commerce, and to impose such duties, as might be necessary for the purpose, which shared even a more mortifying fate; for it was rejected in that body, although all the duties were to be collected by, and paid over to the states.2

§ 264. Various reasons concurred to produce these extraordinary results. But the leading cause was a growing jealousy of the general government; and a more devoted attachment to the local interests of the states; -- a jealousy, which soon found its way even into the councils of congress, and enervated the little power, which it was yet suffered to exert. One memorable instance occurred, when it was expected, that the British garrisons would surrender the western posts, and it was thought necessary to provide some regular troops to take possession of them on the part of America The power of congress to make a requisition on the states for this purpose was gravely contested; and, as connected with the right to borrow money and emit bills of credit, was asserted to be dangerous to liberty, and alarming to the states. The measure was rejected, and militia were ordered in their stead.3

§ 265. There were other defects seriously urged against the confederation, which, although not of such a fatal tendency, as those already enumerated, were deemed of sufficient importance to justify doubts, as to its efficacy as a bond of union, or an enduring scheme

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1 2 Pitk. Hist. 192; 5 Marsh. Life of Wash. 70.

2 5 Marsh. Life of Washington, 80, 81.

3 5 Marsh. Life of Washington, App. note 1.

of government. It is not necessary to go at large into a consideration of them. It will suffice for the present purpose to enumerate the principal heads. (1.) The principle of regulating the contributions of the states into the common

treasury by quotas, apportioned according to the value of lands, which (as has been already suggested) was objected to, as unjust, unequal, and inconvenient in its operation.1 (2.) The want of a mutual guaranty of the state governments, so as to protect them against domestic insurrections, and usurpations destructive of their liberty.2 (3.) The want of a direct power to raise armies, which was objected to as unfriendly to vigour and promptitude of action, as well as to economy and a just distribution of the public burthens.3 (4.) The right of equal suffrage among all the states, so that the least in point of wealth, population, and means stood equal in the scale of representation with those, which were the largest. From this circumstance it might, nay it must happen, that a majority of the states, constituting a third only of the people of America, could control the rights and interests of the other two thirds.4 Nay, it was constitutionally, not only possible, but true in fact, that even the votes of nine states might not comprehend a majority of the people in the Union. The minority, therefore, possessed a negative upon the majority. (5.) The organization of the whole powers of the general government in a single assembly, without any separate or distinct distribution of the executive, judicial, and legislative

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1 The Federalist, No. 21; 3 Amer. Museum, 62, 63, 64.
2 The Federalist, No. 21; 3 Amer. Museum, 62, 65.
3 The Federalist, No. 22.
4 The Federalist, No. 22; 1 Amer. Museum, 275; 3 Amer. Museum, 62, 66.

functions.1 It was objected, that either the whole superstructure would thus fall, from its own intrinsic feebleness; or, engrossing all the attributes of sovereignty, entail upon the country a most execrable form of government in the shape of an irresponsible aristocracy. (6.) The want of an exclusive power in the general government to issue paper money; and thus to prevent the inundation of the country with a base currency, calculated to destroy public faith, as well as private morals.2 (7.) The too frequent rotation required by the confederation in the office of members of congress, by which the advantages, resulting from long experience and knowledge in the public affairs, were lost to the public councils.3 (8.) The want of judiciary power co-extensive with the powers of the general government.

§ 266. In respect to this last defect, the language of the Federalist4 contains so full an exposition, that no farther comment is required. "Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority, which forms the treaties themselves. These ingredi-

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1 The Federalist, No. 22; 1 Amer. Museum, 8, 9; Id. 272; 3 Amer. Museum, 62, 66; 1 Kent's Comm. Lect. 10, p. 200. [2d edit. p. 212.]
2 1 Amer. Museum, 8, 9; Id. 363.
3 1 Amer. Museum, 8, 9; 3 Amer. Museum, 62, 66.
4 The Federalist, No. 22.

ents are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point, as there are courts. There are endless diversities in the opinions of men. We often see not only different courts, but the judges of the same court differing from each other. To avoid the confusion, which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare, in the last resort, an uniform rule of justice."

§ 267. "This is the more necessary, where the frame of government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts, &c. The treaties of the United States, under the present confederation, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of these legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member, of which these are composed. Is it possible, under such circumstances, that foreign nations can either respect, or confide in such a government? Is it possible, that the people of America will longer consent to trust their honour, their happiness, their safety, on so precarious a foundation?" It might have been added, that the rights of individuals, so far as they depended upon acts or authorities derived from the confederation, were liable to the same difficulties, as the rights

of other nations dependent upon treaties.1 **1 See Chisholm v. Georgia, 2 Dall. R. 419, 447.**

§ 268. The last defect, which seems worthy of enumeration, is, that the confederation never had a ratification of the PEOPLE. Upon this objection, it will be sufficient to quote a single passage from the same celebrated work, as it affords a very striking commentary upon some extraordinary doctrines recently promulgated.1 "Resting on no better foundation than the consent of the state legislatures, it [the confederation] has been exposed to frequent and intricate questions concerning the validity of its powers; and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to a law of a state, it has been contended, that the same authority might repeal the law, by which it was ratified. However gross a heresy it may be to maintain, that a party to a compact has a right to revoke that compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper, than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority."2

§ 269. The very defects of the confederation seem also to have led congress, from the pressure of public necessity, into some usurpations of authority; and the states into many gross infractions of its legitimate sovereignty.3 "A list of the cases, (says the Federalist,) in which congress have been betrayed or forced by the

1 The Federalist, No. 22
2 The Federalist, No. 43.
3 The Federalist, No. 43; 1 Kent's Comm. Lect. 10, p. 201. [2d edit. p. 214, 215.]

defects of the confederation, into violations of their chartered authorities, would not a little surprise those, who have paid no attention to the subject."1 Again, speaking of the western territory, and referring to the ordinance of 1787, for the government thereof, it is observed: " Congress have assumed the administration of this stock. They have begun to render it productive. Congress have undertaken to do more; they have proceeded to form new states, to erect temporary governments, to appoint officers for them, and to prescribe the conditions, on which such states shall be admitted into the confederacy. All this has been done, and done without the least colour of constitutional authority. Yet no blame has been whispered; no alarm has been sounded."2

§ 270. Whatever may be thought as to some of these enumerated defects, whether they were radical deficiences or not, there cannot be a doubt, that others of them went to the very marrow and essence of government. There had been, and in fact then were, different parties in the several states, entertaining opinions hostile, or friendly to the existence of a general government.3 The former would naturally cling to the state governments with a close and unabated zeal, and deem the least possible delegation of power to the Union sufficient, (if any were to be permitted,) with which it could creep on in a semi-animated state. The latter would as naturally desire, that the powers of the general government should have a real, and not merely a suspended vitality; that it should act, and move, and guide, and not merely totter under its own weight, or sink into a drowsy decrepitude, powerless and palsied. But each party must

1 The Federalist, No. 42.
2 The Federalist, No. 38.
3 5 Marsh. Life of Washington, 33.

have felt, that the confederation had at last totally failed, as an effectual instrument of government; that its glory was departed, and its days of labour done; that it stood the shadow of a mighty name; that it was seen only, as a decayed monument of the past, incapable of any enduring record; that the steps of its decline were numbered and finished; and that it was now pausing at the very door of that common sepulchre of the dead, whose inscription is, Nulla vestigia retrorsum.

§ 271. If this language should be thought too figurative to suit the sobriety of historical narration, we might avail ourselves of language as strongly coloured, and as desponding, which was at that period wrung from the hearts of our wisest patriots and statesmen.1 It is, indeed, difficult to overcharge any picture of the gloom and apprehensions, which then pervaded the public councils, as well as the private meditations of the ablest men of the country. We are told by an historian of almost unexampled fidelity and moderation, and himself a witness of these scenes,2 that " the confederation was apparently expiring from mere debility. Indeed, its preservation in its actual condition, had it

been practicable, was scarcely to be desired. Without the ability to exercise them, it withheld from the states powers, which are essential to their sovereignty. The last hope of its friends having been destroyed, the vital necessity of some measure, which might prevent the separation of the integral parts, of which the American empire was composed, became apparent even to those, who had been unwilling to perceive it."3

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1 5 Marsh. Life of Wash. 92, 93, 94, 95, 96, 104, 113, 114, 118, 120; 1 Kent's Comm. 202; 1 Tuck. Black. Comm. App. note D, 142, 156; 1 Elliot's Debates, 208 to 213; 3 Elliot's Debates, 30, 31 to 34.

2 5 Marsh. Life of Wash. 124.

3 Mr. Jefferson uses the following language: " The alliance between

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the states, under the old articles of confederation, for the purpose of joint defence against the aggressions of Great Britain, was found insufficient, as treaties of alliance generally are, to enforce compliance with their mutual stipulations; and these once fulfilled, that bond was to expire of itself, and each state to become sovereign and independent in all things." 4 Jefferson's Corresp. 444. Thus, he seems to have held the extraordinary opinion, that the confederation was to cease with the war, or, at all events, with the fulfillment of our treaty stipulations.

BOOK III.
THE CONSTITUTION OF THE UNITED STATES.
CHAPTER I.
ORIGIN AND ADOPTION OF THE CONSTITUTION.

=A7 272. IN this state of things, commissioners were appointed by the legislatures of Virginia and Maryland early in 1785, to form a compact relative to the navigation of the rivers Potomac and Pocomoke, and the Chesapeake Bay. The commissioners having met in March, in that year, felt the want of more enlarged powers, and particularly of powers to provide for a local naval force, and a tariff of duties upon imports. Upon receiving their recommendation, the legislature of Virginia passed a resolution for laying the subject of a tariff before all the states composing the Union. Soon afterwards, in January, 1786, the legislature adopted another resolution, appointing commissioners, "who were to meet such, as might be appointed by the other states in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the states; to consider how far a uniform system in their commercial relations may be necessary to their

common interest, and their permanent harmony; and to report to the several states such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in congress assembled to provide for the same."1

=A7 273. These resolutions were communicated to the states, and a conventio= n of commissioners from five states only, viz. New-York, New-Jersey, Pennsylvania, Delaware, and Virginia, met at Annapolis in September, 1786.2 After discussing the subject, they deemed more ample powers necessary, and as well from this consideration, as because a small number only of the states was represented, they agreed to come to no decision, but to frame a report to be laid before the several states, as well as before congress.3 In this report they recommended the appointment of commissioners from all the states, "to meet at Philadelphia, on the second Monday of May, then next, to take into consideration the situation of the United States; to devise such further provisions, as shall appear to them necessary, to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every state, will effectually provide for the same."4

=A7 274. On receiving this report, the legislature of Virginia passed an ac= t for the appointment of delegates to meet such, as might be appointed by other states, at Philadelphia.5 The report was also received in congress.

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1 5 Marsh. Life of Wash. 90, 91; 1 Kent's Comm. 203.

2 1 Amer. Museum, 267; 2 Pitk. Hist. 218.

3 5 Marsh. Life of Wash. 267; 2 Pitk. Hist. 218; 1 U. S. Laws, (Bioren & Duane's edit. 1815,) p 55, &c. to 58.

4 1 Amer. Museum, 267, 268.

5 Marsh. Life of Wash. 98.

But no step was taken, until the legislature of NewYork instructed its delegation in congress to move a resolution, recommending to the several states to appoint deputies to meet in convention for the purpose of revising and proposing amendments to the federal constitution.1 On the 21st of February, 1787, a resolution was accordingly moved and carried in congress, recommending a convention to meet in Philadelphia, on the second Monday of May ensuing, "for the purpose of revising the articles of confederation, and reporting to congress, and the several legislatures, such alterations and provisions therein, as shall, when agreed to in congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government, and the preservation of the Union."2 The alarming insurrection then existing in Massachusetts, without doubt, had no small share in producing this result. The report of congress, on that subject, at once demonstrates their fears,=20and their political weakness.3

=A7 275. At the time and place appointed, the representatives of twelve states assembled. Rhode-Island alone declined to appoint any on this momentous occasion.4 After very protracted deliberations, the convention finally adopted the plan of the present constitution on the 17th of September, 1787; and by a contemporaneous resolution, directed it to be " laid before the United States in congress assembled," and declared their opinion, "that it should afterwards be submit-

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1 It was carried in the senate of the state by a majority of one only. 5 Marsh. Life of Wash. 125.

2 2 Pitk. Hist. 219; 5 Marsh. Life of Wash. 124, 125; 12 Journ. of Congress, 12, 13, 14; 2 Pitk. Hist. 219, 220, 222.

3 2 Pitk. Hist. 220, 221; Journ. of Congress, Oct. 1786; 1 Secret Journ. 268. 4 5 Marsh. Life of Wash. 128.

ted to a convention of delegates chosen in each state by the people thereof, under a recommendation of its legislature for their assent and ratification;"1 and that each convention, assenting to and ratifying the same, should give notice thereof to congress. The convention, by a further resolution, declared their opinion, that as soon as nine states had ratified the constitution, congress should fix a day, on which electors should be appointed by the states, which should have ratified the same, and a day, on which the electors should assemble and vote for the president, and the time and place of commencing proceedings under the constitution; and that after such publication, the electors should be appointed, and the senators and representatives elected. The same resolution contained further recommendations for the purpose of carrying the constitution into effect.

=A7 276. The convention, at the same time, addressed a letter to congress, expounding their reasons for their acts, from which the following extract cannot but be interesting. "It is obviously impracticable (says the address) in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals, entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend, as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights, which must be surrendered, and those, which may be reserved; and on the present occasion this difficulty was increased by difference among the sev-

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1 5 Marsh. Life of Washington, 128, 129; Journ. of Convention, 370; 12 Journ. of Congress, 109; 2 Pitk. Hist. 224, 264.

eral states, as to their situation, extent, habits, and particular interests. In all our deliberations on this subject, we kept steadily in our view that, which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the convention to be less rigid on points of inferior magnitude, than might have been otherwise expected. And thus the constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession, which the peculiarity of our political situation rendered indispensable."1

=A7 277. Congress, having received the report of the convention on the 28th of September, 1787, unanimously resolved, "that the said report, with the resolutions and letter accompanying the same, be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof, in conformity to the resolves of the convention, made and provided in that case."2

=A7 278. Conventions in the various states, which had been represented in the general convention, were accordingly called by their respective legislatures; and the constitution having been ratified by eleven out of the twelve states, congress, on the 13th of September, 1788, passed a resolution appointing the first Wednesday in January following, for the choice of electors of presi-

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1 12 Journ. of Congress, 109, 110; Journ. of Convention, 367, 368; 5 Marsh. Life of Wash. 129.
2 5 Marsh. Life of Wash. 128; 12 Journ. of Congress, 99, 110; Journ. of Convention, App. 391. 3 Journ. of Convention, App. 449, 450, 451; 2 Pitk. Hist. 291.

dent; the first Wednesday of February following, for the assembling of the electors to vote for a president; and the first Wednesday of March following, at the then seat of congress [New-York] the time and place for commencing proceedings under the constitution. Electors were accordingly appointed in the several states who met and gave their votes for a president; and the other elections for senators and representatives having, been duly made, on Wednesday, the 4th of March, 1789, congress assembled under the new constitution, and commenced proceedings under it. A quorum of both houses, however, did not assemble until the 6th of April, when the votes for president being counted, it was found that George Washington was unanimously elected president, and John Adams was elected vice president.1 On the 30th of April, president Washington was sworn into office, and the government then went into full operation in all its departments.

=A7 279. North-Carolina had not, as yet, ratified the constitution. The first convention called in that state, in August, 1788, refused to ratify it without some previous amendments, and a declaration of rights. In a second convention, however, called in November, 1789, this state adopted the constitution.2 The state of Rhode-Island had declined to call a convention; but finally, by a convention held in May, 1790, its assent was obtained; and thus all the thirteen original states became parties to the new government.3

=A7 280. Thus was achieved another, and still more glorious triumph in the cause of national liberty, than

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1 5 Marsh. Life of Wash. 133, 151, 152; 2 Pitk. Hist. 317, 318; 1 Lloyd's Debates, 3, 4, 5, 6.
2 2 Pitk. Hist. 283; Journ. of Convention, App. 452; 1 Kent's Comm. 204, 20= 5.
3 2 Pitk. Hist. 265; Journ. of Convention, App. 452, 458.

even that, which separated us from the mother country. By it we fondly trust, that our republican institutions will grow up, and be nurtured into more mature strength and vigour; our independence be secured against foreign usurpation and aggression; our domestic blessings be widely diffused, and generally felt; and our union, as a people, be perpetuated, as our own truest glory and support, and as a proud example of a wise and beneficent government, entitled to the respect, if not to the admiration of mankind.

CHAPTER II.
OBJECTIONS TO THE CONSTITUTION.

=A7 281. LET it not, however, be supposed, that a constitution, which is now looked upon with such general favour and affection by the people, had no difficulties to encounter at its birth. The history of those times is full of melancholy instruction on this subject, at once to admonish us of past dangers, and to awaken us to a lively sense of the necessity of future vigilance. The constitution was adopted unanimously by Georgia, New-Jersey, and Delaware. It was supported by large majorities in Pennsylvania, Connecticut, Maryland, and South-Carolina It was carried in the other states by small majorities, and especially in Massachusetts, New-York, and Virginia by little more than a preponderating vote.1 Indeed, it is believed, that in each of these states, at the first assembling of the conventions, there was a decided majority opposed to the constitution. The ability of the debates, the impending evils, and the absolute necessity of the case seem to have reconciledsome persons to the adoption of it, whose opinions had been strenuously the other way.2 "In our endeavours," said Washington, "to establish a new general government, the contest nationally considered, seems not to have been so much for glory, as for existence. It was for a long time doubtful, whether we were to survive, as an indepen-

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1 2 Pitk. Hist. 265, 268, 273, 279, 281; North Amer. Rev. Oct. 1827, P. 270 to 278.
2 2 Pitk. Hist. 266, 269, 281; 5 Marshall's Life of Washington, 132, 133, 188.

dent republic, or decline from our federal dignity into insignificant and withered fragments of empire."1

=A7 282. It is not difficult to trace some of the more important causes, which led to so formidable an opposition, and made the constitution at that time a theme, not merely of panegyric, but of severe invective, as fraught with the most alarming dangers to public liberty, and at once unequal, unjust, and oppressive.

=A7 283. Almost contemporaneously with the first proposition for a confederation, jealousies began to be entertained in respect to the nature and extent of the authority, which should be exercised by the national

government. The large states would naturally feel, that in proportion as congress should exercise sovereign powers, their own local importance and sovereignty would be diminished injuriously to their general influence on other states from their strength, population, and character. On the other hand, by an opposite course of reasoning, the small states had arrived nearly at the same result. Their dread seems to have been, lest they should be swallowed up by the power of the large states in the general government, through common combinations of interest or ambition.2 **=A7 284.** There was, besides, a very prevalent opinion, that the interests o= f the several states were not the same; and there had been no sufficient experience during their colonial dependence and intercommunication to settle such a question by any general reasoning, or any practical results. During the period, therefore, in which the confederation was under discussion in congress, much excitement and much jealousy as exhibited on this subject. The original draft, submit-

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1 5 Marshall's Life of Washington, 138.

2 5 Marshall's Life of Washington, 130, 131; 4 Elliot's Debates, &c.

ted by Dr. Franklin, in July, 1775, contained a much more ample grant of powers, than that actually adopted; for congress were to be invested with power to make ordinances relating "to our general commerce, or general currency," to establish posts, &c. and to possess other important powers of a different character.1 The draft submitted by Mr. Dickenson, on the 12th of July, 1776, contains less ample powers; but still more broad, than the articles of confederation.2 In the subsequent discussions few amendments were adopted, which were not of a restrictive character; and the real difficulties of the task of overcoming the prejudices, and soothing the fears of the different states, are amply displayed in the secret journals now made public. In truth, the continent soon became divided into two great political parties, "the one of which contemplated America as a nation, and laboured incessantly to invest the federal head with powers competent to the preservation of the Union; the other attached itself to the state authorities; viewed all the powers of congress with jealousy; and assented reluctantly to measures, which would enable the head to act in any respect independently of the members."3 During the war, the necessities of the country confined the operations of both parties within comparatively narrow limits. But the return of peace, and the total imbecility of the general government, gave (as we have seen) increased activity and confidence to both. **=A7 285.** The differences of opinion between these parties were too honest, too earnest, and too deep to be reconciled, or surrendered. They equally=20p= er -

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1 1 Secret Journals, 285, Art. 5.

2 1 Secret Journals, 290.

3 5 Marshall's Life of Washington, 33.

vaded the public councils of the states, and the private intercourse of social life. They became more warm, not to say violent, as the contest became more close, and the exigency more appalling. They were inflamed by new causes, of which some were of a permanent, and some of a temporary character, The field of argument was wide; and experience had not, as yet, furnished the advocates on either side with such a variety of political tests, as were calculated to satisfy doubts, allay prejudices, or dissipate the rears and illusions of the imagination.
=A7 286. In this state of things the embarrassments of the country in its financial concerns, the general pecuniary distress among the people from the exhausting operations of the war, the total prostration of commerce, and the languishing unthriftiness of agriculture, gave new impulses to the already marked political divisions in the legislative councils. Efforts were made, on one side, to relieve the pressure of the public calamities by a resort to the issue of paper money, to tender laws, and instalment and other laws, having for their object the postponement of the payment of private debts, and a diminution of the public taxes. On the other side, public as well as private creditors became alarmed from the increased dangers to property, and the increased facility of perpetrating frauds to the destruction of all private faith and credit. And they insisted strenuously upon the establishment of a government, and system of laws, which should preserve the public faith, and redeem the country from that ruin, which always follows upon the violation of the principles of justice, and the moral obligation of contracts. "At length," we are told,1 "two great parties were formed in

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1 5 Marshall's Life of Washington, 83.

every state, which were distinctly marked, and which pursued distinct objects with systematic arrangement. The one struggled with unabated zeal for the exact observance of public and private engagements. The distresses of

individuals were, they thought, to be alleviated by industry and frugality, and not by a relaxation of the laws, or by a sacrifice of the rights of others. They were consequently uniform friends of a regular administration of justice, and of a vigorous course of taxation, which would enable the state to comply with its engagements. By a natural association of ideas, they were also, with very few exceptions, in favour of enlarging the powers of the federal government, and of enabling it to protect the dignity and character of the nation abroad, and its interests at home. The other party marked out for itself a more indulgent course. They were uniformly in favour of relaxing the administration of justice, of affording facilities for the payment of debts, or of suspending their collection, and of remitting taxes. The same course of opinion led them to resist every attempt to transfer from their own hands into those of congress powers, which were by others deemed essential to the preservation of the Union. In many of the states the party last mentioned constituted a decided majority of the people; and in all of them it was very powerful." Such is the language of one of our best historians in treating of the period immediately preceding the formation of the constitution of the United States.1

=A7 287. Without supposing, that the parties, here alluded to, were in all respects identified with those, of which we have already spoken, as contemporaneous with the confederation, it is easy to perceive, what pro-

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1 See also 5 Marshall's Life of Washington, 130, 131.

digious means were already in existence to oppose a new constitution of government, which not only transferred from the states some of the highest sovereign prerogatives, but laid prohibitions upon the exercise of other powers, which were at that time in possession of the popular favour. The wonder, indeed, is not, under such circumstances, that the constitution should have encountered the most ardent opposition; but that it should ever have been adopted at all by a majority of the states.

=A7 288. In the convention itself, which framed it, there was a great diversity of judgment, and upon some vital subjects, an intense and irreconcilable hostility of opinion.1 It is understood, that at several periods, the convention were upon the point of breaking up without accomplishing any thing.2 In the state conventions, in which the constitution was presented for ratification, the debates were long, and animated, and eloquent; and, imperfect as the printed collections of those debates are, enough remains to establish the consummate ability, with which every part of the constitution was successively attacked, and defended.3 Nor did the struggle end here. The parties, which were then formed, continued for a long time afterwards to be known and felt in our legislative and other public deliberations. Perhaps they have never entirely ceased.

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1 2 Pitk. Hist. 225 to 260; Dr. Franklin's Speech, 2 Amer. Museum, 534, 538; 3 Amer. Museum, 62, 66, 70, 157, 559, 560; 4 Elliot's Debates. -- Three members of the convention, Mr. Gerry of Massachusetts, and Mr. Mason and Mr. Randolph of Virginia, declined signing the constitution; 3 Amer. Museum, 68. See also Mr. Jay's Letter in 1787; 3 Amer. Museum, 554 to 565.

2 5 Marshall's Life of Washington, 128.

2 Pitk. Hist. 265 to 283.

=A7 289. Perhaps, from the very nature and organization of our government, being partly federal and partly national in its character, whatever modifications in other respects parties may undergo, there will forever continue to be a strong line of division between those, who adhere to the state governments, and those, who adhere to the national government, in respect to principles and policy. It was long ago remarked, that in a contest for power, "the body of the people will always be on the side of the state governments. This will not only result from their love of liberty and regard to their own safety, but from other strong principles of human nature. The state governments operate upon those familiar personal concerns, to which the sensibility of individuals is awake. The distribution of private justice, in a great measure belonging to them, they must always appear to the sense of the people, as the immediate guardians of their rights. They will of course have the strongest hold on their attachment, respect, and obedience."1 To which it may be added, that the state governments must naturally open an easier field for the operation of domestic ambition, of local interests, of personal popularity, and of flattering influence to those, who have no eager desire for a wide spread fame, or no acquirements to justify it.

=A7 290. On the other hand, if the votaries of the national government are fewer in number, they are likely to enlist in its favour men of ardent ambition, comprehensive views, and powerful genius. A love of the Union; a sense of its importance, nay, of its necessity, to secure permanence and safety to our political liberty; a consciousness, that the powers of the national consti-

1 Gen. Hamilton's Speech in 1786; 1 Amer. Museum, 445, 447. See also The =46ederalist, No. 17, 31, 45, 46.

tution are eminently calculated to preserve peace at home, and dignity abroad, and to give value to property, and system and harmony to the great interests of agriculture, commerce, and manufactures; a consciousness, too, that the restraints, which it imposes upon the states, are the only efficient means to preserve public and private justice, and to ensure tranquility amidst the conflicting interests and rivalries of the states: -- these will, doubtless, combine many sober and reflecting minds in its support. If to this number we add those, whom the larger rewards of fame, or emolument, or influence, connected with a wider sphere of action, may allure to the national councils, there is much reason to presume, that the Union will not be without resolute friends.

=A7 291. This view of the subject, on either side, (for it is the desire of the commentator to abstain, as much as possible, from mere private political speculation,) is not without its consolations. If there were but one consolidated national government, to which the people might look up for protection and support, they might in time relax in that vigilance and jealousy, which seem so necessary to the wholesome growth of republican institutions. If, on the other hand, the state governments could engross all the affections of the people, to the exclusion of the national government, by their familiar and domestic regulations, there would be danger, that the Union, constantly weakened by the distance and discouragements of its functionaries, might at last become, as it was under the confederation, a mere show, if not a mockery of sovereignty. So, that this very division of empire may, in the end, by the blessing of Providence, be the means of perpetuating our rights and liberties, by keeping alive in every state at once a sincere love of its own government, and a love of the Union,

and by cherishing in different minds a jealousy of each, which shall check, as well as enlighten, public opinion.

=A7 292. The objections raised against the adoption of the constitution wer= e of very different natures, and, in some instances, of entirely opposite characters. They will be round embodied in various public documents, in the printed opinions of distinguished men, in the debates of the respective state conventions, and in a still more authentic shape in the numerous amendments proposed by these conventions, and accompanying their acts of ratification. It is not easy to reduce them all into general heads; but the most material will here be enumerated, not only to admonish us of the difficulties of the task of framing a general government; but to prepare us the better to understand, and expound the constitution itself.

=A7 293. Some of the objections were to the supposed defects and omissions in the instrument; others were to the nature and extent of the powers conferred by it; and others again to the fundamental plan or scheme of its organization.

(1.) It was objected in the first place, that the scheme of government was radically wrong, because it was not a confederation of the states; but a government over individuals.1 It was said, that the federal form, which regards the Union, as a confederation of sovereign states, ought to have been preserved; instead of which the convention had framed a national government, which regards the Union, as a consolidation of states.2 This objection was far from being universal; for many admitted, that there ought to be a government over individuals to a certain extent, but by no means

1 The Federalist, No. 38, 39; 2 Amer. Museum, 422; Id. 543, 546.

2 The Federalist, No. 39; Id. No. 38; 2 Pitk. Hist. 270, 272.

to the extent proposed. It is obvious, that this objection, pushed to its full extent, went to the old question of the confederation; and was but a re-argument of the point, whether there should exist a national government adequate to the protection and support of the Union. In its mitigated form it was a mere question, as to the extent of powers to be confided to the general government, and was to be classed accordingly. It was urged, however, with no inconsiderable force and emphasis; and its supporters predicted with confidence, that a government so organized would soon become corrupt and tyrannical, " and absorb the legislative, executive, and judicial powers of the several states, and produce from their ruins one consolidated government, which, from the nature of things, would be an iron-handed despotism."1 Uniform experience (it was said) had demonstrated,2 "that a very extensive territory cannot be governed on

the principles of freedom otherwise, than by a confederacy of republics, possessing all the powers of internal government, but united in the management of their general and foreign concerns."3 Indeed, any scheme of a general government, however guarded, appeared to some minds (which possessed the public confidence) so entirely impracticable, by reason of the extensive territory of the United States, that they did not hesitate to declare their opinion, that it would be destructive of the civil liberty of the citizens.4 And

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1 Address of the Minority of Penn. convention, 2 Amer. Museum, 542, 543. See also 2 Pitk. Hist. 272, 273.

2 2 Amer. Museum, 542.

3 See also 2 Amer. Museum, 422, 423, 424.

4 Yates and Lansing's Letter, 3 Amer. Museum, 156, 157; Mr. Jay's Letter, 1787, 3 Amer. Museum, 531, 562. -- The same objection is repeatedly taken notice of in the Federalist, as one then beginning to be prevalent. The =46ederalist, No. 1, 2, 9, 13, 14, 23.

others of equal eminence foretold, that it would commence in a moderate aristocracy, and end either in a monarchy, or a corrupt, oppressive aristocracy.1 It was not denied, that, in form, the constitution was strictly republican; for all its powers were derived directly or indirectly from the people, and were administered by functionaries holding their offices during pleasure, or for a limited period, or during good behaviour; and in the serespects it bore an exact similitude to the state governments, whose republican character had never been doubted.2

=A7 294. But the friends of the constitution met the objection by asserting= , the indispensable necessity of a form of government, like that proposed, and demonstrating the utter imbecility of a mere confederation, without powers acting directly upon individuals. They considered, that the constitution was partly federal, and partly national in its character, and distribution of powers. In its origin and establishment it was federal.3 In some of its relations it was federal; in others, national. In the senate it was federal; in the house of representatives it was national; in the executive it was of a compound character; in the operation of its powers it was national; in the extent of its powers, federal. It acted on individuals, and not on states merely. But its powers were limited, and left a large mass of sovereignty in the states. In making amendments, it was also of a compound character, requiring, the concurrence of more than a majority, and less than the whole of the states. So, that on the whole their conclusion was, that " the constitution is, in strictness, neither a national nor a federal constitution,

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1 Mr. George Mason's Letter, 2 Amer. Museum, 534, 536.

2 The Federalist, No. 39.

3 The Federalist, No. 39.

but a composition of both. In its foundation it is federal, not national; in the sources, from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers it is national, not federal; in the extent of them again it is federal, not national; and, finally, in the authoritative mode of introducing amendments it is neither wholly federal, nor wholly national.1

=A7 295. Time has in this, as in many other respects, assuaged the fears, and disproved the prophesies of the opponents of the constitution. It has gained friends in its progress. The states still flourish under it with a salutary and invigorating energy; and its power of direct action upon the people has hitherto proved a common blessing, giving dignity and spirit to the government, adequate to the exigencies of war, and preserving us from domestic dissensions, and unreasonable burthens in times of peace.

=A7 296. If the original structure of the government was, as has been shown= , a fertile source of opposition, another objection of a more wide and imposing nature was drawn from the nature and extent of its powers. This, indeed, like the former, gave rise to most animated discussions, in which reason was employed to demonstrate the mischiefs of the system, and imagination to portray them in all the exaggerations, which fear and prophesy could invent. Looking back, indeed, to that period with the calmness, with which we naturally

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1 The Federalist, No. 39. See also 1 Tucker's Black. App. 145, 146. -- The whole reasoning contained in the 39th number of the Federalist (of which the above is merely a summary) deserves a thorough examination by every statesman. See also on the same subject, Dane's App. =A714, p. 25, &c.; =A73= 5, p. 44, &c.; 1 Tucker's Black. Comm. App. 146, &c.; The Federalist, No. 9; 3 Dall. R. 473.

review events and occurrences, which are now felt only as matters of history, one is surprised at the futility of some of the objections, the absurdity of others, and the overwrought colouring of almost all, which were urged on this head against the constitution. That some of them had a just foundation, need not be denied or concealed; for the system was human, and the result of compromise and conciliation, in which something of the correctness of theory was yielded to the interests or prejudices of particular states, and something of inequality of benefit borne for the common good.

=A7 297. The objections from different quarters were not only of different degrees and magnitude, but often of totally opposite natures. With some persons the mass of the powers was a formidable objection; with others, the distribution of those powers. With some the equality of vote in the senate was exceptionable; with others the inequality of representation in the house. With some the power of regulating the times and places of elections was fatal; with others the power of regulating commerce by a bare majority. With some the power of direct taxation was an intolerable grievance; with others the power of indirect taxation by duties on in-ports. With some the restraint of the state legislatures from laying duties upon exports and passing ex post facto laws was incorrect; with others the lodging of the executive power in a single magistrate.1 With some the term of office of the senators and representatives was too long; with others the term of office of the president was obnoxious to a like censure, as well as his re-eligibility.2 With some the intermixture of

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1 2 Amer. Museum, 534, 536, 540; Id. 427, 435; Id. 547, 555.

2 3 Amer. Museum, 62; 2 Pitk. Hist. 283, 284; The Federalist, No. 71, 72.

the legislative, executive, and judicial functions in the senate was a mischievous departure from all ideas of regular government; with others the non-participation of the house of representatives in the same functions was the alarming evil. With some the powers of the president were alarming and dangerous to liberty; with others the participation of the senate in some of those powers. With some the powers of the judiciary were far too extensive; with others the power to make treaties even with the consent of two thirds of the senate. With some the power to keep up a standing army was a sure introduction to despotism; with others the power over the militia.1 With some the paramount authority of the constitution, treaties, and laws of the United States was a dangerous feature; with others the small number composing the senate and the house of representatives was an alarming and corrupting evil.2

=A7 298. In the glowing language of those times the people were told, "that the new government will not be a confederacy of states, as it ought, but one consolidated government, founded upon the destruction of the several governments of the states. The powers of congress, under the new constitution, are complete andunlimited over the purse and the sword, and are perfectly independent of, and supreme over the state governments, whose intervention in these great points is entirely destroyed. By virtue of their power of taxation, congress may command the whole, or any part of the properties of the people. They may impose what

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1 See 2 Amer. Museum, 422, &c.; Id. 435; Id. 534; Id. 540, &c. 543, &c.; Id. 553; 3 Amer. Museum, 62; Id. 157; Id. 419, 420, &c.

2 Many of the objections are summed up in the Federalist, No. 38, with great force and ability.

imposts upon commerce, they may impose what land taxes, and taxes, excises, and duties on all instruments, and duties on every fine article, that they may judge proper." "Congress may monopolize every source of revenue, and thus indirectly demolish the state governments; for

without funds they could not exist." "As congress have the control over the time of the appointment of the president, of the senators, and of the representatives of the United States, they may prolong their existence in office for life by postponing the time of their election and appointment from period to period, under various presences." "When the spirit of the people shall be gradually broken; when the general government shall be firmly established; and when a numerous standing army shall render opposition vain, the congress may complete the system of despotism in renouncing all dependence on the people, by continuing themselves and their children in the government."1

=A7 299. A full examination of the nature and extent of the objections to the several powers given to the general government will more properly find a place, when those powers come successively under review in our commentary on the different parts of the constitution itself. The outline here furnished may serve to show what those were, which were presented against them, as an aggregate or mass. It is not a little remarkable, that some of the most formidable applied with equal force to the articles of confederation, with this difference only, that though unlimited in their terms, they were in some instances checked by the want of power to carry them into effect, otherwise than by requisitions

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1 Address of the minority in the Pennsylvania Convention, 2 Amer. Museum, 536, 543, 544, 545. See also the Address of Virginia, 2 Pitk. History, 334.

on the states. Thus presenting, as has been justly observed, the extraordinary phenomenon of declaring certain powers in the federal government. absolutely necessary, and at the same time rendering them absolutely nugatory.1

=A7 300. Another class of objections urged against the constitution was founded upon its deficiencies and omissions. It cannot be denied, that some of the objections on this head were well taken, and that there was a fitness in incorporating some provision on the subject into the fundamental articles of a free government. There were others again, which might fairly enough be left to the legislative discretion and to the natural influences of the popular voice in a republican form of government. There were others again so doubtful, both in principle and policy, that they might properly be excluded from any system aiming at permanence in its securities as well as its foundations.

=A7 301. Among the defects which were enumerated, none attracted more attention, or were urged with more zeal, than the want of a distinct bill of rights, which should recognise the fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness. It was contended, that it was indispensable, that express provision should be made for the trial by jury in civil cases, and in criminal cases upon a presentment by a grand jury only; and that all criminal trials should be public, and the party be confronted with the witnesses against him; that freedom of speech and freedom of the press should be secured; that there should be no national religion, and the rights of con-

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1 The Federalist, No. 38.

science should be inviolable; that excessive bail should not be required, nor cruel and unusual punishments inflicted; that the people should have a right to bear arms; that persons conscientiously scrupulous should not be compelled to bear arms; that every person should be entitled of right to petition for the redress of grievances; that search warrants should not be granted without oath, nor general warrants at all; that soldiers should not be enlisted except for a short, limited term; and not be quartered in time of peace upon private houses without the consent of the owners; that mutiny bills should continue in force for two years only; that causes once tried by a jury should not be re-examinable upon appeal, otherwise than according to the course of the common law; and that the powers not expressly delegated to the general government should be declared to be reserved to the states. In all these particulars the constitution was obviously defective; and yet (it was contended) they were vital to the public security.1

=A7 302. Besides these, there were other defects relied on, such as the want of a suitable provision for a rotation in office, to prevent persons enjoying them for life; the want of an executive council for the president; the want of a provision limiting the duration of standing armies; the want of a clause securing the people the enjoyment of the common law;2 the want of security for proper elections of public officers; the want of a prohibition of members of congress holding any public offices, and of judges holding any other offices; and

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1 Amer. Museum, 422 to 430; Id. 435, &c.; Id. 435, &c.; 536, 540, &c. 553, &c. 557; 3 Amer. Museum, 62; Id. 157; Id. 419, 420, &c.; The Federalist, No. 38.

2 Mr. Mason, 2 Amer. Museum, 534.

finally the want of drawing a clear and direct line between the powers to be exercised by congress and by the states.1

=A7 303. Many of these objections found their way into the amendments, which, simultaneously with the ratification, were adopted in many of the state conventions. With the view of carrying into effect the popular will, and also of disarming the opponents of the constitution of all reasonable grounds of complaint, congress, at its very. first session, took into consideration the amendments so proposed; and by a succession of supplementary articles provided, in substance, a bill of rights, and secured by constitutional declarations most of the other important objects thus suggested. These articles (in all, twelve) were submitted by congress to the states for their ratification; and ten of them were finally ratified by the requisite number of states; and thus became incorporated into the constitution.2 It is a curious fact, however, that although the necessity of these amendments had been urged by the enemies of the constitution, and denied by its friends, they encountered scarcely any other opposition in the state legislatures, than what was given by the very party, which had raised the objections.3 The friends of the constitution generally supported them upon the ground of a large public policy, to quiet jealousies, and to disarm resentments.

=A7 304. It is perhaps due to the latter to state, that they believed, that some of the objections to the constitution existed only in imagination, and that others derived their sole support from an erroneous construction

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1 2 Amer. Museum, 426, 428; Id. 534, 537; Id. 557, 549; 3 Amer. Mus. 62; Id. 419, 420, &c. 2 Pitk. Hist. 267, 218, 280, 282, 283, 284.

2 2 Pitk. Hist. 332, 334.

3 5 Marshall's life of Washington, 209, 210.

of that instrument.1 In respect to a bill of rights, it was stated, that several of the state constitutions contained=20none in form; and yet were no= t on that account thought objectionable. That it was not true, that the constitution of the United States did not, in the true sense of the terms, contain a bill of rights. It was emphatically found in those clauses, which respected political rights, the guaranty of republican forms of government, the trial of crimes by jury, the definition of treason, the prohibition against bills of attainder and ex post facto laws and titles of nobility, the trial by impeachment, and the privilege of the writ of habeas corpus. That a general bill of rights would be improper in a constitution of limited powers, like that of the United States; and might even be dangerous, as by containing exceptions from powers not granted it might give rise to implications of constructive power. That in a government, like ours, founded by the people, and managed by the people, and especially in one of limited authority, there was no necessity of any bill of rights; for all powers not granted were reserved; and even those granted might at will be resumed, or altered by the people. That a bill of rights might be fit in a monarchy, where there were struggles between the crown and the people about prerogatives and privileges. But, here, the government is the government of the people; all its officers are their officers; and they can exercise no rights or powers, but such as the people commit to them. In such a case the silence of the constitution argues nothing. The trial by jury, the freedom of the press, and the liberty of conscience are not taken away, because they are not secured. They

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1 5 Marshall's Life of Washington, 207, 208.

remain with the people among the mass of ungranted powers, or find an appropriate place in the laws and institutions of each particular state.1

=A7 305. Notwithstanding the force of these suggestions, candour will compe= l us to admit, that as certain fundamental rights were secured by the constitution, there seemed to be an equal propriety in securing in like manner others of equal value and importance. The trial by jury in criminal cases was secured; but this clause admitted of more clear definition, and of auxiliary provisions. The trial by jury in civil cases at common law was as dear to the people, and afforded at least an equal protection to persons and property. The same remark may be made of several other provisions included in the amendments. But these will more properly fall under consideration in our commentary upon that portion of the constitution. The promptitude, zeal, and liberality, with which the friends of the constitution supported these amendments, evince the good faith and sincerity of their opinions, and increase our reverence for their labours, as well as our sense of their wisdom and patriotism.

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1 The Federalist, No. 81; Mr. Jay's Address, 3 Amer. Museum, 554, 559; 2 Amer. Museum, 422, 425.

CHAPTER III.

NATURE OF THE CONSTITUTION -- WHETHER A COMPACT.

=A7 306. Having thus sketched out a general history of the origin and adoption of the constitution of the United States, and a summary of the principal objections and difficulties, which it had to encounter, we are at length arrived at the point at which it may be proper to enter upon the consideration of the actual structure, organization, and powers, which belong to it. Our main object will henceforth be to unfold in detail all its principal provisions, with such commentaries, as may explain their import and effect, and with such illustrations, historical and otherwise, as will enable the reader fully to understand the objections, which have been urged against each of them respectively; the amendments, which have been proposed to them; and the arguments, which have sustained them in their present form.

=A7 307. Before doing this, however, it seems necessary, in the first place= , to bestow some attention upon several points, which have attracted a good deal ofdiscussion, and which are preliminary in their own nature; and in the next place to consider, what are the true rules of interpretation belonging to the instrument.

=A7 308. In the first place, what is the true nature and import of the instrument? Is it a treaty, a convention, a league, a contract, or a compact? Who are the parties to it? By whom was it made? By whom was it ratified? What are its obligations? By

whom, and in what manner may it be dissolved? Who are to determine its validity and construction? Who are to decide upon the supposed infractions and violations of it? These are questions often asked, and often discussed, not merely for the purpose of theoretical speculation; but as matters of practical importance, and of earnest and even of vehement debate. The answers given to them by statesmen and jurists are often contradictory, and irreconcilable with each other; and the consequences, deduced from the views taken of some of them, go very deep into the foundations of the government itself, and expose it, if not to utter destruction, at least to evils, which threaten its existence, and disturb the just operation of its powers.

=A7 309. It will be our object to present in a condensed form, some of the principal expositions, which have been insisted on at different times, as to the nature and obligations of the constitution, and to offer some of the principal objections, which have been suggested against those expositions. To attempt a minute enumeration would, indeed, be an impracticable task; and considering the delicate nature of others, which are still the subject of heated controversy, where the ashes are scarcely yet cold, which cover the concealed fires of former political excitements, it is sufficiently difficult to detach some of the more important from the mass of accidental matter, in which they are involved.

=A7 310. It has been asserted by a learned commentator,1 that the constitution of the United States is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several

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1 1 Tucker's Black. Comm. App. note D, p. 140 et seq.

states, and ratified by the people thereof respectively; whereby the several states, and the people thereof, respectively have bound themselves to each other, and to the federal government of the United States, and by which the federal government is bound to the several states and to every citizen of. the United States. The author proceeds to expound every part of this definition at large. It is (says he) a compact, by which it is distinguished from a charter or grant, which is either the act of a superior to an inferior, or is founded upon some consideration moving from one of the parties to the other, and operates as an exchange or sale.1 But were the contracting parties, whether considered as states in their political capacity and character, or as individuals, are all equal; nor is there any thing granted from one to another; but each stipulates to part with, and receive the same thing precisely without any distinction or difference between any of the parties.

=A7 311. It is a federal compact.2 Several sovereign and independent states may unite themselves together by a perpetual confederation, without each ceasing to be a perfect state. They will together form a federal republic. The deliberations in common will offer no

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1 Tucker's Black. Comm. App. note D. p. 141.

2 Mr. Jefferson asserts, that the constitution of the United States is a compact between the states. "They entered into a compact," says he, (in a paper designed to be adopted by the legislature of Virginia, as a solemn protest,) " which is called the Constitution of the United States of America, by which they agreed to unite in a single government, as to their relations with each, and with foreign nations, and as to certain other articles particularly specified."* It would, I imagine, be very difficult to point out when, and in what manner, any such compact was made. The constitution was neither made, nor ratified by the states, as sovereignties, or political communities. It was framed by a convention, proposed to the people of the states for their adoption by congress; and was adopted by state conventions, -- the immediate representatives of the people.

*** 4 Jefferson's Corresp. 415.**

violence to each member, though they may in certain respects put some constraint on the exercise of it in virtue of voluntary engagements. The extent, modifications, and objects of the federal authority are mere matters of discretion.1 So long, as the separate organization of the members remains; and, from the nature of the compact, must continue to exist both for local and domestic, and for federal purposes, the union is in fact, as well as in theory, an association of states, or a confederacy.

=A7 312. It is, also, to a certain extent, a social compact. In the act of association, in virtue of which a multitude of men form together a state or nation, each individual is supposed to have entered into engagements with all, to procure the common welfare; and all are supposed to have entered into engagements with each other, to facilitate the means of supplying the necessities of each individual, and to protect and defend him.2 And this is what is ordinarily meant by the original contract of society. But a contract of this nature actually existed in a visible form between the citizens of each state in their several constitutions. It might, therefore, be deemed somewhat extraordinary, that in the establishment of a federal republic, it should have been thought necessary to extend its operation to the persons of individuals, as well as to the states composing the confederacy.

=A7 313, It may be proper to illustrate the distinction between federal compacts and obligations, and such as are social, by one or two examples.3 A federal compact, alliance, or treaty, is an act of the state or body politic, and not of an individual. On the contrary, a

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1 1 Tucker's Black. Comm. Appx. note D. p. 141.

2 Id. p. 144.

3 Id. 145.

social compact is understood to mean the act of individuals about to create, and establish a state or body politic among, themselves. If one nation binds itself by treaty to pay a certain tribute to another; or if all the members of the same confederacy oblige themselves to furnish their quo[as of a common expense, when required; in either of these cases, the state or body politic only, and not the individual, is answerable for this tribute or quota. This is, therefore, a federal obligation. But, where by any compact, express or implied, a number of persons are bound to contribute their proportions of the common expenses, or to submit to all laws made by the common consent; and where in default of compliance with these engagements the society is authorized to levy the contribution, or to punish the person of the delinquent; this seems to be understood to be more in the nature of a social, than a federal obligation.1

=A7 314. It is an original compact. Whatever political relation existed between the American colonies antecedent to the Revolution, as constituent parts of the British empire, or as dependencies upon it, that relation was completely dissolved, and annihilated from that period. From the moment of the Revolution they became severally independent and sovereign slates, possessing all the lights, jurisdictions, and authority, that other sovereign states, however constituted, or by whatever title denominated, possess; and bound by no ties, but of their own creation, except such, as all other civilized nations are equally bound by, and which together constitute the customary law of nations.2

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1 1 Tucker's Black. Comm. App. note D. p. 145.

2 Id. 150. -- These views are very different from those, which Mr. Dane has, with so much force=20and perspicuity, urged in his Appendix to his Abridgment of the Law, =A72, p. 10, &c.

" In order, correctly, to ascertain this rank, his linking together, and

=A7 315. It is a written compact. Considered as a federal compact or alliance between the states, there is nothing new or singular in this circumstance, as all national compacts since the invention of letters have probably been reduced to that form. But considered in the light of an original social compact, the American Revolution seems to have given birth to this new political phenomenon. In every state a written constitution was framed, and adopted by the people both in their individual and sovereign capacity and character.1

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this subordination, we must go back as far as January, 1774, when the thirteen states existed constitutionally, in the condition of thirteen British colonies, yet, de facto, the people of them exercised original, sovereign power in their institution in 1774, of the continental congress; and, especially, in June, 1775, then vesting in it the great national powers, that will be described; scarcely any of which were resumed. The result will show, that, on revolutionary principles, the general government was, by the sovereign of this people first create de novo,and de facto instituted; and, by the same acts, the people vested in it very extensive powers, which have ever remained in it, modified and defined by the articles of confederation, and enlarged and arranged anew by the constitution of the United States--2d. that the state governments and states, as free and independent states, were, July 4th, 1776, created by the general government, empowered to do it by the people, acting on revolutionary principles, and in their original sovereign capacity; and that all the state governments, as such, have been instituted during the existence of the general government, and in subordination to it, and two thirds of them since the constitution of the United States was ordained and established by all the people thereof in that sovereign capacity. These state governments have been, by the people of each state, instituted under, and, expressly or impliedly, in subordination to the general government, which is expressly recognized by all to be supreme law; and as the power of the whole is, in the nature of things, superior to the power of a part, other things being equal, the power of a state, a part, is inferior to the power of all the states. Assertions, that each of the twenty-four states is completely sovereign, that is, as sovereign as Russia, or France, of course as sovereign as all the states, and that this sovereignty is above judicial cognizance, merit special attention."

1 1 Tucker's Black. Comm. App. note D. p. 153.--There is an inaccuracy here; Connecticut did not form a constitution until 1818, and existed until that period under her colonial charter. Rhode-Island still.

=A7 316. It is a compact freely, voluntarily, and solemnly entered into by the several states, and ratified by the people thereof respectively; freely, there being neither external nor internal force or violence to influence, or promote the measure; the United States being at peace with all the world and in perfect tranquility in each state; voluntarily, because the measure had its commencement in the spontaneous acts of the state legislatures, prompted by a due sense of the necessity of some change in the existing confederation; and solemnly, as having been discussed, not only in the general convention, which proposed and framed it; but afterwards in the legislatures of the several states; and finally in the conventions of all the states, by whom it was adopted and ratified.1

=A7 317. It is a compact, by which the several states and the people thereo= f respectively have bound themselves to each other, and to the federal government. The constitution had its commencement with the body politic of the several states; and its final adoption and ratification was by the several legislatures referred to, and completed by conventions especially, called and appointed for that purpose in each state. The acceptance of the constitution was not only an act of the body politic of each state, but of the people thereof respectively in their sovereign character and capacity. The body politic was competent to bind itself, so far as the constitution of the state permitted.2 But not having power to bind the people in cases beyond their constitutional authority, the assent of the people was indispensably necessary to the validity of the compact,

is without any constitution, and exercises the powers of government under her colonial charter.

1 Id. 155, 156.

2 Id. 169.

by which the rights of the people might be diminished, or submitted to a new jurisdiction, or in any manner affected. From hence, not only the body politic of the several states, but every citizen thereof, may be considered as parties to the compact, and to have bound themselves reciprocally to each other for the due observance of it; and also to have bound themselves to the federal government, whose authority has been thereby created and established.1

=A7 318. Lastly. It is a compact, by which the federal government is bound to the several states, and to every citizen of the United States. Although the federal government can in no possible view be considered as a party to a compact made anterior to its existence, and by which it was in fact created; yet, as the creature of that compact, it must be bound by it to its creators, the several states in the union, and the citizens thereof. Having no existence, but under the constitution, nor any rights, but such as that instrument confers; and those very rights being, in fact duties, it can possess no legitimate power, but such as is absolutely necessary for the performance of a duty prescribed, and enjoined by the constitution.2 Its duties then became the exact measure of its powers; and whenever it exerts a power for any other purpose, than the performance of a duty prescribed by the constitution, it transgresses its proper limits, and violates the public trust. Its duties being moreover imposed for the general benefit and security of the several states in their political character, and of the people, both in their sovereign and individual capacity, if these objects be not obtained, the government does not answer the end of its creation. It is, there-

1 Tucker's Black. Comm. note D. p. 170.

2 Id. 170.

fore, bound to the several states respectively, and to every citizen thereof, for the due execution of those duties, and the observance of this obligation is enforced under the solemn sanction of an oath from those, who administer the government.

=A7 319. Such is a summary of the reasoning of the learned author, by which he has undertaken to vindicate his views of the nature of the constitution. That reasoning s been quoted at large, and for the most part in his own words; not merely as his own, but as representing, in a general sense, the opinions of a large body of statesmen and jurists in different parts of the Union, avowed and acted upon in former times; and recently revived under circumstances, which have given them increased importance, if not a perilous influence.1

=A7 320. It is wholly beside our present purpose to engage in a critical commentary upon the different parts of this exposition. It will be sufficient for all the practical objects we have in view, to suggest the difficulties of maintaining its leading positions, to expound the objections, which have been urged against them, and to bring into notice those opinions, which rest on a very different basis of principles.

=A7 321. The obvious deductions, which may be, and indeed have been, drawn from considering the constitution as a compact between the states, are, that it op-

1 Many traces of these opinions will be found in the public debates in the state legislatures and in congress at different periods. In the resolutions of Mr. Taylor in the Virginia legislature in 1798, it was resolved, "that this assembly doth explicitly and peremptorily declare, that it views the powers of the federal government as resulting from the compact, to which the states are parties." See Dane's Appendix, p 17. The original resolution had the word "alone" after "states," which was struck out upon the motion of the original mover, it having been asserted in the debate, that the people were parties also, and by some of the speakers, that the people were exclusively parties.

erates as a mere treaty, or convention between them, and has an obligatory force upon each state no longer, than suits its pleasure, or its consent continues; that each state has a right to judge for itself in relation to the nature extent, and obligations. Of the instrument, without being at all bound by the interpretation of the federal government, or by that of any other state; and that each retains the power to withdraw from the confederacy and to dissolve the connexion, when such shall be its choice; and may suspend the operations of the federal government, and nullify its acts within its own territorial limits, whenever, in its own opinion, the exi-

The Kentucky Resolutions of 1797, which were drafted by Mr. Jefferson,) declare, "that to this compact [the federal constitution] each state acceded as a state, and is an integral party." North American Review, Oct. 1830, p. 501, 545. In the resolutions of the senate of South Carolina, in Nov. 1817, it is declared, "that the constitution of the United States is a compact between the people of the different states with each other, as separate and independent sovereignties." In Nov. 1799 the Kentucky legislature passed a resolution, declaring, that the federal states had a right to judge of any infraction of the constitution, and, that a nullification by those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy. North American Review, Id. 503. Mr. Madison, in the Virginia Report of 1800, re-asserts the right of the states, as parties, to decide upon the unconstitutionality of any measure. Report. p. 6, 7, 8, 9. The Virginia legislature, in 1829, passed a resolution, declaring, that " the constitution of the United States being a federative compact between sovereign states, in construing which no common arbiter is known, each state has the right to construe the compact for itself.* Mr. Vice President Calhoun's letter to Gov. Hamilton of Aug. 28, 1832, contains a very elaborate exposition of this among other doctrines.

Mr. Dane, in his Appendix, (=A7 3, p. 11,) says, that for forty years one great party has received the constitution, as a federative compact among the states, and the other great party, not as such a compact, but in the main, national and popular. The grave debate in the Senate of the United States, on Mr. Foot's resolution, in the winter of 1830, deserves to be read for its able exposition of the doctrines maintained on each slide. Mr. Dune makes frequent references to it in his Appendix -- 4 Elliot's Debates, 315 to 330. * 3 American Annal Register; Local History, 131.

gency of the case may require.1 These conclusions may not always be avowed; but they flow naturally from the doctrines, which we have under consideration.2 They go to the extent of reducing the government to a mere confederacy during pleasure; and of thus presenting the extraordinary spectacle of a nation existing only at the will of each of its constituent parts.

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1 Virginia, in the resolutions of her legislature on the tariff, in Feb. 1829, declared, "that there is no common arbiter to construe the constitution; being a federative compact between sovereign states, each state has a right to construe the compact for itself." 9 Dane's Abridg. ch. 187, art. 20, =A7 14, p. 589. See also North American Review, Oct. 1830, p. 488 to 528. The resolutions of Kentucky of 1798 contain a like declaration, that "to this compact [the constitution] each state acceded as a state, and is an integral party; that the government created by this compact was not made the exclusive, or final judge of the powers delegated to itself, &c.; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress." North American Review, Oct. 1830, p. 501. The Kentucky resolutions of 1799 go further, and assert, "that the several states, who formed that instrument, [the constitution] being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification by those sovereignties of all unauthorized acts done under colour of that instrument is the rightful remedy." North American Review, Id. 503; 4 Elliot's Debates, 315, 322. In Mr. Madison's Report in the Virginia legislature, in January, 1800, it is also affirmed, that the states are parties to the constitution; but by states he here means (as the context explains) the people of the states. That report insists, that the states are in the last resort the ultimate judges of the infractions of the constitution. p. 6, 7, 8, 9.

2 I do not mean to assert, that all those, who held these doctrines, have adopted the conclusions drawn from them. There are eminent exceptions; and among them the learned commentator on Blackstone's Commentaries seems properly numbered. See 1 Tucker's Black. App. 170, 171, =A7 8. See the Debates in the senate on Mr. Foot's Resolution in 1830, and Mr. Dane's Appendix, and his Abridgment and Digest, 9th Vol. ch. 187, art. 20, =A7 13 t=o 22, p. 588 et seq.; North American Review for Oct. 1830, on the Debates on the Public Lands, p. 481 to 486, 488 to 528; 4 Elliot's Debates, 315 to 330; Madison's Virginia Report, Jan. 1800, p. 6, 7, 8, 9; 4 Jefferson's Correspondence, 415; Vice President Calhoun's Letter to Gov. Hamilton, Aug. 28, 1832.

=A7 322. If this be the true interpretation of the instrument, it has wholl= y railed to express the intentions of its framers, and brings back, or at least may bring back, upon us all the evils of the old confederation, from which we were supposed to have had a safe deliverence. For the power to operate upon individuals, instead of operating

merely on states, is of little consequence, though yielded by the constitution, if that power is to depend for, its exercise upon the continual consent of all the members upon every emergency. We have already seen, that the framers of the instrument contemplated no such dependence. Even under the confederation it was deemed a gross heresy to maintain, that a party to a compact has a right to revoke that compact; and the possibility of a question of this nature was deemed to prove the necessity of laying the foundations of our national government deeper, than in the mere sanction of delegated authority.1 "A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity, than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void."2 Consequences like these, which place the dissolution

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1 The Federalist, No. 22; Id. No. 43; see also Mr. Patterson's Opinion in the Convention, 4 Elliot's Debates, 74, 75; and Yates's Minutes.

2 The Federalist, No. 43. Mr. Madison, in the Virginia Report of January 1800, asserts, (p. 6, 7,) that " the states being parties to the constitutional compact, and in their sovereign capacity, it follows ofneces sity, that there can be no tribunal above their authority to decide in the last resort, whether the compact made by them be violated; and conse-

of the government in the hands of a single state, and enable it at will to defeat, or suspend the operation of the laws of the union, are too serious, not to require us to scrutinize with the utmost care and caution the principles, from which they flow, and by which they are attempted to be justified.

=A7 323. The word " compact," like many other important words in our language, is susceptible of different shades of meaning, and may be used in different senses. It is sometimes used merely to express a deliberate and voluntary assent to any act or thing. Thus, it has been said by Dr. South, that " in the beginnings of speech, there was an implicit compact founded upon common consent, that such words, voices, or gestures, should be signs, whereby they would express their thoughts;"1 where, it is obvious, that nothing more is meant, than a mutual and settled appointment in the use of language. It is also used to express any agreement or contract between parties, by which they are bound, and incur legal obligations.2 Thus we say, that one person has entered into a compact with another, meaning, that the contracting parties have entered

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quently, that, as the parties to it, they must themselves decide in the last resort such questions, as may be of sufficient magnitude to require their interposition." Id. p. 8, 9.

1 Cited in Johnson's Dictionary, verb Compact. See Heinecc. Elem. Juris. Natur. L. 2, ch. 6, =A7 109 to 112.

2 Pothier distinguishes between a contract and an agreement. An agreement, he says, is the consent of two or more persons to form some engagement, or to rescind, or modify an engagement already made. Duorum vel plurium in idem placitum consensus. Pand. Lib. 1, =A7 1. de Pactis. An agreement, by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing, or to do or abstain from a particular act, is a contract; by which he means such an agreement, as gives a party the right legally to demand its performance. Pothier, Oblig. Part. 1, ch. 1, =A7 1, art. 1, =A7 1. See 1 Black. Comm. 44, 45.

into some agreement, which is valid in point of law, and includes mutual rights and obligations between them. And it is also used, in an emphatic sense, to denote those agreements and stipulations, which are entered into between nations, such as public treaties, conventions, confederacies, and other solemn acts of national authority.1 When we speak of a compact in a legal sense, we naturally include in it the notion of distinct contracting parties, having mutual rights, and remedies to enforce the obligations arising therefrom. We suppose, that each party has an equal and independent capacity to enter into the contract, and has an equal right to judge of its terms, to enforce its obligations, and to insist upon redress for any violation of them.2 This, in a general sense, is true under our systems of municipal law, though practically, that law stops short of maintaining it in all the variety of forms, to which modern refinement has pushed the doctrine of implied contracts.

=A7 324. A compact may, then, be said in its most general sense to import a= n agreement according to Lord Coke's definition, aggregatio mentium, an aggregation or consent of minds; in its stricter sense to import a contract between parties, which creates obligations, and rights capable of being enforced, and contemplated, as such, by the parties, in

their distinct and independent characters. This is equally true of them; whether the contract be between individuals, or between nations. The remedies are, or may be, different; but the right to enforce, as accessory to the obligation, is equally retained in each case. It forms the very substratum of the engagement.

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1 Vattel, B. 2, ch. 12, =A7 152; 1 Black. Comm. 43.

2 2 Black. Comm. 442.

=A7 325. The doctrine maintained by many eminent writers upon public law in modern times is, that civil society has its foundation in a voluntary consent or submission;1 and, therefore, it is often said to depend upon a social compact of the people composing the nation. And this, indeed, does not, in substance, differ from the definition of it by Cicero, Multitudo, juris consensu et utilitatis communione sociata; that is, (as Burlamaqui gives it,) a multitude of people united together by a common interest, and by common laws, to which they submit with one accord.2

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1 Woodeson's Elements of Jurisprudence, 21, 22; 1 Wilson's Law Lect. 304, 305; Vattel, B. 1, ch. 1, =A71, 2; 2 Burlamaqui, Part 1, ch. 2, 3, 4; 1 Black. Comm. 47, 48, Heinecc. L. 2, ch. 1, =A712 to 18; (2 Turnbull, Heinecc= . System of Universal Law, B. 2, ch. 1, =A79 to 12;) Id. ch. 6, =A7109 to 115.

2 2 Burlamaqui, Part 1, ch. 4, =A79; Heinecc. Elem. Juris. Natur. L. 2, ch. 6, =A7107. Mr. Locke is one of the most eminent authors, who have treated on this subject. He founds all civil government upon consent. "When," says he, "any number of men have so consented to make a community of government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act, and conclude the rest."* And he considers this consent to be bound by the will of the majority, as the indispensable result of becoming a community; "else," says he, "this original compact, whereby he, with others, incorporates into one society, would signify nothing, and be no compact at all."# Doctor Paley has urged some very forcible objections against this doctrine, both as matter of theory and of fact, with which, however, it is unnecessary here to intermeddle. The discussion of them would more properly belong to lectures upon natural and political law.+ Mr. Burke has, in one of his most splendid performances, made some profound reflections on this subject, the conclusion of which seems to be, that of society is to be deemed a contract, it is one of eternal obligation, and not liable to be dissolved at the will of those, who have entered into it. The passage is as follows: "Society is indeed a contract. Subordinate contracts for objects of more occasional interest may be deposited at pleasure. But the state ought not to be considered as nothing better than a partnership agree * Loke on Government, B. 2, ch 8, =A7 95.

 # Coke on Government, b. 2, =A796, 97, 99; Id. =A7119, 120.

+ Paley on Moral and Political Philosophy, B. 6, ch. 3.

=A7 326. Mr. Justice Blackstone has very justly observed, that the theory o= f an original contract upon the first formation of society is a visionary notion. "But though society had not its formal beginning from any convention of individuals actuated by their wants and fears; yet it is the sense of their weakness and imperfection, that keeps mankind together; that demonstrates the necessity of this union; and that, therefore, is the solid and natural foundation, as well

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ment in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things, subservient only to the gross animal existence, of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those, who are living, but between those, who are living, those, who are dead, and those, who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according, to a fixed compact, sanctioned by the inviolable oath, which holds all physical and all moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of

elementary principles. It is the first and supreme necessity only, a necessity, that is not chosen, but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy. This necessity is no exception to the rule; because this necessity itself is a part too of that moral and physical disposition of things, to which man must he obedient by consent or force. But, if that, which is only submission to necessity, should be made the object of choice, the law is broken, nature is disobeyed, and the rebellious are outlawed, east forth, and exiled from this world of reason, and order, and peace, and virtue, and fruitful penitence, into the antagonist world of madness, discord, vice, confusion, and unavailing sorrow." Reflections on the Revolution in France.

as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet, in nature and reason, must always be understood, and implied in the very act of associating together; namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member; and that in return for this protection each individual should submit to the laws of the community."1 It is in this sense, that the preamble of the constitution of Massachusetts asserts, that "the body politic is formed by a voluntary association of individuals; that it is a social compact, by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good;" and that in the same preamble, the people acknowledge with grateful hearts, that Providence had afforded them an opportunity "of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for themselves and their posterity." It is in this sense too, that Mr. Chief Justice Jay is to be understood, when he asserts,2 that "every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the constitution of the United States is, likewise, a compact

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1 1 Black. Comm. 47; see also 1 Hume's Essays, Essay 12.-- Mr. Hume considers, that the notion of government, being universally founded in original contract, is visionary, unless in the sense of its being founded upon the consent of those, who first associate together, and subject themselves to authority. He has discussed the subject at large in an elaborate Essay. Essay 12, p. 491.

2 Chisholm v. State of Georgia, 3 Dall. R. 419; 2 Cond. Rep. 635, 668; see also 1 Wilson's Law Lect. 305.

made by the people of the United States, to govern themselves as to general objects in a certain manner." He had immediately before stated, with reference to the preamble of the constitution, "Mere we see the people acting, as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution, by which it was their will, that the state governments should be bound, and to which the state constitutions should be made to conform."1

=A7 327. But although in a general sense, and theoretically speaking, the formation of civil societies and states may thus be said to be founded in a social compact or contract, that is, in the solemn, express or implied consent of the individuals composing them; yet the doctrine itself requires many limitations and qualifications, when applied to the actual condition of nations, even of those, which are most free in their organization.2 Every state, however organized, embraces many persons in it, who have never assented to its form of government; and many, who are deemed incapable of such assent, and yet who are held bound by its fundamental institutions and laws. Infants, minors, married women, persons insane, and many others, are deemed subjects of a country, and bound by its laws; although they have

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1 In the ordinance of congress of 1787, for the government of the territory of the United States northwest of river Ohio, in which the settlement of the territory, and the establishment of several states therein, was contemplated, it was declared, that certain articles therein enumerated "shall be considered as articles of compact between the original states and the people and states in the said territory, and for ever remain unalterable, unless by common consent." Here is an express enumeration of parties, some of whom were not then in existence, and the articles of compact attached as such only, when they were brought into life. And then to avoid all doubt, as to their obligatory force, they were to be unalterable, except by common consent. One party could not change or absolve itself from the obligation to obey them.

2 See Burke's Appeal from the New to the Old Whigs.

never assented thereto, and may by those very laws be disabled from such an act. Even our most solemn instruments of government, framed and adopted as the constitutions of our state governments, are not only not founded upon the assent of all the people within the territorial jurisdiction; but that assent is expressly excluded by the very manner, in which the ratification is required to be made. That ratification is restricted to those, who are qualified voters; and who are, or shall be qualified voters, is decided by the majority in the convention or other body, which submits the constitution to the people. All of the American constitutions have been formed in this manner. The assent of minors, of women, and of unqualified voters has never been asked or allowed; yet these embrace a majority of the whole population in every organized society, and are governed by its existing institutions. Nay more; a majority only of the qualified voters is deemed sufficient to change the fundamental institutions of the state, upon the general principle, that the majority has at all times a right to govern the minority, and to bind the latter to obedience to the will of the former. And if more than a plurality is, in any case, required, to amend or change the actual constitution of the society, it is a matter of political choice with the majority for the time being, and not of right on the part of the minority.

=A7 328. It is a matter of fact, therefore, in the history of our own forms of government, that they have been formed without the consent, express or implied, of the whole people; and that, although firmly established, they owe their existence and authority to the simple will of the majority of the qualified voters. There is not probably a single state in the Union, whose constitution has not been adopted against the opinions and wishes of

a large minority, even of the qualified voters; and it is notorious, that some of them have been adopted by a small majority of votes. How, then, can we assert with truth, that even in our free constitutions the government is founded in fact on the assent of the whole people, when many of them have not been permitted to express any opinion, and many have expressed a decided dissent? In what manner are we to prove, that every citizen of the state has contracted with all the other citizens, that such constitution shall be a binding compact between them, with mutual obligations to observe and keep it, against such positive dissent? If it be said, that by entering into. the society an assent is necessarily implied to submit to the majority, how is it proved, that a majority of all the people of all ages and sexes were ever asked to assent, or did assent to such a proposition? And as to persons subsequently born, and subjected by birth to such society, where is the record of such assent in point of law or fact?1

=A7 329. In respect to the American revolution itself, it is notorious, that was brought about against the wishes and resistance of a formidable minority of the people; and that the declaration of independence never had the universal assent of all the inhabitants of the country. So, that this great and glorious change in the organization of our government owes its whole authority to the efforts of a triumphant majority. And the dissent on the part of the minority was deemed in many cases a crime, carrying along with it the penalty of confiscation, forfeiture, and personal, and even capital punishment; and in its mildest form was deemed an unwarrantable outrage upon the public rights, and a total disregard of the duties of patriotism.

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1 See 1 Hume's Essays, Essay 12.

=A7 330. The truth is, that the majority of every organized society has always claimed, and exercised the right to govern the whole of that society, in the manner pointed out by the fundamental laws, which from time to time have existed in such society.1 Every revolution, at least when not produced by positive force, has been founded upon the authority of such majority. And the right results from the very necessities of our nature; for universal consent can never be practically required or obtained. The minority are bound, whether they have assented or not; for the plain reason, that opposite wills in the same society, on the same subjects, cannot prevail at the same time; and, as society is instituted for the general safety and happiness, in a conflict of opinion the majority must have a right to accomplish that object by the means, which they deem adequate for the end. The majority may, indeed, decide, how far they will respect the rights or claims of the minority; and how far they will, from policy or principle, insist upon or absolve them from obedience. But this is a matter, on which it decides for itself, according to its own notions of justice or convenience. In a general sense the will of the majority of the people is absolute and sovereign, limited only by its means and power to make its will effectual.2 The declaration of independence (which, it is historically known, was not the act of the whole American people) puts the doc-

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1 1 Tucker's Black. Comm. App. 168; Id. 172, 173; Burke's Appeal from the New to the Old Whigs.

2 Mr. Dane, in his Appendix to the ninth volume of his Abridgment, has examined this subject very much at large. See, especially, pages 37 to 43. Mr. Locke, the most strenuous asserter of liberty and of the original compact of society, contends resolutely for this power of the majority to bind the minority, as a

necessary condition in the original formation of society. Locke on Government, B. 2, ch. 8, from =A795 to =A7100.

trine on its true grounds; Men are endowed, it declares, with certain unalienable rights, and among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. Whenever any form of government becomes destructive of these ends, it is the right of the people (plainly intending, the majority of the people) to alter, or to abolish it, and to institute a new government, laying its foundationon such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness.

=A7 331. But whatever may be the true doctrine, as to the nature of the original compact of society, or of the subsequent institution and organization of governments consequent thereon, it is a very unjustifiable course of reasoning to connect with the theory all the ordinary doctrines applicable to municipal contracts between individuals, or to public conventions between nations. We have already seen, that the theory itself is subject to many qualifications; but whether true or not, it is impossible, with a just regard to the objects and interests of society, or the nature of compacts of government, to subject them to the same constructions and conditions, as belong to positive obligations, created between independent parties, contemplating, a distinct and personal responsibility. One of the first elementary principles of all contracts is, to interpret them according, to the intentions and objects of the parties. they are not to be so construed, as to subvert the obvious objects, for which they were made; or to lead to results wholly beside the apparent intentions of those, who framed them.1

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1 It was the consideration of the consequences deducible from the theory of an original subsisting compact between the people, upon the

=A7 332. Admitting, therefore, for the sake of argument, that the institution of a government is to be deemed, in the restricted sense already suggested, an original compact or contract between each citizen and the whole community, is it to be construed, as a continuing contract after its adoption, so as to involve the notion of there being still distinct and independent parties to the instrument, capable, and entitled, as matter of right, to judge and act upon its construction, according, to their own views of its import and obligations? to resist the enforcement of the powers delegated to the government at the good pleasure of each? to dissolve all connexion with it, whenever there is a supposed breach of it on the other side?1 These are momentous questions, and go to the very foundation of every government founded on the voluntary choice of the people; and they should be seriously investigated, before we admit the conclusions, which may be drawn from one aspect of them.2

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first formation of civil societies and governments, that induced Doctor Paley to reject it. He supposed, that, if admitted, its fundamental principles were still disputable and uncertain; that, if founded on compact, the form of government, however absurd or inconvenient, was still obligatory; and that every violation of the compact involved a right of rebellion and a dissolution of the government.* Mr. Wilson (afterwards Mr. Justice Wilson) urged the same objection very forcibly in the Pennsylvanian Convention for adopting the constitution. 3 Elliot's Debates, 286, 287, 288. Mr. Hume considers the true reason for obedience to government to be, not a contract or promise to obey; but the fact, that society could not otherwise subsist. #

1 9 Dane's Abridg. ch. 187, art. 20, =A713, p. 589.

2 Mr. Woodeson (Elements of Jurisp. p. 22,) says, "However the historical fact may be of a social compact, government ought to be, and is generally considered as founded on consent, tacit or express, or a real,

*** Paley's Moral Philosophy, B. 6, ch. 3. But see Burke's Reflections on the French Revolution, ante, p. 293, 294. # 1 Hune's Essays, Essay 12.**

=A7 333. Take, for instance, the constitution of Massachusetts, which in it= s preamble contains the declaration already quoted, that government "is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole government;" are we to construe that compact, after the adoption of the constitution, as still a contract, in which each citizen is still a distinct party, entitled to his remedy for any breach of its obligations, and authorized to separate himself from the whole society, and to throw off all allegiance, whenever he supposes, that any of the fundamental principles of that compact are infringed, or misconstrued? Did the people intend, that it should be thus in the power of any individual to dissolve the whole government at his pleasure, or to absolve himself from all obligations and duties thereto, at his choice, or upon his own interpretation of the instrument? If

such a power exists, where is the permanence or security of the government? In what manner are the rights and property of the citizens to be maintained or enforced? Where are the duties of allegiance or obedience? May one withdraw his consent to-day, and re-assert it to-morrow? May one claim the protection and assistance of the laws and institutions to-day, and to-morrow repudiate them? May one declare war against all the others for a supposed

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or quasi compact. This theory is a material basis of political rights; and as a theoretical point, is not difficult to be maintained, &c. &c. Not that such consent is subsequently revokable at the will, even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment." However questionable this latter position may be, (and it is open to many objections,*) it is certain, that a right of the minority to withdraw from the government, and to overthrow its powers, has no foundation in any just reasoning. * See 1 Wilson's 417, 418, 419, 420.

infringement of the constitution? If he may, then each one has the same right in relation to all others; and anarchy and confusion, and not order and good government and obedience, are the ingredients, which are mainly at work in all free institutions, founded upon the will, and choice, and compact of the people. The existence of the government, and its peace, and its vital interests will, under such circumstances, be at the mercy and even at the caprice of a single individual. It would not only be vain, but unjust to punish him for disturbing society, when it is but by a just exercise of the original rights reserved to him by the compact. The maxim, that in every government the will of the majority shall, and ought to govern the rest, would be thus subverted; and society would, in effect, be reduced to its original elements. The association would be temporary and fugitive, like those voluntary meetings among barbarous and savage communities, where each acts for himself, and submits only, while it is his pleasure.

=A7 334. It can readily be understood, in what manner contracts, entered into by private persons, are to be construed, and enforced under the regular operations of an organized government. Under such circumstances, if a breach is insisted on by either side, the proper redress is administered by the sovereign power, through the medium of its delegated functionaries, and usually by the judicial department, according to the principles established by the laws, which compose the jurisprudence of that country. In such a case no person supposes, that each party is at liberty to insist absolutely and positively upon his own construction, and to redress himself accordingly by force or by fraud. He is compellable to submit the decision to others, not chosen by himself, but appointed by the government, to secure

the rights, and redress the wrongs of the whole community. In such cases the doctrine prevails, inter leges silent arma. But the reverse maxim would prevail upon the doctrine, of which we are speaking, inter arma silent Ieges. It is plain, that such a resort is not contemplated by any of our forms of government, by a suit of one citizen against the whole for a redress of his grievances, or for a specific performance of the obligations of the=20constitution. He may have, and doubtless in our forms of administering justice has, a complete protection of his rights secured by the constitution, when they are invaded by any other citizen. But that is in a suit by one citizen against another; and not against the body politic, upon the notion of contract.

=A7 335. It is easy, also, to understand, how compacts between independent nations are to be construed, and violations of them redressed. Nations, in their sovereign character, are all upon an equality; and do not acknowledge any superior, by whose decrees they are bound, or to whose opinions they are obedient. Whenever, therefore, any differences arise between them, as to the interpretation of a treaty, or of the breach of its terms, there is no common arbiter, whom they are bound to acknowledge, having authority to decide them. There are but three modes, in which these differences can be adjusted; first, by new negotiations, embracing and settling the matters in dispute; secondly, by referring the same to some common arbitor, pro hac vice, whom they invest with such power; or thirdly, by a resort to arms, which is the ultima ratio regum, or the last appeal between sovereigns.

=A7 336. It seems equally plain,' that in our forms of government, the constitution cannot contemplate either of these modes of interpretation or redress. Each

citizen is not supposed to enter into the compact, as a sovereign with all the others as sovereign, retaining an independent and coequal authority to Judge, and decide for himself. He has no authority reserved to institute new negotiations; or to suspend the operations of the constitution, or to compel the reference to a common arbiter; or to declare war against the community, to which he belongs.

=A7 337. No such claim has ever (at least to our knowledge) been asserted b= y any jurist or statesman, in respect to any of our state constitutions. The understanding is general, if not universal, that, having been adopted by the

majority of the people, the constitution of the state binds the whole community proprio vigore; and is unalterable, unless by the consent of the majority of the people, or at least of the qualified voters of the state, in the manner prescribed by the constitution, or otherwise provided for by the majority. No right exists, or is supposed to exist, on the part of any town, or county, or other organized body within the state, short of a majority of the whole people of the state, to alter, suspend, resist, or dissolve the operations of that constitution, or to withdraw themselves from its jurisdiction. Much less is the compact supposed liable to interruption, or suspension, or dissolution, at the will of any private citizen upon his own notion of its obligations, or of any infringements of them by the constituted authorities.1 The only redress for any such infringements, and the only guaranty of individual rights and property, are understood to consist in the peaceable appeal to the proper tribunals constituted by the government for such pur-

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1 Dane's App. =A714, p. 25, 26.

poses; or if these should fail, by the ultimate appeal to the good sense, and integrity, and justice of the majority of the people. And this, according to Mr. Locke, is the true sense of the original compact, by which every individual has surrendered to the majority of the society the right permanently to control, and direct the operations of government therein.1

=A7 338. The true view to be taken of our state constitutions is, that they are forms of government, ordained and established by the people in their original sovereign capacity to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare. The language of nearly all these state constitutions is, that the people do ordain and establish this constitution; and where these terms are not expressly used, they are necessarily implied in the very substance of the frame=20of government.2 They may be deemed compacts, (though not generally declared so on their face,) in the sense of their being founded on the voluntary consent or agreement of a majority of the qualified voters of the state. But they are not treated as contracts and conventions between independent individuals and communities, having no common umpire.3 The language of these instruments is not the usual or appropriate language for mere matters resting, and forever to rest in con-

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1 Locke on Government, B. 2, ch. 8, =A795 to 100; ch. 19, =A7212, 220, 226, 240, 243; 1 Wilson's Law Lectures, 310, 384, 417, 418. -- Mr. Dane (App. p. 32) says, that if there be any compact, it is a compact to make a constitution; and that done, the agreement is at an end. It then becomes an executed contract, and, according to the intent of the parties, a fundamental law.

2 Dane's App. =A716, 17, p. 29, 30; Id. =A714, p. 25, 26.

3 Heinecc. Elem. Juris. Natur. L. 2, ch. 6, =A7109 to 115. (2 Turnbull, Hein. p. 95, &c.)

tract. In general the import is, that the people "ordain and establish," that is, in their sovereign capacity, meet and declare, what shall be the fundamental LAW for the government of themselves and their posterity. Even in the constitution of Massachusetts, which, more than any other, wears the air of contract, the compact is declared to be a "mere constitution of civil government," and the people "do agree on, ordain, and establish the following declaration of rights, and frame of government, as the constitution of government." In this very bill of rights, the people are declared " to have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state"; and that "they have an incontestible, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it." It is, and accordingly has always been, treated as a fundamental law, and not as a mere contract of government, during the good pleasure of all the persons; who were originally bound by it, or assented to it.1

=A7 339. A constitution is in fact a fundamental law or basis of government=, and falls strictly within the definition of law, as given by Mr. Justice Blackstone. It is a

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1 Mr. Justice Chase, in Ware v. Hylton, 3 Dall. R. 199 Condensed R. 99, declares the constitution of a state to be the fundamental law of the state. -- Mr. Dane has with, great force said, that a constitution is a thing constituted, an instrument ordained and established. If a committee frame a constitution for a state, and the people thereof meet in their several counties, and ratify it, it is a constitution ordained and established, and not a compact, or contract among the counties. So, if they meet in several towns and ratify it, it is not a compact among them. A compact among states is a confederation, and is always so named, (as was the old confederation,) and never a constitution 9 Dane's Abridgment, ch. 187, art. 20, =A715, p. 590.

rule of action, prescribed by the supreme power in a state, regulating the rights and duties of the whole community. It is a rule, as contradistinguished from a temporary or sudden order; permanent, uniform, and universal. It is also called a rule, to distinguish it from a compact, or agreement; for a compact (he adds) is a promise. proceeding from us; law is a command directed to us. The language of a compact is, I will, or will not do this; that of a law is, Thou shalt, or shalt not do it.1 "In compacts we ourselves determine and promise, what shall be done, before we are obliged to do it. In laws, we are obliged to act without ourselves determining, or promising any thing at all."2 It is a rule prescribed; that is, it is laid down, promulgated, and established. It is prescribed by the supreme power in a state, that is, among us, by the people, or a majorityof them in their original sovereign capacity. Like the ordinary municipal laws, it may be founded upon our consent, or that of our representatives; but it derives its ultimate obligatory force, as a law, and not as a compact.

=A7 340. And it is in this light, that the language of the constitution of the United States manifestly contemplates it; for it declares (article 6th), that this constitution and the laws, &c. and treaties made under the authority of the United States, "shall be the supreme LAW of the land." This (as has been justly observed by the Federalist) results from the very nature of political institutions. A law, by the very meaning of the terms, includes supremacy.3 If individuals enter into

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1 Black. Comm. 38, 44, 45. See also Burlamaqui, Part 1, ch 8, p. 48, =A73,= 4, 5.

2 1 Black. Comm. 45.

3 The Federalist, No. 33. See also, No. 15.

a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws, which the latter may enact, pursuant to the powers entrusted to it by its constitution, must be supreme over those societies, and the individuals, of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy.1 A state constitution is then in a just and appropriate sense, not only a law, but a supreme law, for the government of the whole people, within the range of the powers actually contemplated, and the rights secured by it. It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of contract, and resting, on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being, transferred or surrendered.2

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1 The Federalist, No. 33.

2 Mr. Adams, in his Oration on the 4th of July, 1831, uses the following language: "In the constitution of this commonwealth [Massachusetts] it is declared, that the body politic is formed by a voluntary association of individuals. That it is a social compact, &c. The body politic of the United States was formed by a voluntary association of the people of the United Colonies. The Declaration of Independence was a social compact, by which the whole people covenanted with each citizen of the united colonies, and each citizen with the whole people, that the united colonies were, and of right ought to be, free and independent states. To this compact, union was as vital, as freedom and independence. From the hour of that independence, no one of the states, whose people were parties to it, could, without a violation of that primitive compact, secede, or separate from the rest. Each was pledged to all; and all were pledged to each other by a concert of soul, without

=A7 341. The resolution of the convention of the peers and commons in 1688 which deprived King James the Second of the throne of England, may perhaps be thought by some persons to justify the doctrine of an original compact of government in the sense of those, who deem the constitution of tile United States a treaty or league between the states, and resting merely in contract; It is in the following words: "Resolved, that King James the Second, having endeavoured to subvert the constitution of the kingdom by breaking the original contract between king and people; and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and withdrawn himself out of the kingdom, hath abdicated the government, and that the throne is thereby become vacant."1

=A7 342. It is well known, that there was a most serious difference of opinion between the house of peers=20and the house of commons upon the language of this resolution, and especially upon that part, which declared the abdication and vacancy of the throne. In consequence of which a free conference was held by committees of

limitation of time, in the presence of Almighty God, and proclaimed to all mankind. The colonies were not declared to be sovereign states. The term 'sovereign' is not even to be found in the Declaration." Again -- "Our Declaration of Independence, our confederation, our constitution of the United States, and all our state constitutions, without a single exception, have been voluntary compacts, deriving all their authority from the free consent of the parties to them." And he proceeds to state, that the modern doctrine of nullification of the laws of the Union by a single state, is a solecism of language, and imports selfcontradiction; and goes to the destruction of the government, and the Union. It is plain, from the whole reasoning of Mr. Adams, that when be speaks of the constitution as a compact, he means no more, than that it is a voluntary and solemn consent of the people to adopt it, as a form of government; and not a treaty obligation to be abrogated at will by a single state.

1 1 Black. Comm. 211, 222.

both houses, in which the most animated debates took place between some of the most distinguished men in the kingdom. But the commons adhering to their vote, the lords finally acceded to it. The whole debate is preserved; and the reasoning on each side is given at large.1 In the course of the debate notice was frequently taken of the expression of breaking the original contract between king and people. The Bishop of Ely said, "I may say, that this breaking the original contract is a language, that hath not been long used in this place, nor known in any of our law books or public records. It is sprung up, but as taken from some late authors, and those none of the best received; and the very phrase might bear a great debate, if that were now to be spoken to." -- "The making of new laws being as much a part of the original compact, as the observing old ones, or any thing else, we are obliged to pursue those laws, till altered by the legislative power, which, singly or jointly, without the royal assent, I suppose we do not pretend to." -- "We must think sure that meant of the compact, that was made at first time, when the government was first instituted, and the conditions, that each part of the government should observe on their part; of which this was most fundamental, that king, lords, and commons in parliament assembled shall have the power of making new laws and altering of old ones."2 Sir George Treby said, "We are gone too far, when we offer to inquire into the original contract, whether any such thing is known, or understood in our law or constitution, and whether it be new language among us." First, it is a phrase used by the learned

1 Parliamentary Debates, 1688, edit. 1742, p. 203 et seq.

2 Id. p. 217, 218.

Mr. Hooker in his book of Ecclesiastical Polity, whom I mention as a valuable authority, &c. "But I have yet a greater authority than this to influence this matter, and that is your lordship's own, who have agreed to all the vote, but this word, abdicated, and the vacancy of the throne." He then supposes the king to say, "The title of kingship I hold by original contract, and the fundamental constitutions of the government, and my succession to, and possession of the crown on these terms is a part of that contract. This part of the contract I am weary of," &c.1 The Earl of Nottingham said, "I know no laws, as laws, but what are fundamental constitutions, as the laws are necessary so far to support the foundation."2 Sir Thomas Lee said, "The contract was to settle the constitution, as to the legislature; and it is true, that it is a part of the contract, the making of laws, and that those laws should oblige all sides when made. But yet not so as to exclude this original constitution in all governments, that commence by compact, that there should be a power in the states to make provision in all times, and upon all occasions for extraordinary cases of necessity, such as ours now is."3 Sir George Treby again said, "The laws made are certainly part of the original contract, and by the laws made, &c. we are tied up to keep in the hereditary line," &c.4 Mr. Sergeant Holt (afterwards Lord Chief Justice) said, "The government and magistracy are all under a trust, and any acting contrary to that trust is a renouncing of the trust, though it be not a renouncing by formal deed. =46or it is a plain declaration by act and deed, though not in writing,

1 Parliamentary Debates, 1688, edit. 1742, p. 221, 223, 224.

2 Id. p. 225,2 26.

3 Id. 246.

4 Id. 249.

that he, who hath the trust, acting contrary, is a disclaimer of the trust."1 Mr. Sergeant Maynard said, "The constitution, notwithstanding the vacancy, is the same. The laws, that are the foundations and rules of that

constitution, are the same. But if there be in any instance a breach of that constitution, that will be an abdication, and that abdication will confer a vacancy."2 Lord Nottingham said, "Acting against a man's trust (says Mr. Sergeant Holt) is a renunciation of that trust. I agree, it is a violation of his trust to act contrary to it. And he is accountable for that violation to answer, what the trust suffers out of his own estate. But I deny it to be presently a renunciation of the trust, and that such a one is no longer a trustee."3

=A7 343. Now it is apparent from the whole reasoning of all the parties, that they were not considering, how far the original institution of government was founded in compact, that is, how far society itself was founded upon a social compact. It was not a question brought into discussion, whether each of the people contracted with the whole people, or each department of the government with all others, or each organized community within the realm with all others, that there should be a frame of government, which should form a treaty between them, of which each was to judge for himself, and from which each was at liberty to withdraw at his pleasure, whenever he or they supposed it broken. All of the speakers on all sides were agreed, that the constitution was not gone; that it remained in full force, and obligatory upon the whole people, including the laws made under it, notwithstanding the violations by the king.

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1 Parliamentary Debates 1688, edit. 1742, p. 213.

2 Id. p. 213, 214.

3 Id. 220.

=A7 344. The real point before them was upon a contract of a very different sort, a contract, by which the king upon taking upon himself the royal office undertook, and bound himself to the whole people to govern them according to the laws and constitution of the government. It was, then, deemed a contract on his part singly with the whole people, they constituting an aggregate body on the other part. It was a contract or pledge by the executive, called upon to assume an hereditary, kingly authority, to govern according to the rules prescribed by the form of government, already instituted by the people. The constitution of government and its limitations of authority were supposed to be fixed (no matter whether in fiction only, or in fact) antecedently to his being chosen to the kingly office. We can readily understand, how such a contract may be formed, and continue even to exist. It was actually made with William the Third, a few days afterwards; it has been recently made in =46rance by King Louis Philippe, upon the expulsion of the old line of the Bourbons. But in both these cases the constitution of government was supposed to exist independent Or, and antecedent to, this contract. There was a mere call of a particular party to the throne, already established in the government, upon certain fundamental conditions, which, if violated by the incumbent, he broke his contract, and forfeited his right to the crown. But the constitution of government remained, and the only point left was to supply the vacancy by a new choice.1

=A7 345. Even in this case a part of the people did not undertake to declare the compact violated, or the throne vacant. The declaration was made by the peers in

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1 1 Black. Comm. 212, 213.

their own right, and by the commons by their representatives, both being assembled in convention expressly to meet the exigency. "For," says Blackstone, "whenever a question arises between the society at large, and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of that society itself. There is not upon earth any other tribunal to resort to."1 **=A7 346.** This was precisely the view entertained by the great revolutionary whigs in 1688. They did not declare the government dissolved, because the king had violated the fundamental laws and obligations of the constitution. But they declared, that those acts amounted to a renunciation and abdication of the government by him; and that the throne was vacant, and must be supplied by a new choice. The original contract with him was gone. He had repudiated it; and lost all rights under it. But these violations did not dissolve the social organization, or vary the existing constitution and laws, or justify any of the subjects in renouncing their own allegiance to the government; but only to King James."2 In short, the government was no more dissolved, than our own would be, if the president of the United States should violate his constitutional duties, and, upon an impeachment and trial, should be removed from office.

=A7 347. There is no analogy whatsoever between that case, and the government of the United States, or the social compact, or original constitution of government

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1 1 Black. Comm. 211.

2 1 Black. Comm. 212, 213.-- The same doctrines were avowed by the great whig leaders of the house of commons on the trial of Doctor Sacheverill, in 1709. Mr. Burke, in his Appeal from the New to the Old Whigs, has given a summary of the reasoning, and supported it by copious extracts from the trial.

adopted by a people. If there were any analogy, it would follow, that every violation of the constitution of the United States by any department of the government would amount to a renunciation by the incumbent or incumbents of all rights and powers conferred on that department by the constitution, ipso facto, leaving a vacancy to be filled up by a new choice; a doctrine, that has never yet been broached, and indeed is utterly unmaintainable, unless that violation is ascertained in some mode known to the constitution, and a removal takes place accordingly. For otherwise such a violation by any functionary of the government would amount to a renunciation of the constitution by all the people of the United States, and thus produce a dissolution of the government eo instanti; a doctrine so extravagant, and so subversive of the rights and liberties of the people, and so utterly at war with all principles of common sense and common Justice, that it could never find its way into public favour by any ingenuity of reasoning, or any vagaries of theory.

=A7 348. In short, it never entered into the heads of the great men, who accomplished the glorious revolution of 1688, that a constitution of government, however originating, whether in positive compact, or in silent assent and acquiescence, after it was adopted by the people, remained a mere contract or treaty, open to question by all, and to be annihilated at the will of any of them for any supposed or real violations of its provisions. They supposed, that from the moment it became a constitution, it ceased to be a compact, and became a fundamental law of absolute paramount obligation, until changed by the whole people in the manner prescribed by its own rules, or by the implied resulting power, belonging to the people in all cases of necessity to pro-

vide for their own safety. Their reasoning was addressed, not to the constitution, but to the functionaries, who were called to administer it. They deemed, that the constitution was immortal, and could not be forfeited; for it was prescribed by and for the benefit of the people. But they deemed, and wisely deemed, that magistracy is a trust, a solemn public trust; and he, who violates his duties, forfeits his own right to office, but cannot forfeit the rights of the people.

=A7 349. The subject has been, thus far, considered chiefly in reference to the point, how far government is to be considered as a compact, in the sense of a contract, as contradistinguished from an act of solemn acknowledgment or assent; and how far our state constitutions are to be deemed such contracts, rather than fundamental laws, prescribed by the sovereign power. The conclusion, to which we have arrived, is, that a state constitution is no farther to be deemed a compact, than that it is a matter of consent by the people, binding them to obedience to its requisitions; and that its proper character is that of a fundamental law, prescribed by the will of the majority of the people of the stale, (who are entitled to prescribe it,) for the government and regulation of the whole people.1 It binds them, as a supreme compact, ordained by the sovereign power,

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1 It is in this sense, that Mr. Chief Justice Jay is to be understood in his opinion in Chisholm v. Georgia, (2 Dall. R. 419; S. C. Peters's Cond. R. 635, 668,) when he says, " every state constitution is a compact, made by and between the citizens of the state to govern themselves in a certain manner; and the constitution of the United States is likewise a compact, made by the people of the United States to govern themselves, as to general objects, in a certain manner." The context abundantly shows, that he considered it a fundamental law of government; and that its powers did not rest on mere treaty; but were supreme, and were to be construed by the judicial department; and that the states were bound to obey.

and not merely as a voluntary contract, entered into by parties capable of contracting and binding, themselves by such terms, as; they choose to select.1 If this be a correct view of the subject, it will enable us to enter upon the other parts of the proposed discussion with principles to guide us in the illustration of the controversy.

=A7 350. In what light, then, is the constitution of the United States to be regarded? Is it a mere compact, treaty, or confederation of the states composing the Union, or of the people. thereof, whereby each of the several states, and the people thereof, have respectively bound themselves to each other? Or is it a form of government, which, having been ratified by a majority of the people in all the states, is obligatory upon them, as the prescribed rule of conduct of the sovereign power, to the extent of its provisions?

=A7 351. Let us consider, in the first place, whether it is to be deemed a compact? By this, we do not mean an act of solemn assent by the people to it, as a form of government, (of which there is no room for doubt;) but a contract imposing mutual obligations, and contemplating the permanent subsistence of parties having an independent right to

construe, control, and judge of its obligations. If in this latter sense it is to be deemed a compact, it must be, either because it contains on its face stipulations to that effect, or because it is necessarily implied from the nature and objects of a frame of government.

=A7 352. There is nowhere found upon the face of the constitution any clause, intimating it to be a compact, or in anywise providing for its interpretation, as such.

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1 Heinecc. Elem. Juris. Natur. L. 2, ch. 6,=20=A7109 to 112; 2 Turnbull's= Heinecc. p. 95, &c.

On the contrary, the preamble emphatically speaks of it, as a solemn ordinance and establishment of government. The language is, "We, the people of the United States, do ordain and establish this constitution for the United States of America." The people do ordain and establish, not contract and stipulate with each other.1 The people of the United States, not the distinct people of a particular state with the people of the other states. The people ordain and establish a "constitution," not a "confederation." The distinction between a constitution and a confederation is well known and understood. The latter, or at least a pure confederation, is a mere treaty or league between independent states, and binds no longer, than during, the good pleasure of each.2 It rests forever in articles of compact, where each is, or may be the supreme judge of its own rights and duties. The former is a permanent form of government, where the powers, once given, are irrevocable, and cannot be resumed or withdrawn at pleasure. Whether formed by a single people, or by different societies of people,

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1 The words "ordain and establish" are also found in the 3d article of the constitution. "The judicial power shall be vested in one supreme court, and in such inferior courts, as the congress may from time to time ordain and establish. " How is this to be done by congress? Plainly by a law; and when ordained and established, is such a law a contract or compact between the legislature and the people, or the Court, or the different departments of the government? No. It is neither more nor less than a law, made by competent authority, upon an assent or agreement of minds. In Martin v. Hunter, (1 Wheat. R. .3 04, 324,) the Supreme Court said, "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, " by the people of the United States." To the same effect is the reasoning Of Mr. Chief Justice Marshall, in delivering the opinion of the court in M'Culloch v. Maryland, (4 Wheaton, 316, 402 to 405, already cited.)

2 The Federalist, No. 9, 15, 17, 18, 33; Webster's Speeches, 1830; Dane's App. =A72, p. 11, =A714, p. 25, &c.; Id. =A710, p. 21; Mr. Martin's Letter, = 3 Elliot, 53; 1 Tucker's Black. Comm. App. 146.

in their political capacity, a constitution, though originating in consent, becomes, when ratified, obligatory, as a fundamental ordinance or law.1 The constitution of a confederated republic, that is, of a national republic formed of several states, is, or at least may be, not less an irrevokable form of government, than the constitution of a state formed and ratified by the aggregate of the several counties of the state.2

=A7 353. If it had been the design of the framers of the constitution or of the people, who ratified it, to consider it a mere confederation, resting on treaty stipulations, it is difficult to conceive, that the appropriate terms should not have been found in it. The United States were no strangers to compacts of this nature.3 They had subsisted to a limited extent before the revolution. The articles of confederation, though in some few respects national, were mainly of a pure federative character, and were treated as stipulations between states for many purposes independent and sovereign.4 And yet (as has been already seen) it was deemed a political heresy to maintain, that under it any state had a right

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1 1 Wilson's Lectures, 417.

2 See The Federalist, No. 9; Id. No. 15, 16; Id. No. 33; Id. No. 39.

3 New-England Confederacy of 1643; 3 Kent. Comm. 190, 191, 192; Rawle on Const. Introduct. p. 24, 25.--In the ordinance of 1787, for the government of the territory northwest of the Ohio, certain articles were expressly declared to be "articles of compact between the original states, [i. e. the United States,] and the people and states [states in fuluro, for none were then in being] in the said territory "But to guard against any possible difficulty, it was declared, that these articles should" forever remain unalterable, unless by common consent,"So, that though a compact, neither party was at liberty to withdraw from it at its pleasure, or to absolve itself from its obligations. Why was not the constitution of the United States declared to be articles of compact, if that was the intention of the framers?

4 The Federalist, No. 15, 22, 39, 40, 43; Ogden v. Gibbons, 9 Wheaton's R. 1, 187.

to withdraw from it at pleasure, and repeal its operation; and that a party to the compact had a right to revoke that compact.1 The only places, where the terms, confederation or compact, are found in the constitution, apply to subjects of an entirely different nature, and manifestly in contradistinction to constitution. Thus, in the tenth section of the first article it is declared, that "no state shall enter into any treaty, alliance, or confederation;" "no state shall, without the consent of congress, &c. enter into any agreement or compact with another state, or with a foreign power." Again, in the sixth article it is declared, that "all debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation." Again, in the tenth amendment it is declared, that "the powers not delegated by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." A contract can in no just sense be called a delegation of powers.

=A7 354. But that, which would seem conclusive on the subject, (as has been already stated,) is, the very language of the constitution itself, declaring it to be a supreme fundamental law, and to be of judicial obligation, and recognition in the administration of justice. "This constitution," says the sixth article, "and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or law of any state to the contrary notwithstand-

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1 The Federalist, No. 22; Id. No. 43.

ing." If it is the supreme law, how can the people of any state, either by any form of its own constitution, or laws, or other proceedings, repeal, or abrogate, or suspend it?

=A7 355. But, if the language of the constitution were less explicit and irresistible, no other inference could be correctly deduced from a view of the nature and objects of the instrument. The design is to establish a form of government. This, of itself, imports legal obligation, permanence, and uncontrollability by any, but the authorities authorized to alter, or abolish it. The object was to secure the blessings of liberty to the people, and to their posterity. The avowed intention was to supercede the old confederation, and substitute in its place a new form of government. We have seen, that the inefficiency of the old confederation forced the states to surrender the league then existing, and to establish a national constitution.1 The convention also, which framed the constitution, declared this in the letter accompanying it. "It is obviously impracticable in the federal government of these states," says that letter, "to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest."2 "In all our delibera-

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1 The very first resolution adopted by the convention (six states to two states) was in the following words: " Resolved, that it is the opinion of this committee, that a national government ought to be established of a supreme legislative, judiciary, and executive;"* plainly showing, that it was a national government, not a compact, which they were about to establish; a supreme legislative, judiciary, and executive, and not a mere treaty for the exercise of dependent powers during the good pleasure of all the contracting parties.

2 Journal of Convention, p. 367, 368.

*** Journal of Congress, p. 83, 134, 139, 207; 4 Elliot's Debates, 49 See also 2 Pitkin's History, 232.**

tions on this subject, we kept steadily in our view that, which appeared to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence." Could this be attained consistently with the notion of an existing treaty or confederacy, which each at its pleasure was at liberty to dissolve?1

=A7 356. It is also historically known, that one of the objections taken by the opponents of the constitution was, " that it is not a confederation of the states, but a government of individuals."2 It was, nevertheless, in the solemn instruments of ratification by the people of the several states, assented to, as a constitution. The language of those instruments uniformly is, "We, &c. do assent to, and ratify the said constitution."3 The forms of the convention of Massachusetts and NewHampshire are somewhat peculiar in their language. "The convention, &c. acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the Uni-

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1 The language of the Supreme Court in Gibbons v. Ogden, (9 Wheat. R. 1, 187,) is very expressive on this subject.

"As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character, in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument, by which that change was effected."

2 The Federalist, No. 38, p. 247; Id. No. 39, p. 256.

3 See the forms in the Journals of the Convention, &c. (1819), p. 390 to 46=5.

verse in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without force or surprise, of entering into an explicit and solemn compact with each other, by assenting to, and ratifying a new constitution, &c. do assent to, and ratify the said constitution."1 And although many declarations of rights, many propositions of amendments, and many protestations of reserved powers are to be found accompanying the ratifications of the various conventions, sufficiently evincive of the extreme caution and jealousy or those bodies, and of the people at large, it is remarkable, that there is nowhere to be found the slightest allusion to the instruments as a confederation or compact of states in their sovereign capacity, and no reservation of any right, on the part of any state, to dissolve its connexion, or to abrogate its assent, or to suspend the operations of the constitution, as to itself. On the contrary, that of Virginia, which speaks most pointedly to the topic, merely declares, "that the powers granted under the constitution, being derived from the people of the United States, may be resumed by them [not by any one of the states] whenever the same shall be perverted to their injury or oppression."2

=A7 357. So that there is very strong negative testimony against the notion of its being a compact or confederation, of the nature of which we have spoken, founded upon the known history of the times, and the acts of ratification, as well as upon the antecedent articles of confederation. The latter purported on their

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1 Journals of the Convention, &c. (1819), p. 401, 402, 412.

2 Id. p. 416.-- Of the right of a majority of the whole people to change their constitution, at will, there is no doubt. See 1 Wilson's Lectures, 418; 1 Tucker's Black. Comm. 165.

face to be a mere confederacy. The language of the third article was, "The said states hereby severally enter into a firm league of friendship with each other for their common defence, &c. binding themselves to assist each other." And the ratification was by delegates of the state legislatures, who solemnly plighted and engaged the faith of their respective constituents, that they should abide by the determination of the United States in congress assembled on all questions, which, by the said confederation, are submitted to them; and that the articles thereof should be inviolably observed by the states they respectively represented.1

=A7 358. It is not unworthy of observation, that in the debates of the various conventions called to examine and ratify the constitution, this subject did not pass without discussion. The opponents, on many occasions, pressed the objection, that it was a consolidated government, and contrasted it with the confederation.2 None of its advocates pretended to deny, that its design was to establish a national government, as contradistinguished from a mere league or treaty, however they might oppose the suggestions, that it was a consolidation of the states.3 In the North Carolina de-

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1 Articles of Confederation, 1781, art. 13.

2 I do not say, that the manner of stating the objection was just, but the fact abundantly appears in the printed debates. For instance, in the Virginia debates, (2 Elliot's Deb. 47,) Mr. Henry said, "That this is a consolidated government is demonstrably clear." "The language [is] 'We, the people,' instead of, 'We, the states.' States are the characteristics and soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated national government of the people of all the states." The like suggestion will be found in various places in Mr. Elliot's Debaters in other states. See 1 Elliot's Debates, 91, 92, 110. See also, 3 Amer. Museum, 422; 2 Amer. Museum, 540, 546; Mr. Martin's Letter, 4 Elliot's Debates, p. 53.

3 3 Elliot's Debates, 145, 257, 201; The Federalist, No. 32, 33, 39, 44.
45; 3 Amer. Museum, 422, 424.

bates, one of the members laid it down, as a fundamental principle of every sale and free government, that "a government is a compact between the rulers and the people." This was most strenuously denied on the other side by gentlemen of great eminence. They said, "A compact cannot be annulled, but by the consent of both parties. Therefore, unless the rulers are guilty of oppression, the people, on the principles of a compact, have no right to new-model their government. This is held to be the principle of some monarchical governments in Europe. Our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents. And the people, without their consent, may new-model the government, whenever they think proper, not merely because it is oppressively exercised, but because they think another form will be more conducive to their welfare."1

=A7 359. Nor should it be omitted, that in the most elaborate expositions o= f the constitution by its friends, its character, as a permanent form of government, as a fundamental law, as a supreme rule, which no state was at liberty to disregard, suspend, or annul, was constantly admitted, and insist ed on, as one of the strongest reasons, why it should be adopted in lieu of the confederation.2 It is matter of surprise, therefore, that

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1 Mr. Iredell, 3 Elliot's Debates, 24, 25; Id. 200, Mr. McClure, Id. 25; Mr. Spencer, Id. 26, 27; Id. 139. See also 3 Elliot's Debates, 156; See also Chisholm v. Georgia, 3 Dall, 419; 2 Condensed Rep. 635, 667, 668. See also in Penn. Debates, Mr. Wilson's denial, that the constitution was a compact; 3 Elliot's Debates, 286, 287. See also McCulloch v. Maryland, 4 Wheaton, 316, 404.
2 The Federalist, No. 15 to 20, 38, 39, 44; North Amer. Review, Oct. 1827,
p. 265, 266

a learned commentator should have admitted the right of any state, or of the people of any state, without the consent of the rest, to secede from the Union at its own pleasure.1 The people of the United States have a right to abolish, or alter the constitution of the United States; but that the people of a single state have such a right, is a proposition requiring some reasoning beyond the suggestion, that it is implied in the principles, on which our political systems are founded.2 It seems, indeed, to have its origin in the notion of all governments being founded in compact, and therefore liable to be dissolved by the parties, or either of them; a notion, which it has been our purpose to question, at least in the sense, to which the objection applies.

=A7 360. To us the doctrine of Mr. Dane appears far better founded, that "the constitution of the United States is not a compact or contract agreed to by two or more parties, to be construed by each for itself, and here to stop for the want of a common arbiter to revise the construction of each party or state. But that it is, as the people have named and called it, truly a Constitution; and they properly said, ' We, the people of the United States, do ordain and establish this constitution,' and not, we, the people of each state."3 And this expo-

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1 Rawle on the Constitution, ch. 32, p. 295, 296, 297, 302, 305.
2 Dane's App. =A7 59, 60, p. 69, 71.
3 Mr. (afterwards Mr. Justice) Wilson, who was a member of the Federal Convention, uses, in the Pennsylvania Debates, the following language: "We were told, &c. that the convention no doubt thought they were forming a compact or contract of the greatest importance. It was matter of surprise to see the great lending principles of this system still so very much misunderstood. I cannot answer for what every member thought; but I believe it cannot be said, they thought they were making a contract, because I cannot discover the least trace of a compact in that system. There can be no compact, unless there are more parties than one. It is a new doctrine, that one can make a compact with

tion has been sustained by opinions of some of our most eminent statesmen and judges.1 It was truly remarked by the Federalist,2 that the constitution was the result neither from the decision of a majority of the people of the union, nor from that of a majority of the states. It resulted from the unanimous assent of the several states that are parties to it, differing no otherwise from their ordinary assent, than its being expressed, not by the legislative authority but by that of the people themselves.

=A7 361. But if the constitution could in the sense, to to which we have alluded, be deemed a compact, between whom is it to be deemed a contract? We have already seen, that the learned commentator on Blackstone, deems it a

compact with several aspects, and first between the states, (as contradistinguished from the people of the states) by which the several states have bound themselves to each other, and to the fed-

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himself. 'The convention were forming contracts! with whom? I know no bargains, that were there made, I am unable to conceive, who the patties could be. The state governments make a bargain with each other. That is the doctrine, that is endeavoured to be established by gentlemen in the opposition; their state sovereignties wish to be represented. But far other were the ideas of the convention. This is not a government founded upon compact. It is founded upon the power of the people. They express in their name and their authority, we, the people, do ordain and establish," &c. 3 Elliot's Debates, 286, 287. He adds (Id. 288) "This system is not a compact or contract. The system tells you, what it is; it is an ordinance and establishment of the people." 9 Dane's Abridg. ch. 187, art. 20, =A715, p. 589, 590; Dane's App. =A710, p. 21, =A750, p. 69.

1 See Ware v. Hylton, 3 Dall. 199; I Cond. Rep. 99,1 12; Chrisholm v. Georgia, 3 Dall. 419; 2 Cond. R. 668, 671; Elliot's Debates, 72; 2 Elliot's Debates, 47; Webster's Speeches, p. 410; The Federalist, No. 22, 33, 39; 2 Amer. Museum, 536, 516; Virginia Debates in 1798, on the Alien Laws, p. 111, 136, 138, 140; North Amer. Rev. Oct. 1830, p. 437, 444.

2 No. 39.

eral government.1 The Virginia Resolutions of 1798, assert, that "Virginia views the powers of the federal government, as resulting from the compact, to which the states are parties." This declaration was, at the time, matter of much debate and difference of opinion among the ablest representatives in the legislature. But when it was subsequently expounded by Mr. Madison in the celebrated Report of January, 1800, after admitting, that the term "states" is used in different senses, and among others, that it sometimes means the people composing a political society in their highest sovereign capacity, he considers the resolution unobjectionable, at least in this last sense, because in that sense the constitution was submitted to the "states"; in that sense the "states" ratified it; and in that sense the states are consequently parties to the compact, from which the powers of the federal government result.2 And that is the sense, in which he considers the states parties in his still later and more deliberate examinations.3 **=A7 362.** This view of the subject is, however, wholly at variance with that= , on which we are commenting; and which, having no foundation in the words of the constitution, is altogether a gratuitous assumption, and therefore inadmissible. It is no more true, that a state is a party to the constitution, as such, because it was framed by delegates chosen by the states, and submitted by the legislatures thereof to the people of the states for ratification, and that the states are necessary agents to give effect to some of its provisions, than that

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1 1 Tuck. Black. Comm. 169; Haynes's Speech in the Senate, in 1830; 4 Elliot's Debates, 315, 316.

2 Resolutions of 1800, p. 5, 6.

3 North American Review Oct. 1830, p. 537, 544.

for the same reasons the governor, or senate, or house of representatives, or judges, either of a state or of the United States, are parties thereto. No state, as such, that is the body politic, as it was actually organized, had any power to establish a contract for the establishment of any new government over the people thereof, or to delegate the powers of government in whole, or in part to any other sovereignty. The state governments were framed by the people to administer the state constitutions, such as they were, and not to transfer the administration thereof to any other persons, or sovereignty. They had no authority to enter into any compact or contract for such a purpose. It is no where given, or implied in the state constitutions; and consequently, if actually entered into, (as it was not,) would have had no obligatory force. The people, and the people only, in their original sovereign capacity, had a right to change their form of government, to enter into a compact, and to transfer any sovereignty to the national government.1 And the states never, in fact, did in their political capacity, as contradistinguished from the people thereof, ratify the constitution. They=20were not called upon to do it by congress; and were not contemplated, as essential to give validity to it.2

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1 4 Wheaton, 404.

2 The Federalist, No 39.--In confirmation of this view, we may quote the reasoning of the Supreme Court in the case of McCulloch v. Maryland, (4 Wheaton's R 316,) in answer to the very argument.

"The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.
"It would be difficult to sustain this proposition. The convention, which framed the constitution, was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the

=A7 363. The doctrine, then, that the states are parties is a gratuitous assumption. In the language of a most

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then existing congress of the United States, with a request, that it might be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner, in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states -- and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines, which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.
"From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is ' ordained and established ' in the name of the people; and is declared to be ordained, ' in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.
" It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question, whether they may resume and modify the power granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, ' in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, ant of deriving its power directly from them, was felt and acknowledged by all.

distinguished statesman,1 "the constitution itself in its very front refutes that. It declares, that it is ordained and established by the PEOPLE of the United States. So far from saying, that it is established by the governments of the several states, it does not even say, that it is established by the people of the several states. But it pronounces, that it is established by the people of the United States in the aggregate. Doubtless the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they establish the constitution."2

"The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.
"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."
1 Webster's Speeches, 1830, p. 431; 4 Elliot's Debates, 326.

2 Mr. Dane reasons to the same effect, though it is obvious, that he could not, at the time, have had any knowledge of the views of Mr. Webster.* He adds, " If a contract, when and how did the Union become a party to it? If a compact, why is it never so denominated, but often and invariably in the instrument itself, and in its amendments, styled, " This constitution? and if a contract, why did the framers and people call it the supreme law."# In Martin v. Hunter, (1 Wheat. R. 304, 324,) the supreme court expressly declared, that " the constitution was ordained and established," not by the states in their sovereign capacity, but emphatically, as the preamble of the constitution declares, " by the people of the United States."

*** 9 Dane's Abridg. ch. 189, art. 20, =A715, p. 589,590; Dane's App. 40,41, 4=2.**

 # 9 Dane's Abridg. 590.

=A7 364. But if it were admitted, that the constitution is a compact betwee= n the states, "the inferences deduced from it," as has been justly observed by the same statesman,1 "are warranted by no just reason. Because, if the constitution be a compact between the states, still that constitution or that compact has established a government with certain powers; and whether it be one of these powers, that it shall construe and interpret for itself the terms of the compact in doubtful cases, can only be decided by looking to the compact, and inquiring, what provisions it contains on that point. Without any inconsistency with natural reason, the government even thus created might be trusted with this power of construction. The extent of its powers must, therefore, be sought in the instrument itself." "If the constitution were the mere creation of the state governments, it might be modified, interpreted, or construed according to their pleasure. But even in that case, it would be necessary, that they should agree. One alone could not interpret it conclusively. One alone could not construe it. One alone could not modify it." "If all the states are parties to it, one alone can have no right to fix upon it her own peculiar construction."2

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1 Webster's Speeches, 429; 4 Elliot's Debates, 324.

2 Even under the confederation, which was confessedly, in many respects, a mere league or treaty, though in other respects national, congress unanimously resolved, that it was not within the competency of any state to pass acts for interpreting, explaining, or construing a national treaty, or any part or clause of it. Yet in that instrument there was no express judicial powers given to the general government to construe it. It was, however, deemed an irresistible and exclusive authority in the general government, from the very nature of the other powers given to them; and especially from the power to make war and peace, and to form treaties. Journals of Congress, April 13, 1787, p. 32, &c.; Rawle on Const. App. 2, P. 316, 320.

=A7 365. Then, is it a compact between the people of the several states, each contracting with all the people of the other states?1 It may be admitted, as was the early exposition of its advocates, "that the constitution is founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but that this assent and ratification is to be given by the whole people, not as individuals, composing one entire nation, but as composing the distinct and independent states, to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, the authority of the people themselves. The act, therefore, establishing the constitution will not be [is not to be] a national, but a federal act."2 "It may also be admitted," in the language of one of its most enlightened commentators, that "it was formed, not by the governments of the component states, as the federal government, for which it was substituted, was formed. Nor was it formed by a majority of the people of the United States, as a single community, in the manner of a consolidated government. It was formed by the states, that is, by the people in each of the states acting m their highest sovereign capacity; and formed consequently by the same authority, which formed the state constitutions."3 But this would not necessarily

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1 In the resolutions passed by the senate of South-Carolina in December, 1827, it was declared, that " the constitution of the United States is a compact between the people of the different states with each other, as separate and independent sovereignties." Mr. Grimke filed a protest founded on different views of it. See Grimke's Address and Resolutions in 1828, (edition, 1829, at Charleston,) where his exposition of the constitution is given at large, and maintained in a very able speech.

2 The Federalist, No. 39; see Sturgis v. Crowninshield, 4 Wheat. R. 122, 19=3.

3 Mr. Madison's Letter in North American Review, October, 1830, P. 537, 538=.

draw after it the conclusion, that it was to be deemed a compact, (in the sense, to which we have so often alluded,) by which each state was still, after the ratification, to act upon it, as a league or treaty, and to withdraw from it at pleasure. A government may originate in the voluntary compact or assent of the people of several states, or of a people never before united, and yet when adopted and ratified by them, be no longer a matter resting in compact; but become an executed government or constitution, a fundamental law, and not a mere league. But the difficulty in asserting it to be a compact between the people of each state, and all the people of the other states is, that the constitution itself contains no such expression, and no such designation of parties.1 We, "the people of the United States, &c. do ordain, and establish this constitution," is the language; and not we, the people of each state, do establish this compact between ourselves, and the people of all the other states. We are obliged to depart from the words of the instrument, to sustain the other interpretation; an interpretation, which can serve no better purpose, than to confuse the mind in relation to a subject otherwise clear. It is for this reason, that we should prefer an adherence to the words of the constitution, and to the judicial exposition of these words according to their plain and common import.2

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1 See Dane's App. =A732, 33, p. 41, 42, 43.

2 Chisholm v. Georgia, 2 Dall. 419; 2 Cond. Rep. 668, 671; Martin v. Hunter, 1 Wheat. R. 304, 324; Dane's App. p. 22, 24, 29, 30, 37, 39, 40, 41, 42, 43,=2051.

This subject is considered with much care by President Monroe in his Exposition, accompanying his Message, of the 4th of May, 1822. It is due to his memory to insert the following passages which exhibits his notion of the supremacy of the Union.

"The constitution of the United States being ratified by the people of the several states, became, of necessity, to the extent of its powers, the paramount authority of the Union. On sound principles, it can be view-

=A7 366. But supposing, that it were to be deemed such a compact among the people of the several states, let us see what the enlightened statesman, who vindi-

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ed in no other light. The people, the highest authority known to our system, from whom all our institutions spring, and on whom they depend, formed it. Had the people of the several states thought proper to incorporate themselves into one community under one government, they might have done it. They had the power, and there was nothing then, nor is there any thing now, should they be so disposed, to prevent it. They wisely stopped, however, at a certain point, extending the incorporation to that point, making the national government, thus far, A consolidated government, and preserving the state government, without that limit, perfectly sovereign and independent of the national government. Had the people of the several states incorporated themselves into one community, they must have remained such; their constitution becoming then, like the constitutions of the several states, incapable of change, until altered by the will of the majority. In the institution of a state government by the citizens of a state, a compact is formed, to which all and every citizen are equal parties. They are also the sole parties; and may amend it at pleasure. In the institution of the government of the United States, by the citizens of every state, a compact was formed between the whole American people, which has the same force, and partakes of all the qualities, to the extent; of its powers, as a compact between the citizens of a state, in the formation of their own constitution. It cannot be altered, except by those who formed it, or in the mode prescribed by the parties to the compact itself.

"This constitution was adopted for the purpose of remedying all the defects of the confederation; and in this, it has succeeded, beyond any calculation, that could have been formed of any human institution. By binding the states together, the constitution performs the great office of the confederation, but it is in that sense only, that it has any of the properties of that compact, and in that it is more effectual, to the purpose, as it holds them together by a much stronger bond, and in all other respects, in which the confederation failed, the constitution has been blessed with complete success. The confederation was a compact between separate and independent states; the execution of whose articles, in the powers which operated internally, depended on the state governments. But the great office of the constitution, by incorporating the people of the several states, to the extent of its powers, into one community, and

enabling it to act directly on the people, was to annul the powers of the state government to that extent, except in cases where they were concurrent, and to preclude their agency in giving effect to those of the general government. The government of the United States relies on its own means for the execution of its powers, as the state government do for

cates that opinion, holds as the appropriate deduction from it. "Being thus derived (says he) from the same source, as the constitutions of the states, it has, within each state, the same authority, as the constitution of the state; and is as much a constitution within the strict sense of the term, within its prescribed sphere, as the constitutions of the states are, within their respective spheres. But with this obvious and essential differe nce, that being a compact among the states in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered, or annulled at the will of the states individually, as the constitution of a state may be at its individual will."1

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the execution of theirs; both governments having, a common origin, or sovereign, the people; the state governments, the people of each state, the national government, the people of every state; and being amenable to the power, which created it. It is by executing its functions as a government, thus originating and thus acting, that the constitution of the United States holds the states together, and performs the office of a league. It is owing to the nature of its powers, and the high source, from whence they are derived, the people, that it performs that office better than the confederation, or any league, whichever existed, being a compact, which the state governments did not form, to which they are not parties, and which executes its own powers independently of them."

1 Mr. Madison's Letter, North American Review, Oct. 1830, p. 538.--Mr. Paterson (afterwards Mr. Justice Paterson) in the convention, which framed the constitution, held the doctrine, that under the confederation no state had a right to withdraw from the Union without the consent of all. " The confederation (said he) is in the nature of a compact; and can any state, unless by the consent of the whole, either in politics or law, withdraw their powers? Let it be said by Pennsylvania and the other large states, that they, for the sake of peace, assented to the confederation; can she now resume her original right without the consent of the donee?" * Mr. Dane unequivocally holds the same language in respect to the constitution. "It is clear (says he) the people of any one state alone never can take, or withdraw power from the United States, which was granted to it by all, as the people of all the states can do rightfully in a justifiable revolution, or as the people can do in the manner their constitution prescribes." Dane's App.

=A710, p. 21.

*** Yates's debates, 4 Elliot's Debates, 75.**

=A7 367. The other branch of the proposition, we have been considering, is, that it is not only a compact between the several states, and the people thereof, but also a compact between the states and the federal government; and e converso between the federal government, and the several states, and every citizen of the United States.1 This seems to be a doctrine far more involved, and extraordinary, and incomprehensible, than any part of the preceding. The difficulties have not escaped the observation of those, by whom it has been advanced. "Although (says the learned commentator) the federal government can, in no possible view, be considered as a party to a compact made anterior to its existence; yet, as the creature of that compact, it must be bound by it to its creators, the several states in the Union, and the citizens thereof."2 If by this, no more were meant than to state, that the federal government cannot lawfully exercise any powers, except those conferred on it by the constitution, its truth could not admit of dispute. But it is plain, that something more was in the author's mind. At the same time, that he admits, that the federal government could not be a party to the compact of the constitution "in any possible view," he still seems to insist upon it, as a compact, by which the federal government is bound to the several states, and to every citizen; that is, that it has entered into a contract with them for the due execution of its duties.

The ordinance of 1787, for the government of the western territory, contains (as we have seen) certain articles declared to be " articles of compact;" but they are also declared to " remain for ever unalterable, except by common consent." So, that there may be a compact and yet by the stipulations neither party may be at liberty to withdraw from it, or absolve itself from its obligations. Ante, p. 209.

1 1 Tucker's Black. Comm. 169, 170.

2 1 Tucker's Black. Comm. 170.

=A7 368. And a doctrine of a like nature, viz. that the federal government is a party to the compact, seems to have been gravely entertained on other solemn occasions.1 The difficulty of maintaining it, however, seems absolutely insuperable. The federal government is the result of the constitution, or (if the phrase is deemed by any person more appropriate) the creature o the compact. How, then, can it be a party to that compact, to which it owes its own existence?2 How can it be said, that it has entered into a contract, when at the time it had no capacity to conduct; and was not even in esse? If any provision was made for the general government's becoming a party, and entering into a compact, after it was brought into existence, where is that provision to be found? It is not to be found in the constitution itself. Are we at liberty to imply such a provision, attaching to no power given in the constitution? This would be to push the doctrine of implication to an extent truly alarming; to draw inferences, not from what is, but from what is not, stated in the instrument. But, if any such implication could exist, when did the general government signify its assent to become such a party? When did the people authorize it to do so?3 Could the government do so, without the express authority of the people? These are questions, which are more easily asked, than answered.

=A7 369. In short, the difficulties attendant upon all the various theories under consideration, which treat the constitution of the United States, as a compact, either between the several states, or between the people

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1 Debates in the Senate, in 1830, on Mr. Foot's Resolution, 4 Elliot's Debates, 315 to 331.

2 Webster's Speeches, 429; 4 Elliot's Debates, 324.

3 Dane's App. =A732, p. 41; Id. =A738, p. 46.

of the several states, or between the whole people of the United States, and the people of the several states, or between each citizen of all the states, and all other citizens, are, if not absolutely insuperable, so serious, and so wholly founded upon mere implication, that it is matter of surprise, that they should have been so extensively adopted, and so zealously propagated. These theories, too, seem mainly urged with a view to draw conclusions, which are at war with the known powers, and reasonable objects of the constitution; and which, if successful, would reduce the government to a mere confederation. They are objectionable, then, in every way; first, because they are not justified by the language of the constitution; secondly, because they have a tendency to impair, and indeed to destroy, its express powers and objects; and thirdly, because they involve consequences, which, at the will of a single state, may overthrow the constitution itself. One of the fundamental rules in the exposition of every instrument is, so to construe its terms, if possible, as not to make them the source of their own destruction, or to make them utterly void, and nugatory. And if this be generally true, with how much more force does the rule apply to a constitution of government, framed for the general good, and designed for perpetuity? Surely, if any implications are to be made beyond its terms, they are implications to preserve, and not to destroy it.1

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1 The following strong language is extracted from Instruction given to some Representatives of the state of Virginia by their constituents in 1787, with reference to the confederation: " Government without coercion is a proposition at once so absurd and self contradictory, that the idea creates a confusion of the understanding. It is form without substance; at best a body without a soul. If men would act right, government of all kinds would be useless. If states or nations, who are but assemblages of men, would do right, there would be no wars or disorders in the universe.

=A7 370. The cardinal conclusion, for which this doctrine of a compact has been, with so much ingenuity and ability, forced into the language of the constitution, (for the language no where alludes to it,) is avowedly to establish, that in construing the constitution, there is no common umpire; but that each state, nay each department of the government of each state, is the supreme judge for itself, of the powers, and rights, and duties, arising under that instrument.1 Thus, it has been solemnly asserted on more than one occasion, by some of the state legislatures, that there is no common arbiter, or tribunal, authorized to decide in the last resort, upon the powers and the interpretation of the constitution. And the doctrine has been recently revived with extraordinary zeal, and vindicated with uncommon vigour.2 A majority of the states, however, have never as-

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Bad as individuals are, states are worse. Clothe men with public authority, and almost universally they consider themselves, as liberated from the obligations of moral rectitude, because they are no longer amenable to justice." 1 Amer. Mus. 290.

1 Madison's Virginia Report, January, 1800, p. 6, 7, 8, 9; Webster's Speeches, 407 to 409, 410, 411, 419 to 421.

2 The legislature of Virginia, in 1829, resolved, that there is no common arbiter to construe the constitution of the United States; the constitution being a federative compact between sovereign states, each state has a right to construe the compact for itself" Georgia and South-Carolina have recently maintained the same doctrine; and it has been asserted in the senate of the United States, with an uncommon display of eloquence and pertinacity.* It is not a little remarkable, that in 1810, the legislature of Virginia thought very differently, and then deemed the supreme court a fit and impartial tribunal.# Pennsylvania at the same time, though she did not deny the court to be, under the constitution, the appropriate tribunal, was desirous of substituting some other arbiter.+ The recent resolutions of her own legislature (in March, 1831) show, that she now approves of the supreme court, as the true and common ar-

*** Dane's Abridg. ch. 197, art. =A720, to 13, p. 589, &c. 591; Dane's Apr. 5=**
2 to 59, 67 to 72; 3 American Annual Register, Local Hist. 131.
 # North American Review October, 1830. p. 509, 512; 6 Wheat. R. 358.
+ North American Review, Id. 507, 508.

sented to this doctrine; and it has been, at different times, resisted by the legislatures of several of the states, in the most formal declarations.1

=A7 371. But if it were admitted, that the constitution is a compact, the conclusion, that there is no common arbiter, would neither be a necessary, nor natural conclusion from that fact standing alone. To decide upon the point, it would still behove us to examine the very terms of the constitution, and the delegation of powers under it. It would be perfectly competent even for confederated states to agree upon, and delegate authority to construe the compact to a common arbiter. The people of the United States had an unquestionable right to confide this power to the government of the United States, or to any department thereof, if they chose so

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biter. One of the expositions of the doctrine is, that if a single state denies a power to exist under the constitution, that power is to be deemed defunct, unless three-fourths of the states shall afterwards reinstate that power by an amendment to the constitution.* What, then, is to be done, where ten states resolve, that a power exists, and one, that it does not exist? See Mr. Vice-President Calhoun's Letter of 28th August, 1832, to Gov. Hamilton.

1 Massachusetts openly opposed it in the resolutions of her legislature of the 12th of February, 1799, and declared, " that the decision of all cases in law and equity arising under the constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people, in the judicial courts of the United States." # Six other states, at that time, seem to have come to the same result.+ And on other occasions, a Larger number have concurred on the same point.@ Similar resolutions have been passed by the legislatures of Delaware and Connecticut in 1834, and by some other states. How is it possible, for a moment, to reconcile the notion, that each state is the supreme judge for itself of the construction of the constitution, with the very first resolution of the convention, which formed the constitution: "Resolved, &c. that a national government ought to be established; consisting of a supreme, legislative, judiciary, and executive? " %

*** Elliot's Debates, 320, 321. # Dane's App. 58.**
 # North American Review, October, 1830, p. 500.
@ Dane's App. 67; Id. 52 to 59.
% Journals of Convention, 83; 4 Elliot's Deb. 49.

to do. The question is, whether they have done it. If they have, it becomes obligatory and binding upon all the states.

=A7 372. It is not, then, by artificial reasoning founded upon theory, but upon a careful survey of the language of the constitution itself, that we are to interpret its powers, and its obligations. We are to treat it, as it purports on its face to be, as a CONSTITUTION of government; and we are to reject all other appellations, and definitions of it, such, as that it is a compact, especially as they may mislead us into false constructions and glosses, and can have no tendency to instruct us in its real objects.

CHAPTER IV.

WHO IS FINAL JUDGE OR INTERPRETER IN CONSTITUTIONAL CONTROVERSIES.

=A7 373. THE consideration of the question, whether the constitution has made provision for any common arbiter to construe its powers and obligations, would properly find a place in the analysis of the different clauses of that instrument. But, as it is immediately connected with the subject before us, it seems expedient in this place to give it a deliberate attention.1

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1 The point was very strongly argued, and much considered, in the case of Cohens v. Virginia, in the Supreme Court in 1821, (6 Wheat. R. 264.) The whole argument, as well as the judgment, deserves an attentive reading. The result, to which the argument against the existence of a common arbiter leads, is presented in a very forcible manner by Mr. Chief Justice Marshall, in pages 376, 377.

" The questions presented to the court by the two first points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry, whether the constitution and laws of the United States have been violated by the judgment, which the plaintiffs in error seek to review; and maintain, that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain, that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts, which maybe made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain, that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state in the Union. That the constitution, laws, and treaties, may receive as many constructions, as there are states; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he, who demands decision without permitting inquiry, affirms, that the decision he asks does not depend on inquiry.

=A7 374. In order to clear the question of all minor points, which might embarrass us in the discussion, it is necessary to suggest a few preliminary remarks. The constitution, contemplating the grant of limited powers, and distributing them among various functionaries, and the state governments, and their functionaries, being also clothed with limited powers, subordinate to those granted to the general government, whenever any question arises, as to the exercise of any power by any of these functionaries under the state, or federal government, it is of necessity, that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such power.1 It may arise in the course of the discharge of the functions of any one, or of all, of the great departments of government, the executive, the legislative, and the judicial. The officers of each of these departments are equally bound by their oaths of office to support the constitution of the United States, and are therefore conscientiously bound to abstain from all acts, which are inconsistent with it. Whenever, therefore, they are required to act in a case, not hitherto settled by any proper authority, these functionaries must, in the first instance, decide, each for himself, whether, consistently with the constitution, the act can be done. If, for instance, the president is required to do any act, he is not only authorized, but required, to decide for himself, whether, consistently with his constitutional duties, he can do the act.2 So, if a proposition be be-

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"If such be the constitution, it is the duty of this court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task, which the American people have assigned to the judicial department."

1 See the Federalist, No. 33.

2 Mr. Jefferson carries his doctrine much farther, and holds, that each

fore congress, every member of the legislative body is bound to examine, and decide for himself, whether the bill or resolution is within the constitutional reach of the legislative powers confided to congress. And in many cases the decisions of the executive and legislative departments, thus made, become final and conclusive, being from their very nature and character incapable of revision. Thus, in measures exclusively of a political, legislative, or executive character, it is plain, that as the supreme authority, as to these questions, belongs to the legislative and executive departments, they cannot be re-examined elsewhere. Thus, congress having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of reexamination in any other tribunal. So the power to make treaties being

confided to the president and senate, when a treaty is properly ratified, it becomes the law of the land, and no other tribunal can gainsay its stipulations. Yet cases may readily be imagined, in which a tax may be laid, or a treaty made, upon motives and grounds wholly beside the intention of the constitution.1 The

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department of government has an exclusive right, independent of the judiciary, to decide for itself, as to the true construction of the constitution. " My construction," says he, " is very different from that, you quote. It is, that each department of the government is truly independent of the others, and has an equal right to decide for itself, what is the meaning of the constitution in the laws submitted to its action, and especially, when it is to act ultimately and without appeal." And he proceeds to give examples, in which he disregarded, when president, the decisions of the judiciary, and refers to the alien and sedition laws, and the case of Marbury v. Madison, (1 Cranch, 137.) 4 Jefferson's Corresp. 316, 317. See also 4 Jefferson's Corresp. 27; Id. 75; Id. 372, 374.
=091 See 4 Elliot's Debates, 315 to 320.

remedy, however, in such cases is solely by an appeal to the people at the elections; or by the salutary power of amendment, provided by the constitution itself.1

=A7 375. But, where the question is of a different nature, and capable of judicial inquiry and decision, there it admits of a very different consideration. The decision then made, whether in favour, or against the constitutionality of the act, by the state, or by the national authority, by the legislature, or by the executive, being capable, in its own nature, of being brought to the test of the constitution, is subject to judicial revision. It is in such cases, as we conceive, that there is a final and common arbiter provided by the constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the courts of the Union.2

=A7 376. Let us examine the grounds, on which this doctrine is maintained. The constitution declares, (Art. 6,) that " This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties, &c. shall be the supreme law of the

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1 The Federalist, No. 44. -- Mr. Madison, in the Virginia Report of Jan. 1800, has gone into a consideration of this point, and very properly suggested, that there may be infractions of the constitution not within the reach of the judicial power, or capable of remedial redress through the instrumentality of courts of law. But we cannot agree with him, that in such cases, each state may take the construction of the constitution into its own hands, and decide for itself in the last resort; much less, that in a case of judicial cognizance, the decision is not binding on the states. See Report p. 6, 7, 8, 9.
2 Dane's App. =A744, 45, p. 52 to 59. -- It affords me very sincere gratification to quote the following passage from the learned Commentaries of Mr. Chancellor Kent, than whom very few judges in our country are more profoundly versed in constitutional law. After enumerating the judicial powers in the constitution, he proceeds to observe: "The propriety and fitness of these judicial powers seem

land." It also declares, (Art. 3,) that " The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States and treaties made, and which shall be made under their authority." It further declares, (Art. 3,) that the judicial power of the United States " shall be vested in one Supreme Court, and in such inferior courts, as the congress may, from time to time, ordain and establish." Here, then, we have express, and determinate provisions upon the very subject. Nothing is imperfect, and nothing is left to implication. The constitution is the supreme law; the judicial power extends to all cases arising in law and equity under it; and the courts of the United States are, and, in the last resort, the Supreme Court of the United States is, to be vested with this judicial power. No man can doubt or deny, that the power to construe the constitution is a judicial power.1 The power to construe a treaty is clearly so, when the case arises in judgment in a controversy between individuals.2 The like principle must apply, where the meaning of the constitution arises in a judicial controversy; for it is an appropriate function of the judiciary to construe laws.3 If, then, a case under the constitu-

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to result, as a necessary consequence, from the union of these states in one national government, and they may be considered as requisite to its existence. The judicial power in every government must be co-extensive with the power of legislation. Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the old confederation, or other powers must be assumed by the legislative body to the destruction ofliberty." 1 Kent's Comm. (2d ed. p. 296,) Lect. 14, 277.

1 4 Dane's Abridg. ch. 187. art. 20, =A715, p. 590; Dane's App. =A742, p. 4= 9, 50; =A744, p. 52, 53; 1 Wilson's Lectures, 461, 462, 463.

2 See Address of Congress, Feb. 1787; Journals of Congress, p. 33; Rawle on the Constitution, App. 2, p. 316. 3 Bacon's Abridgment, Statute. H.

tion does arise, if it is capable of judicial examination and decision, we see, that the very tribunal is appointed to make the decision. The only point left open for controversy is, whether such decision, when made, is conclusive and binding upon the states, and the people of the states. The reasons, why it should be so deemed, will now be submitted.

=A7 377. In the first place, the judicial power of the United States rightfully extending to all such cases, its judgment becomes ipso facto conclusive between the parties before it, in respect to the points decided, unless some mode be pointed out by the constitution, in which that judgment may be revised. No such mode is pointed out. Congress is vested with ample authority to provide for the exercise by the Supreme Court of appellate jurisdiction from the decisions of all inferior tribunals, whether state or national, in cases within the purview of the judicial power of the United States; but no mode is provided, by which any superior tribunal can re-examine, what the Supreme Court has itself decided. Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly

deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

=A7 378. This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mete discretion, and to the abandonment of all the just checks upon judicial authority. It would seem impossible, then, to presume, if the people intended to introduce a new rule in respect to the decisions of the Supreme Court, and to limit the nature and operations of their judgments in a manner wholly unknown to the common law, and to our existing jurisprudence, that some indication of that intention should not be apparent on the face of the constitution. We find, (Art. 4,) that the constitution has declared, that full faith and credit shall be given in each state to the judicial proceedings of every other state. But no like provision has been made in respect to the judgments of the courts of the United States, because they were plainly supposed to be of paramount and absolute obligation throughout all the states. If the judgments of the Supreme Court upon constitutional questions are conclusive and binding upon the citizens at large, must they not be equally conclusive upon the states? If the states are parties to that instrument, are not the people of the states also parties?

=A7 379. It has been=20said, "that however true it may be, that the judicia= l department is, in all questions submitted to it by the forms of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the other departments of the government, not in relation to the rights of the parties to the constitutional compact, from which the judicial, as well as the other departments hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers might subvert for ever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve."1 Now, it is certainly possible, that all the departments of a government may conspire to subvert the constitution of that government, by which they are created. But if they should so conspire, there would still remain an adequate remedy to redress the evil. In the first place, the people, by the exercise of the elective franchise, can easily check and remedy any dangerous, palpable, and deliberate infraction of the constitution in two of the great departments of government; and, in the third department, they can remove the judges, by impeachment, for any corrupt conspiracies. Besides these ordinary remedies, there is a still more extensive one, embodied in the form of the constitution, by the power of amending it, which is always in the power of three fourths of the states. It is a supposition not to be endured for a moment, that

three fourths of the states would conspire in any deliberate, dangerous, and palpable breach of the constitution. And if the judicial department alone should

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1 Madison's Virginia Report, Jan. 1800, p. 8, 9.

attempt any usurpation, congress, in its legislative capacity, has full power to abrogate the injurious effects of such a decision. Practically speaking, therefore, there can be very little danger of any such usurpation or deliberate breach.

=A7 380. But it is always a doubtful mode of reasoning to argue from the possible abuse of powers, that they do not exist.1 Let us look for a moment at the consequences, which flow from the doctrine on the other side. There are now twenty-four states in the Union, and each has, in its sovereign capacity, a right to decide for itself in the last resort, what is the true construction of the constitution; what are its powers; and what are the obligations founded on it. We may, then, have, in the free exercise of that right, twentyfour honest, but different expositions of every power in that constitution, and of every obligation involved in it. What one state may deny, another may assert; what one may assert at one time, it may deny at another time. This is not mere supposition. It has, in point of fact, taken place. There never has been a single constitutional question agitated, where different states, if they have expressed any opinion, have not expressed different opinions; and there have been, and, from the fluctuating nature of legislative bodies, it may be supposed? that there will continue to be, cases, in which the same state will at different times hold different opinions on the same question. Massachusetts at one time thought the embargo of 1807 unconstitutional; at another a majority, from the change of parties, was as decidedly the other way. Virginia, in 1810, thought that the Supreme Court was the common

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1 See Anderson v. Dunn, 6 Wheaton's R. 204, 232.

arbiter; in 1829 she thought differently.1 What, then, is to become of the constitution, if its powers are thus perpetually to be the subject of debate and controversy? What exposition is to be allowed to be of authority? Is the exposition of one state to be of authority there, and the reverse to be of authority in a neighbouring state, entertaining an opposite exposition? Then, there would be at no time in the United States the same constitution in operation over the whole people. Is a power, which is doubted, or denied by a single state, to be suspended either wholly, or in that state? Then, the constitution is practically gone, as a uniform system, or indeed, as any system at all, at the pleasure of any state. If the power to nullify the constitution exists in a single state, it may rightfully exercise it at its pleasure. Would not this be a far more dangerous and mischievous power, than a power granted by all the states to the judiciary to construe the constitution? Would not a tribunal, appointed under the authority of all, be more safe, than twenty-four tribunals acting at their own pleasure, and upon no common principles and co-operation? Suppose congress should declare war; shall one state have power to suspend it? Suppose congress should make peace; shall one state have power to involve the whole country in war? Suppose the president and senate should make a treaty; shall one state declare it a nullity, or subject the whole country to reprisals for refusing to obey it? Yet, if every state may for itself judge of its obligations under the constitution, it may disobey a particular law or treaty, because it may deem it an unconstitutional exercise of power,

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1 Dane's App. =A744, 45, p. 52 to 59, =A754, p. 66; 4 Elliot's Debates,= 338, 339.

although every other state shall concur in a contrary opinion. Suppose congress should lay a tax upon imports burthensome to a particular state, or for purposes, which such state deems unconstitutional, and yet all the other states are in its favour; is the law laying the tax to become a nullity? That would be to allow one state to withdraw a power from the Union, which was given by the people of all the states. That would be to make the general government the servant of twentyfour masters, of different wills and different purposes, and yet bound to obey them all.1

=A7 381. The argument, therefore, arising from a possibility of an abuse of power, is, to say the least of it, quite as strong the other way. The constitution is in quite as perilous a state from the power of overthrowing it lodged in every state in the Union, as it can be by being lodged in any department of the federal government. There is this difference, however, in the cases, that if there be federal usurpation, it may be checked by the people of all the states in a constitutional way. If there be usurpation by a single state, it is, upon the theory we are considering, irremediable. Other difficulties, however, attend the reasoning we are considering. When it is said, that the decision of the Supreme Court in the last resort is obligatory, and final "in relation to the authorities of the other departments of the government," is it meant of the federal government only, or of the states also? If of the former only, then the

constitution is no longer the supreme law of the land, although all the state functionaries are bound by ah oath to support it. If of the latter also, then it is obligatory upon the state

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1 Webster's Speeches, 420; 4 Elliots Debates, 339.

legislatures, executives, and judiciaries. It binds them; and yet it does not bind the people of the states, or the states in their sovereign capacity. The states may maintain one construction of it, and the functionaries of the state are bound by another. If, on the other hand, the state functionaries are to follow the construction of the state, in opposition to the construction of the Supreme Court, then the constitution, as actually administered by the different functionaries, is different; and the duties required of them may be opposite, and in collision with each other. If such a state of things is the just result of the reasoning, may it not justly be suspected, that the reasoning itself is unsound?

=A7 382. Again; it is a part of this argument, that the judicial interpretation is not binding " inrelation to the rights of the parties to the constitutional compact." "On any other hypothesis the delegation of judicial power would annul the authority delegating it." Who then are the parties to this contract? Who did delegate the judicial power? Let the instrument answer for itself. The people of the United States are the parties to the constitution. The people of the United States delegated the judicial rower. It was not a delegation by the people of one state, but by the people of all the states. Why then is not a judicial decision binding in each state, until all, who delegated the power, in some constitutional manner concur in annulling or overruling the decision? Where shall we find the clause, which gives the power to each state to construe the constitution for all; and thus of itself to supersede in its own favour the construction of all the rest? Would not this be justly deemed a delegation of judicial power, which would annul the authority

delegating it?1 Since the whole people of the United States have concurred in establishing the constitution, it would seem most consonant with reason to presume, in the absence of all contrary stipulations, that they did not mean, that its obligatory force should depend upon the dictate or opinion of any single state. Even under the confederation, (as has been already stated,) it was unanimously resolved by congress, that "as state legislatures are not competent to the making of such compacts or treaties, [with foreign states,] so neither are they competent in that capacity authoritatively to decide on, or ascertain the construction and sense of them." And the reasoning, by which this opinion is supported, seems absolutely unanswerable.2 If this was true under such an instrument, and that construction was avowed before the whole American people, and brought home to the knowledge of the state legislatures, how can we avoid the inference, that under the constitution, where an express judicial power in cases arising under the constitution was provided for, the people must have understood and intended, that the states should have no right to question, or control such judicial interpretation?

=A7 383. In the next place, as the judicial power extends to all cases arising under the constitution, and that constitution is declared to be the supreme law, that supremacy would naturally he construed to ex-

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1 There is vast force in the reasoning Mr. Webster on this subject, in his great Speech on Mr. Foot's Resolutions in the senate, in 1830, which well deserves the attention of every statesman and jurist. See 4 Elliot's Debates, 338, 339, 343, 344, and Webster's Speeches, p. 407, 408, 418, 419, 420; Id. 430, 431, 432.

2 Journals of Congress, April 13, 1787, p. 32, &c. Rawle on the Constitution, App. 2, p. 316, &c.

tend, not only over the citizens, but over the states.1 This, however, is not left to implication, for it is declared to be the supreme law of the land, "any thing in the constitution or laws of any state to the contrary notwithstanding." The people of any state cannot, then, by any alteration of their state constitution, destroy, or impair that supremacy. How, then, can they do it in any other less direct manner? Now, it is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that constitution. If then all the departments of the national government may rightfully exercise all the powers, which the judicial department has, by its interpretation, declared to be granted by the constitution; and are prohibited from exercising those, which are thus declared not to be granted by it, would it not be a solecism to hold, notwithstanding, that such rightful exercise should not be deemed the supreme law of the land, and such prohibited powers should still be deemed granted? It would seem repugnant to the first notions of justice, that in respect to the same instrument of government, different powers, and duties, and obligations should arise, and different rules should prevail, at the same time among the governed, from a

right of interpreting the same words (manifestly used in one sense only) in different, nay, in opposite senses. If there ever was a case, in which uniformity of interpretation might well be deemed a necessary postulate, it

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1 The Federalist, No. 33.

would seem to be that of a fundamental law of a government. It might otherwise follow, that the same individual, as a magistrate, might be bound by one rule, and in his private capacity by another, at the very same moment.

=A7 384. There would be neither wisdom nor policy in such a doctrine; and i= t would deliver over the constitution to interminable doubts, founded upon the fluctuating opinions and characters of those, who should, from time to time, be called to administer it. Such a constitution could, in no just sense, be deemed a law, much less a supreme or fundamental law. It would have none of the certainty or universality, which are the proper attributes of such a sovereign rule. It would entail upon us all the miserable servitude, which has been deprecated, as the result of vague and uncertain jurisprudence. Misera est servitus, ubi jus est vagum aut incertum. It would subject us to constant dissensions, and perhaps to civil broils, from the perpetually recurring conflicts upon constitutional questions. On the other hand, the worst, that could happen from a wrong decision of the judicial department, would be, that it might require the interposition of congress, or, in the last resort, of the amendatory power of the states, to redress the grievance.

=A7 385. We find the power to construe the constitution expressly confided to the judicial department, without any limitation or qualification, as to its conclusiveness. Who, then, is at liberty, by general implications, not from the terms of the instrument, but from mere theory, and assumed reservations of sovereign right, to insert such a limitation or qualification? We find, that to produce uniformity of interpretation, and to preserve the constitution, as a perpetual bond of

union, a supreme arbiter or authority of construing is, if not absolutely indispensable, at least, of the highest possible practical utility and importance. Who, then, is at liberty to reason down the terms of the constitution, so as to exclude their natural force and operation?

=A7 386. We find, that it is the known course of the judicial department of the several states to decide in the last resort upon all constitutional questions arising in judgment; and that this has always been maintained as a rightful exercise of authority, and conclusive upon the whole state.1 As such, it has been constantly approved by the people, and never withdrawn from the courts by any amendment of their constitutions, when the people have been called to revise them. We find, that the people of the several states have constantly relied upon this last judicial appeal, as the bulwark of their state rights and liberties; and that it is in perfect consonance with the whole structure of the jurisprudence of the common law. Under such circumstances, is it not most natural to presume, that the same rule was intended to be applied to the constitution of the United States? And when we find, that the judicial department of the United States is actually entrusted with a like power, is it not an irresistible presumption, that it had the same object, and was to have the same universally conclusive effect? Even under the confederation, an instrument framed with infinitely more jealousy and deference for state rights, the judgments of the judicial department appointed to decide controversies between states was declared to be final and conclusive; and the appellate power in other

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1 2 Elliot's Debates, 248, 328, 329, 395; Grimke's Speech in 1828, p. 25, &c.; Dane's App. =A7 44, 45, p. 52 to 59; Id. =A7 48, p. 62.

cases was held to overrule all state decisions and state legislation.1

=A7 387. If, then, reasoning from the terms of the constitution, and the known principles of our jurisprudence, the appropriate conclusion is, that the judicial department of the United States is, in the last resort, the final expositor of the constitution, as to all questions of a judicial nature; let us see, in the next place, how far this reasoning acquires confirmation from the past history of the constitution, and the practice under it.

=A7 388. That this view of the constitution was taken by its framers and friends, and was submitted to the people before its adoption, is positively certain. The Federalist2 says, "Under the national government, treaties and articles of treaties as well as the law of nations, will always be expounded in one sense, and executed in the same manner; whereas, adjudications on the same points and questions in thirteen states, or three or four confederacies, will not always accord, or be consistent; and that as well from the variety of independent courts and judges appointed by different and independent governments, as from the different local laws, which may affect and influence them. The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to, one national government, cannot be too much commended." Again, referring to the objection

taken, that the government was national, and not a confederacy of sovereign states, and after stating, that the jurisdiction of the national government extended to certain enumerated objects only, and left the resi-

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1 Dane's App. =A752, p. 65; Penhallow v. Doane, 3 Dall. 54; Journals of Congress, 1779, Vol. 5, p. 86 to 90; 4 Cranch, 2.

2 The Federalist, No. 3.

due to the several states, it proceeds to say:1 "It is true, that in controversies between the two jurisdictions (state and national) the tribunal, which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made according to the rules of the constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact. And that it ought to be established under the general, rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."2

=A7 389. The subject is still more elaborately considered in another number,3 which treats of the judicial department in relation to the extent of its powers. It is there said, that there ought always to be a constitutional method of giving efficacy to constitutional provisions; that if there are such things as political axioms, the propriety of the judicial department of a government being co-extensive with its legislature, may be ranked among the number;4 that the mere necessity of uniformity in the interpretation of the national law decides the question; that thirteen independent courts of final jurisdiction over the same causes is a hydra of government, from which nothing but contradiction and confusion can proceed; that controversies between the

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1 The Federalist, No. 39.

2 See also The Federalist, No. 33.

3 The Federalist, No. 80.

4 The same remarks will be found pressed with great force by Mr. Chief Justice Marshall, in delivering the opinion of the court in Cohens v. Virginia, (6 Wheat. 264, 384.)

nation and its members can only, be properly referred to the national tribunal; that the peace of the whole ought not to be left at the disposal of a part; and that whatever practices may have a tendency to disturb the harmony of the states, are proper objects of federal superintendence and control.1

=A7 390. The same doctrine was constantly avowed in the state conventions, called to ratify the constitution. With some persons it formed a strong objection to the constitution; with others it was deemed vital to its ex-

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1 In The Federalist, No. 78 and 82, the same course of reasoning is pursued, and the final nature of the appellate jurisdiction of the Supreme Court is largely insisted on. In the Convention of Connecticut, Mr. Ellsworth (afterwards Chief Justice of the United States) used the following language: "This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is the constitutional check. If the United States go beyond their powers; if they make a law, which the constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it void. On the other hand, if the states go beyond their limits; if they make a law, which is a usurpation upon the general government, the law is void, and upright and independent judges will declare it. Still, however, if the United States and the individual states will quarrel; if they want to fight, they may do it, and no frame of government can possibly prevent it " In the debates in the South Carolina legislature, when the subject of calling a convention to ratify or reject the constitution was before them,* Mr. Charles Pinckney (one of the members of the convention) avowed the doctrine in the strongest terms. " That a supreme federal jurisdiction was indispensable," said he, "cannot be denied. It is equally true, that in order to ensure the administration of justice, it was necessary to give all the powers, original as well as appellate, the constitution has enumerated. Without it we could not expect a due observance of treaties; that the state judiciaries would confine themselves within their proper sphere; or that a general sense of justice would pervade the Union, &c. That to ensure these, extensive authorities were necessary; particularly so, were they in a tribunal, constituted as this is, whose duty it would be, not only to decide all national questions, which should arise within the Union; but to control and keep the state judiciaries within their proper limits, whenever they should attempt to interfere with the power."

*** Debates in 1788, printed by A. E. Miller, 1831, Charleston, p. 7.**

istence and value.1 So, that it is indisputable, that the constitution was adopted under a full knowledge of this exposition of its grant of power to the judicial department.2

=A7 391. This is not all. The constitution has now been in full operation more than forty years; and during this period the Supreme Court has constantly exercised this power of final interpretation in relation, not only to the constitution, and laws of the Union, but in relation to state acts and state constitutions and laws, so far as they affected the constitution, and laws, and treaties of the United States.3 Their decisions upon these grave questions have never been repudiated, or impaired by congress.4 No state has ever deliberately or forcibly resisted the execution of the judgments founded upon

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1 It would occupy too much space to quote the passages at large. Take for an instance, in the Virginia debates, Mr. Madison's remarks. " It may be a misfortune, that in organizing any government, the explication of its authority should be left to any of its co-ordinate branches. There is no example in any country, where it is otherwise. There is no new policy in submitting it to the judiciary of the United States." 2 Elliot's Debates, 390. See also Id. 380, 383, 395, 400, 404, 418. See also North Carolina Debates, 3 Elliot's Debates, 125, 127, 128, 130, 133, 134, 139, 141, 142, 143; Pennsylvania Debates, 3 Elliot's Debates, 280, 313. Mr. Luther Martin, in his letter to the Maryland Convention, said: " By the third article the judicial power is vested in one Supreme Court, &c. These courts, and these only, will have a right to decide upon the laws of the United States, and all questions arising upon their construction, &c. Whether, therefore, any laws, &c. of congress, or acts of its president, &c. are contrary to, or warranted by the constitution, rests only with the judges, who are appointed by congress to determine; by whose determinations every state is bound." 3 Elliot's Debates, 44, 45; Yates's Minutes, &c. See also The =46ederalist, No. 78.

2 See Mr. Pinckney's Observations cited in Grimke's Speech in 1828, p. 86, = 87.

3 Dane's App. =A744, p. 53, 54, 55; Grimke's Speech, 1828, p. 34 to 42.

4 In the debate in the first congress organized under the constitution, the same doctrine was openly avowed, as indeed it has constantly been by the majority of congress at all subsequent periods. See 1 Lloyd's Debates, 219 to 599; 2 Lloyd's Debates, 284 to 327.

them; and the highest state tribunals have, with scarcely a single exception, acquiesced in, and, in most instances, assisted in executing them.1 During the same period, eleven states have been admitted into the Union, under a full persuasion, that the same power would be exerted over them. Many of the states have, at different times within the same period, been called upon to consider, and examine the grounds, on which the doctrine has been maintained, at the solicitation of other states which felt, that it operated injuriously, or might operate injuriously upon their interests. A great majority of the states, which have been thus called upon in their legislative capacities to express opinions, have maintained the correctness of the doctrine, and the beneficial effects of the powers, as a bond of union, in terms of the most unequivocal nature.2 Whenever any

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1 Chief Justice M'Kean, in Commonwealth v.Cobbett (3 Dall. 473,) seems to have adopted a modified doctrine, and to have held, that the Supreme Court was not the common arbiter; but if not, the only remedy was, not by a state deciding for itself, as in case of a treaty between independent governments, but by a constitutional amendment by the states. But see, on the other hand, the opinion of Chief Justice Spencer, in Andrews v. Montgomery, 19 Johns. R. 164.

2 Massachusetts, in her Resolve of February 12, 1799, (p. 57,) in answer to the Resolutions of Virginia of 1798, declared, " that the decision of all cases in law and equity, arising under the constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States;" and " that the people in that solemn compact, which is declared to be the supreme law of the land, have not constituted the state legislatures the judges of the acts or measures of the federal government, but have confided to them the power of proposing such amendments" &c.; and "that by this construction of the constitution, an amicable and dispassionate remedy is pointed out for any evil, which experience may prove to exist, and the peace and prosperity of the United States may be preserved without interruption." See also Dane's App. =A744, p. 56; Id. 80. Mr. Webster's Speech in the Senate, in 1830, contains an admirable exposition of the same doctrines.

Webster's Speeches, 410, 419, 420, 421. In June, 1821. the House of Representatives of NewHampshire passed certain resolutions. (172 yeas to 9 nays,) drawn

amendment has been proposed to change the tribunal, and substitute another common umpire or interpreter, it has rarely received the concurrence of more than two or three states, and has been uniformly rejected by a great majority, either silently, or by an express dissent. And instances have occurred, in which the legislature of the same state has, at different times, avowed opposite opinions, approving at one time, what it had denied, or at least questioned at another. So, that it may be asserted with entire confidence, that for forty years three fourths of all the states composing the Union have expressly assented to, or silently approved, this construction of the constitution, and have resisted every effort to restrict, or alter it. A weight of public opinion among the people for such a period, uniformly thrown into one scale so strongly, and so decisively, in the midst of all the extraordinary changes of parties, the events of peace and of war, and the trying conflicts of public policy and state interests, is perhaps unexampled in the history of all other free governments.1 It affords,

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up (as is understood) by one of her most distinguished statesmen, asserting the same doctrines. Delaware, in January, 1831, and Connecticut and Massachusetts held the same, in May, 1831.

1 Virginia and Kentucky denied the power in 1793 and 1800; Massachusetts, Delaware, Rhode-Island, New-York, Connecticut, NewHampshire, and Vermont disapproved of the Virginia resolutions, and passed counter resolutions. (North American Review, October, 1830, p. 500.) No other state appears to have approved the Virginia resolutions. (Ibid.) In 1810 Pennsylvania proposed the appointment of another tribunal than the Supreme Court to determine disputes between the general and state governments. Virginia, on that occasion, affirmed, that the Supreme Court was the proper tribunal; and in that opinion New-Hampshire, Vermont, North-Carolina, Maryland, Georgia, Tennessee, Kentucky, and New-Jersey concurred; and no one state approved of the amendment (North American Review, October, 1830, p. 507 to 512; Dane's App. =A755, p. 67; 6 Wheat. R. 358, note.) Recently, in March, 1831, Pennsylvania has resolved, that the 25th section of the judiciary act of 1789, ch. 20, which gives the Supreme Court appellate

as satisfactory a testimony in favour of the just and safe operation of the system, as can well be imagined; and, as a commentary upon the constitution itself, it is as absolutely conclusive, as any ever can be, and affords the only escape from the occurrence of civil conflicts, and the delivery over of the subject to interminable disputes.1

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jurisdiction from state courts on constitutional questions, is authorized by the constitution, and sanctioned by experience, and also all other laws empowering the federal judiciary to maintain the supreme laws.

1 Upon this subject the speech of Mr. Webster in the Senate, in 1830, presents the whole argument in a very condensed and powerful form. The following passage is selected, as peculiarly appropriate: "The people, then, sir, erected this government. They gave it a constitution, and in that constitution they have enumerated the powers which they bestow on it. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of such powers, as are granted; and all others, they declare, are reserved to the states, or the people. But, sir, they have not stopped here. If they had, they would have accomplished but half their work. No definition can be so clear, as to avoid possibility of doubt; no limitation so precise, as to exclude all uncertainty. Who, then, shall construe this grant of the people? Who shall interpret their will, where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding on the powers of the government? Sir, they have settled all this in the fullest manner. They have left it, with the government itself, in its appropriate branches. Sir, the very chief end, the main design, for which the whole constitution was framed and adopted, was to establish a government, that should not be obliged to act through state agency, or depend on state opinion and state discretion. The people had had quite enough of that kind of government, under the confederacy. Under that system, the legal action--the application of law to individuals, belonged exclusively to the states. Congress could only recommend--their acts were not of binding force, till the states had adopted and sanctioned them. Are we in that condition still? Are we yet at the mercy of state discretion, and state construction? Sir, if we are, then vain will be our attempt to maintain the constitution, under which we sit.

"But, sir, the people have wisely provided, in the constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are, in the constitution, grants of powers to Congress; and restrictions on these powers. There are, also, prohibitions on the states. Some authority must, therefore, necessarily exist, having the ultimate

=A7 392. In this review of the power of the judicial department, upon a question of its supremacy in the interpretation of the constitution, it has not been thought

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jurisdiction to fix and ascertain the interpretation of these grants, restrictions, and prohibitions. The constitution has itself pointed out, ordained, and established that authority. How has it accomplished this great and essential end? By declaring, sir, that ' the constitution and the law of the United States, made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.'

"This, sir, was the first great step. By this, the supremacy of the constitution and laws of the United States is declared. The people so will it. No state law is to be valid, which comes in conflict with the constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the constitution itself decides, also, by declaring, 'that the judicial power shall extend to all cases arising under the constitution and laws of the United States.' These two provisions, sir, cover the whole ground. They are, in truth, the keystone of the arch. With these, it is a constitution; without them, it is a confederacy. In pursuance of these clear and express provisions, congress established, at its very first session, in the judicial act, a mode for carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, sir, became a government. It then had the means of self-protection; and, but for this, it would, in all probability, have been now among things, which are past. Having constituted the government, and declared its powers, the people have further said, that since somebody must decide on the extent of these powers, the government shall itself decide; subject, always, like other popular governments, to its responsibility to the people. And now, sir, I repeat, how is it, that a state legislature acquires any power to interfere? Who, or what, gives them the right to say to the people, ' We, who are your agents and servants for one purpose, will undertake to decide, that your other agents and servants, appointed by you for another purpose, have transcended the authority you gave them !' The reply would be, I think, not impertinent--' Who made you a judge over another's servants? To their own masters they stand or fall.'

"Sir, I deny this power of state legislatures altogether. It cannot stand the test of examination. Gentlemen may say, that in an extreme case, a state government might protect the people from intolerable oppression. Sir, in such a case, the people might protect themselves, without the aid of the state governments. Such a case warrants revolution. It must make, when it comes, a law for itself. A nullifying act of a state legislature cannot alter the case, nor make resistance any more lawful.

necessary to rely on the deliberate judgments of that department in affirmance of it. But it may be proper to add that the judicial department has not only constantly exercised this right of interpretation in the last resort; but its whole course of reasonings and operation has proceeded upon the ground, that, once made, the interpretation was conclusive, as well upon the states, as the people.1

In maintaining these sentiments, sir, I am but asserting the rights of the people. I state what they have declared, and insist on their right to declare it. They have chosen to repose this power in the general government, and I think it my duty to support it, like other constitutional powers."

See also 1 Wilson's Law Lectures, 461, 462.--It is truly surprising, that Mr. Vice-President Calhoun, in his Letter of the 28th of August, 1832, to governor Hamilton, (published while the present work was passing through the press,) should have thought, that a proposition merely offered in the convention, and referred to a committee for their consideration, that " the jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state, or the United States and the citizens of an individual state,"* should, in connexion with others giving a negative on state laws, establish the conclusion, that the convention, which framed the constitution, was opposed to granting the power to the general government, in any form, to exercise any control whatever over a state by force, veto, or judicial process, or in any other form. This clause for conferring jurisdiction on the Supreme

Court in controversies between the United States and the states, must, like the other controversies between states, or between individuals, referred to the judicial power, have been intended to apply exclusively to suits of a civil nature, respecting property, debts contracts, or other claims by the United States against a state; and not to the decision of constitutional questions in the abstract. At a subsequent period of the convention, the judicial power was expressly extended to all cases arising under the constitution, laws, and treaties, of the United States, and to all controversies, to which the United States should be a party,# thus covering the whole ground of a right to decide constitutional questions of a judicial nature. And this, as the Federalist informs us, was the substitute for a negative upon state laws, and the only one, which was deemed safe or efficient. The =46ederalist No. 80.

1 Martin v. Hunter, I Wheat. R. 304, 334, &c. 342 to 348; Cohens v. The State of Virginia,6 Wheat. R. 264, 376, 377 to 392; Id. 413 to

*** Journal of Convention, 20th Aug. P. 235.**

 # Journal of Convention, 27th Aug. p. 298.

=A7 393. But it may be asked, as it has been asked, what is to be the remedy, if there be any misconstruction of the constitution on the part of the government

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432; Bank of Hamilton v. Dudley, 2 Peters's R. 524; Ware v. Hylton, 3 Dall. 199; I Cond. R. 99, 112. The language of Mr. Chief Justice Marshall, in delivering the opinion of the court in Cohens v. Virginia, (6 Wheat. 384 to 390,) presents the argument in favour of the jurisdiction of the judicial department in a very forcible manner. " While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction, which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question, which grows out of theconstitution and laws.

"If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it, as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the courts of the Union should be construed to be coextensive with the legislative, merely because it is fit, that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution, which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument, which purport to establish this principle, shall be contracted for the purpose of destroying it.

" The mischievous consequences of the construction, contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments, by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole.

" The answer, which has been given to this argument, does not deny its truth, but insists, that confidence is reposed, and may be safely re-

of the United States, or its functionaries, and any powers exercised by them, not warranted by its true meaning? To this question a general answer may be given

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posed, in the state institutions; and that, if they shall ever become so insane, or so wicked, as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them. " We readily concur with the counsel for the defendant in the declaration, that the cases, which have been put, of direct legislative resistance for the purpose of oppose the acknowledged powers of the government, are extreme cases, and in the hope, that they will never occur; capacity of the

government to protect itself and its laws in such cases, would contribute in no inconsiderable degree to their occurrence. "Let it be admitted, that the cases, which have been put, are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different states may entertain different opinions on the true construction of the constitutional powers of congress. We know, that at one time, the assumption of the debts, contracted by the several states during the war of our revolution, was deemed unconstitutional by some of them. We know, too, that at other times, certain taxes, imposed by congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance, that we shall be less divided, than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert, that the judicatures of the states will be exempt from the prejudices, by which the legislatures and people are influenced, and will constitute perfectly impartial tribunal. In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance, which that constitution attaches to the independence of judges, we are the less inclined to suppose, that it can have intended to leave these constitutional questions to tribunals, where this independence may not exist, in all cases where a state shall prosecute an individual, who claims the protection of an act of congress. These prosecutions may take place, even without a legislative act. A person, making a seizure under an act of congress, may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief, if the first decisions in such cases should be final!

"These collisions may take place in times of no extraordinary com-

in the worlds of its early expositors: "The same, as if the state legislatures should violate their respective constitutional authorities." In the first instance, if this should

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motion. But a constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of selfpreservation from the perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers, than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances, under which our constitution was formed; nothing in the histo ry of the times, which would justify the opinion, that the confidence reposed in the states was so implicit, as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of congress, under the confederation, were as constitutionally obligatory, as the laws enacted by the present congress. That they were habitually disregarded, is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable, that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change, which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumentality of state governments. But, ought not this ability, in reason and sound policy, to he applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion? Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?

"The counsel for Virginia endeavour to obviate the force of these arguments by saying, that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise, until there shall be a disposition so hostile to the present political system, as to produce a determination to destroy it; and, when that de-

be by congress, " the success of the usurpation will depend on the executive and judiciary departments, which are to expound, and give effect to the legislative acts; and, in the last resort, a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers. The

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termination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the states can put an end to the government by refusing to act. They have only not to elect senators, and it expires without a struggle.

"It is very true, that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make, or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise. it is usurpation, and ought to be repelled by those, to whom the people have delegated their power of repelling it.

"The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will.

"It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions, which should protect that instrument against a general combination of the states, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it."

See also M'Culloch v. Maryland, (4 Wheat. 316, 405, 406.) See also the reasoning of Mr. Chief Justice Jay, in Chisholm v. Georgia,(2 Dall. 419, S. C. 2 Peters's Cond. R. 635, 670 to 675.) Osborn v. Bank of the United States,(9 Wheat. 738, 818, 819;) and Gibbons v. Ogden,(9 Wheat. 1, 210.)

truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal, than of the state legislatures, for this plain reason, that, as every act of the former will be an invasion of the rights of the latter, these will ever be ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives. There being no such intermediate body between the state legislatures and the people, interested in watching the conduct of the former, violations of the state constitution are more likely to remain unnoticed and unredressed."1

§ 394. In the next place, if the usurpation should be by the president, an adequate check may be generally found, not only in the elective franchise, but also in the controlling power of congress, in its legislative or impeaching capacity, and in an appeal to the judicial department. In the next place, if the usurpation should be by the judiciary, and arise from corrupt motives, the power of impeachment would remove the offenders; and in most other cases the legislative and executive authorities could interpose an efficient barrier. A declaratory or prohibitory law would, in many cases, be a complete remedy. We have, also, so far at least as a conscientious sense of the obligations of duty, sanctioned by an oath of office, and an indissoluble responsibility to the people for the exercise and abuse of power, on the part of different departments of the government, can influence human minds, some additional guards against known and deliberate usurpations; for both are provided for in the constitution itself. "The wisdom and the discretion of congress, (it has been justly observed,) their identity with the people,

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1 The Federalist, No. 44; 1 Wilson's Law Lectures, 461, 462; Dane's App. §58, p. 68.

and the influence, which their constituents possess at elections, are, in this, as in many other instances, as, for example, that of declaring, war; the sole restraints; on this they have relied, to secure them from abuse. They are the restraints, on which the people must often solely rely in all representative governments."1

§ 395. But in the next place, (and it is that, which would furnish a case of most difficulty and danger, though it may fairly be presumed to be of rare occurrence,) if the legislature, executive, and judicial departments should all concur in a gross usurpation, there is still a peaceable remedy provided by the constitution. It is by the power of amendment, which may always be applied at the will of three fourths of the states. If, therefore, there should be a corrupt co-operation of three fourths of the states for permanent usurpation, (a case not to be supposed, or if supposed, it differs not at all in principle or redress from the case of a majority of a state or nation having the same intent,) the case is certainly irremediable under any known forms of the constitution. The states may now by a constitutional amendment, with few limitations, change the whole structure and powers of the government, and thus legalize any present excess of power. And the general right of a society in other cases to change the government atthe will of a majority of the whole people, in any manner, that may suit its pleasure, is undisputed, and seems indisputable. If there be any remedy at all for the minority in such cases, it is a remedy never provided for by human institutions. It is by a

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1 Gibbons v. Ogden, 9) Wheat. R. 1, 197. -- See also, on the same subject, the observations of Mr. Justice Johnson in delivering the opinion of the court, in Anderson v. Dunn, 6 Wheat. R. 204, 226.

resort to the ultimate right of all human beings in extreme cases to resist oppression, and to apply force against ruinous injustice.1 § 396. As a fit conclusion to this part of these commentaries, we cannot do better than to refer to a confirmatory view, which has been recently presented to the public by one of the framers of the constitution, who is now, it is believed, the only surviving member of the federal convention, and who, by his early as well as his later labours, has entitled himself to the gratitude of his country, as one of its truest patriots, and most enlightened friends. Venerable, as he now is, from age and character, and absolved from all those political connexions, which may influence the judgment, and mislead the mind, he speaks from his retirement in a voice, which cannot be disregarded, when it instructs us by its profound reasoning, or admonishes us of our dangers by its searching appeals. However particular passages may seem open to criticism, the general structure of the argument stands on immovable foundations, and can scarcely perish, but with the constitution, which it seeks to uphold.2

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1 See Webster's Speeches, p. 408, 409; 1 Black. Comm. 161, 162. See also 1 Tucker's Black. Comm. App. 73 to 75.

2 Reference is here made to Mr. Madison's Letter, dated August, 1830, to Mr. Edward Everett, published in the North American Review for October, 1830. The following extract is taken from p. 537, et seq.

" In order to understand the true character of the constitution of the United States, the error, not uncommon, must be avoided, of viewing it through the medium, either of a consolidates government, or of a confederated government, whilst it is neither the one, nor the other; but a mixture of both. And having, in no model, the similitudes and analogies applicable to other systems of government, it must, more than any other, be its own interpreter according to its text and the facts of the case.

" From these it will be seen, that the characteristic peculiarities of the constitution are, 1, the mode of its formation; 2, the division of the supreme powers of government between the states in their united capacity, and the states in their individual capacities.

" 1. It was formed, not by the governments of the component states, as the federal government, for which it was substituted was formed. Nor was it formed by a majority of the people of the United States, as a single community, in the manner of a consolidated government.

" It was formed by the states, that is, by the people in each of the states, acting in their highest sovereign capacity; and formed consequently, by the same authority, which formed the state constitutions.

" Being thus derived from the same source as the constitutions of the states, it has, within each state, the same authority, as the constitution of the state; and is as much a constitution, in the strict sense of the term, within its prescribed sphere, as the constitutions of the states are, within their respective spheres: but with this obvious and essential difference, that being a compact among the states in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered, or annulled at the will of the states individually, as the constitution of a state may. be at its individual will.

" 2. And that it divides the supreme powers of government, between the government of the United States, and the governments of the individual states; is stamped on the face of the instrument; the powers of war and of taxation, of commerce and of treaties, and other enumerated powers vested in the government of the United States, being of as high and sovereign a character, as any of the powers reserved to the state governments.

"Nor is the government of the United States, created by the constitution, less a government in the strict sense of the term, within the sphere of its powers, than the governments created by the constitutions of the states are, within their several spheres. It is, like them, organized into legislative, executive, and judiciary departments. It operates, like them, directly on persons and things. And, like them, it has at command a physical force for executing the powers committed to it. The concurrent operation in certain cases is one of the features marking the peculiarity of the system.

"Between these different constitutional governments, the one operating in all the states, the others operating separately in each, with the aggregate powers of government divided between them, it could not escape attention, that controversies would arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system, that does not provide for a peaceable and authoritative termination of occurring controversies, would not be more than the shadow of a government; the object and end of a real government being, the substitution of law and order for uncertainty, confusion, and violence.

"That to have left a final decision, in such cases, to each of the states, then thirteen, and already twenty-four, could not fail to make the constitution and laws of the United States different in different states, was obvious; and not less obvious, that this diversity of indepen-

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dent decisions must altogether distract the government of the union, and speedily put an end to the union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the states, or they could be duly executed in none. An impost, or an excise, for example, if not in force in some states, would be defeated in others. It is well known, that this was among the lessons of experience, which had a primary influence in bringing about the existing constitution. A loss of its general authority would moreover revive the exasperating questions between the states holding ports for foreign commerce, and the adjoining states without them; to which are now added, all the inland states, necessarily carrying on their foreign commerce through other states

"To have made the decisions under the authority of the individual states, co-ordinate, in all cases, with decisions under the authority of the United States, would unavoidably produce collisions incompatible with the peace of society, and with that regular and efficient administration, which is of the essence of free governments. Scenes could not be avoided, in which a ministerial officer of the United States, and the correspondent officer of an individual state, would have rencounters in executing conflicting decrees; the result of which would depend on the comparative force of the local posses attending them; and that, a casualty depending on the political opinions and party feelings in different states.

"To have referred every clashing decision, under the two authorities, for a final decision, to the states as parties to the constitution, would be attended with delays, with inconveniences, and with expenses, amounting to a prohibition of the expedient; not to mention its tendency to impair the salutary veneration for a system requiring such frequent inter positions, nor the delicate questions, which might present themselves as to the form of stating the appeal, and as to the quorum for deciding it.

"To have trusted to negotiation for adjusting disputes between the governme nt of the United States and the state governments, as between independent and separate sovereignties, would have lost sight altogether of a constitution and government for the Union; and opened a direct road from a failure of that resort, to the ultima ratio between nations wholly independent of, and alien to each other. If the idea had its origin in the process of adjustment between separate branches of the same government, the analogy entirely fails. In the case of disputes between independent parts of the same government, neither part being able to consummate its will, nor the government to proceed without a concurrence of the parts, necessity brings about an accommodation. In disputes between a state government, and the government of the United States, the case is practically, as well as theoretically different; each party possessing all the departments of an organized government, legislative, executive, and judiciary; and having each a physical force to support.

its pretensions. Although the issue of negotiation might sometimes avoid this extremity, how often would it happen among so many states, that an unaccommodating spirit in some would render that resource unavailing? A contrary supposition would not accord with a knowledge of human nature, or the evidence of our own political history.

"The constitution, not relying on any of the preceding modifications, for its safe and successful operation, has expressly declared, on the one hand, 1, 'that the constitution, and the laws made in pursuance thereof, and all treaties made under the authority of the United States shall be the supreme law of the land; 2, that the judges of every state shall be bound thereby, any thing in the constitution and laws of any state to the contrary notwithstanding; 3, that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made under their authority, &c.'

"On the other hand, as a security of the rights and powers of the states, in their individual capacities, against an undue preponderance of the powers granted to the government over them in their united capacity, the constitution has relied on, (1,) the responsibility of the senators and representatives in the legislature of the United States to the legislatures and people of the states; (2,) the responsibility of the president to the people of the United States; and (3,) the liability of the executive and judicial functionaries of the United States to impeachment by the representatives of the people of the states, in one branch of the legislature of the United States, and trial by the representatives of the states, in the other branch: the state functionaries, legislative, executive, and judicial, being, at the same time, in their appointment and responsibility, altogether independent of the agency or authority of the United States.

"How far this structure of the government of the United States is adequate and safe for its objects, time alone can absolutely determine. Experience seems to have shewn, that whatever may grow out of future stages of our national career, there is, as yet, a sufficient control, in the popular will, over the executive and legislative departments of the government. When the alien and sedition laws were passed, in contravention to the opinions and feelings of the community, the first elections, that ensued, put an end to them. And whatever may have been the character of other acts, in the judgment of many of us it is but true, that they have generally accorded with the views of the majority of the states and of the people. At the present day it seems well understood, that the laws, which have created most dissatisfaction, have had a like sanction without doors: and that, whether continued, varied, or repealed, a like proof will be given of the sympathy and responsibility of the representative body to the constituent body. Indeed, the great complaint now is, against the results of this sympathy and responsibility in the legislative policy of the nation.

"With respect to the judicial power of the United States, and the authority of the Supreme Court in relation to the boundary of jurisdiction between the federal and the state governments, I may be permitted to refer to the thirty-ninth number of the Federalist for the light, in which the subject was regarded by its writer at the period, when the constitution was depending; and it is believed, that the same was the prevailing view then taken of it; that the same view has continued to prevail; and that it does so at this time, notwithstanding the eminent exceptions to it.

"But it is perfectly consistent with the concession of this power to the Supreme Court, in cases falling within the course of its functions, to maintain, that the power has not always been rightly exercised. To say nothing of the period, happily a short one, when judges in their seats did not abstain from intemperate and party harangues, equally at variance with their duty and their dignity; there have been occasional decisions from the bench, which have incurred serious and extensive disapprobation. Still it would seem, that, with but few exceptions, the course of the judiciary has been hitherto sustained by the prominent sense of the nation.

"Those who have denied, or doubted the supremacy of the judicial power of the United States, and denounce at the same time a nullifying power in a state, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition and execution of the law: nor to the destruction of all equipoise between the federal government and the state governments, if, whilst the functionaries of the federal government are directly or indirectly elected by, and responsible to the states, and the functionaries of the states are in their appointment and responsibility wholly independent of the United States, no constitutional control of any sort belonged to

the United States over the states. Under such an organization, it is evident, that it would be in the power of the states, individually, to pass unauthorized laws, and to carry them into complete effect, any thing in the constitution and laws of the United States to the contrary notwithstanding. This would be a nullifying power in its plenary character; and whether it had its final effect, through the legislative, executive, or judiciary organ of the state, would be equally fatal to the constituted relation between the two governments.

"Should the provisions of the constitution as here reviewed, be found not to secure the government and rights of the states, against usurpations and abuses on the part of the United States, the final resort within the purview of the constitution, lies in an amendment of the constitution, according to a process applicable by the states.

"And in the event of a failure of every constitutional resort, and an accumulation of usurpations and abuses, rendering passive obedience and non-resistance a greater evil, than resistance and revolution, there can remain but one resort, the last of all; an appeal from the can-

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celled obligations of the constitutional compact, to original rights and the law of self-preservation. This is the ultima ratio under all governments, whether consolidated, confederated, or a compound of both; and it cannot be doubted, that a single member of the Union, in the extremity supposed, but in that only, would have a right, as an extra and ultra constitutional right, to make the appeal.

"This brings us to the expedient lately advanced, which claims for a single state a right to appeal against an exercise of power by the government of the United States, decided by the state to be unconstitutional, to the parties to the constitutional compact; the decision of the state to have the effect of nullifying the act of the government ofthe United States, unless the decision of the state be reversed by three fourths of the parties.

"The distinguished names and high authorities, which appear to have asserted, and given a practical scope to this doctrine, entitle it to a respect, which it might be difficult otherwise to feel for it.

"If the doctrine were to be understood as requiring the three fourths of the states to sustain, instead of that proportion to reverse the decision of the appealing state, the decision to be without effect during the appeal, it would be sufficient to remark, that this extra-constitutional course might well give way to that marked out by the constitution, which authorizes two thirds of the states to institute, and three fourths to effectuate an amendment of the constitution, establishing a permanent rule of the highest authority, in place of an irregular precedent of construction only.

"But it is understood, that the nullifying doctrine imports, that the decision of the state is to be presumed valid, and that it overrules the law of the United States, unless overruled by three fourths of the states.

"Can more be necessary to demonstrate the inadmissibility of such a doctrine, than, that it puts it in the power of the smallest fraction over one fourth of the United States, that is, of seven states out of twentyfour, to give the law, and even the constitution to seventeen states, each of the seventeen having, as parties to the constitution, an equal right with each of the seven, to expound it, and to insist on the exposition? That the seven might, in particular instances be right, and the seventeen wrong, is more than possible. But to establish a positive and permanent rule giving such a power, to such a minority, over such a majority, would overturn the first principle of free government, and in practice necessarily overturn the government itself.

"It is to be recollected, that the constitution was proposed to the people of the states as a whole, and unanimously adopted by the states as a whole, it being a part of the constitution, that not less than three fourths of the states should be competent to make any alteration in what had been unanimously agreed to. So great is the caution on this point, that in two cases where peculiar interests were at stake, a proportion even

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of three fourths is distrusted, and unanimity required to make an alteration.

"When the constitution was adopted as a whole, it is certain, that there were many parts, which, if separately proposed, would have been promptly rejected. It is far from impossible, that every part of a constitution might be rejected by a majority, and yet taken together as a whole, be unanimously accepted. Free constitutions will rarely, if ever, be formed, without reciprocal concessions; without articles conditioned on, and balancing each other. Is there a constitution of a single state out of the

twenty-four, that would bear the experiment of having its component parts submitted to the people, and separately decided on?

"What the fate of the constitution of the United States would be, if a small proportion of the states could expunge parts of it particularly valued by a large majority, can have but one answer.

"The difficulty is not removed by limiting the doctrine to cases of construction. How many cases of that sort, involving cardinal provisions of the constitution, have occurred? How many now exist? How many may hereafter spring up? How many might be ingeniously created, if entitled to the privilege of a decision in the mode proposed?

"Is it certain, that the principle of that mode would not reach further than is contemplated? If a single state can, of right, require three fourths of its co-states to overrule its exposition of the constitution, because that proportion is authorized to amend it, would the plea be less plausible, that, as the constitution was unanimously established, it ought to be unanimously expounded?

"The reply to all such suggestions, seems to be unavoidable and irresistible; that the constitution is a compact; that its text is to be expounded, according to the provisions for expounding it--making a part of the compact; and that none of the parties can rightfully renounce the expounding provision more than any other part. When such a right accrues, as may accrue, it must grow out of abuses of the compact releasing the sufferers from their fealty to it."

CHAPTER V.

RULES OF INTERPRETATION.

§ 397. IN our future commentaries upon the constitution we shall treat it, then, as it is denominated in the instrument itself, as a CONSTITUTION of government, ordained and established by the people of the United States for themselves and their posterity.1 They have declared it the supreme law of the land. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of certain powers, and reserved all others to the states or to the people. It is a popular government. Those who administer it are responsible to the people. It is as popular, and Just as much emanating from the people, as the state governments. It is created for one purpose; the state governments for another. It may be altered, and amended, and abolished at the will of the people. In short, it was made by the people, made for the people, and is responsible to the people.2

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1 "The government of the Union," says Mr. Chief Justice Marshall, in delivering the opinion of the court in McCulloch v. Maryland, 4 Wheat. 316,

" is emphatically and truly a government of the people. It emanates from them; its powers are granted by them, and are to be exercised directly on them and for their benefit." Id. 404, 405; see also Cohens v. Virginia, 6 Wheat. R. 264, 413, 414.

"The government of the United States was erected," says Mr. Chancellor Kent, with equal force and accuracy, " by the free voice and the joint will of the people of America for their common defence and general welfare." 1 Kent's Comm. Lect. 10, p. 189. 2 I have used the expressive words of Mr. Webster, deeming them as exact as any that could be used. See Webster's Speeches, p, 410, 418, 419; 4 Elliot's Debates, 338, 343.

§ 398. In this view of the matter, let us now proceed to consider the rules, by which it ought to be interpreted; for, if these rules are correctly laid down, it will save us from many embarrassments in examining and defining its powers. Much of the difficulty, which has arisen in all the public discussions on this subject, has had its origin in the want of some uniform rules of interpretation, expressly or tacitly agreed on by the disputants. Very different doctrines on this point have been adopted by different commentators; and not unfrequently very different language held by the same parties at different periods. In short, the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day, or the favour and odium of a particular measure, have not unfrequently furnished a mode of argument, which would, on the one hand, leave the constitution crippled and inanimate, or, on other hand, give it an extent and elasticity, subversive of all rational boundaries.

§ 399. Let us, then, endeavour to ascertain, what are the true rules of interpretation applicable to the constitution; so that we may have some fixed standard, by which to measure its powers, and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and liberties.

§ 400. I. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties. Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law.1 He

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1 1 Black. Comm. 59, 60. See also Ayliffe's Pandects, B. 1, tit 4, p. 25, &c.; 1Domat. Prelim. Book, p. 9; Id. Treatise on Laws, ch. 12, p. 74.

goes on to justify the remark by stating, that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use; that if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter, with reference to which the expressions are used; that the effect and consequence of a particular construction is to be examined, because, if a literal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words, and limit their application.1

§ 401. Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only, when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office. There may be obscurity, as to the meaning, from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived from the whole structure of the instrument, or its avowed object. In all such cases interpretation becomes indispensable.

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1 Id. See also Woodes. Elem. of Jurisp. p. 36. -- Rules of a similar nature will be found laid down in Vattel, B. 2, ch. 17, from §262 to 310, with more ample illustrations and more various qualifications. But not a few of his rules appear to me to want accuracy and soundness. Bacon's Abridg. title, Statute I. contains an excellent summary of the rules for construing statutes. Domat, also, contains many valuable rule in respect to interpretation. See his Treatise on Laws, c. 12, p. 74 &c. and Preliminary Discourse, tit. 1, §2, p. 6 to 16.

§ 402. Rutherforth 1 has divided interpretation into three kinds, literal, rational, and mixed. The first is, where we collect the intention of the party from his words only, as they lie before us. The second is, where his words do not express that intention perfectly, but exceed it, or fall short of it, and we are to collect it from probable or rational conjectures only. The third is, where the words, though they do express the intention, when they are rightly understood, are themselves of doubtful meaning, and we are bound to have recourse to the like conjectures to find out in what sense they are used. In literal interpretation the rule observed is, to follow that sense in respect both of the words, and of the construction of them, which is agreeable to common use, without attending to etymological fancies or grammatical refinements. In mixed interpretation, which supposes the words to admit of two or more senses, each of which is agreeable to common usage, we are obliged to collect the sense, partly from the words, and partly from conjecture of the intention. The rules then adopted are, to construe the words according to the subject matter, in such a sense as to produce a reasonable effect, and with reference to the circumstances of the particular transaction. Light may also be obtained in such cases from contemporary facts, or expositions, from antecedent mischiefs, from known habits, manners, and institutions, and from other sources almost innumerable, which may justly affect the judgment in drawing a fit conclusion in the particular case.

§ 403. Interpretation also may be strict or large; though we do not always mean the same thing, when

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1 Book 2, ch. 7, §3.

we speak of a strict or large interpretation. When common usage has given two senses to the same word, one of which is more confined, or includes fewer particulars than the other, the former is called its strict sense, and the latter, which is more comprehensive or includes more particulars, is called its large sense. If we find such a word in a law, and we take it in its more confined sense, we are said to interpret it strictly. If we take it in its more comprehensive sense, we are said to interpret it largely. But whether we do the one or the other, we still keep to the letter of the law. But strict and large interpretation are frequently opposed to each other in a different sense. The words of a law may sometimes express the meaning of the legislator imperfectly. They may, in their common

acceptation, include either more or less than his intention. And as, on the one hand, we call it a strict interpretation, where we contend, that the letter is to be adhered to precisely; so, on the other hand, we call it a large interpretation, where we contend, that the words ought to be taken in such a sense, as common usage will not fully justify; or that the meaning of the legislator is something different from what his words in any usage would import. In this sense a large interpretation is synonymous with what has before been called a rational interpretation. And a strict interpretation, in this sense, includes both literal and mixed interpretation; and may, as contradistinguished from the former, be called a close, in opposition to a free or liberal interpretation.1

1 The foregoing remarks are borrowed almost in terms from Rutherforth's Institutes of Natural Law (B. 2, ch. 7, §4 to 11), which contain a very lucid exposition of the general rules of interpretation. The whole chapter deserves an attentive perusal.

§ 404. These elementary explanations furnish little room for controversy; but they may nevertheless aid us in making a closer practical application, when we arrive at more definite rules.

§ 405. II. In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. Where its words are plain, clear, and determinate, they require no interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument. Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy; and the argument from inconvenience will probably have different influences upon different minds. Whenever such questions arise, they will probably be settled, each upon its own peculiar grounds; and whenever it is a question of power, it should be approached with infinite caution, and affirmed only upon the most persuasive reasons. In examining the constitution, the antecedent situation of the country, and its institutions, the existence and opera-

tions of the state governments, the powers and operations of the confederation, in short all the circumstances, which had a tendency to produce, or to obstruct its formation and ratification, deserve a careful attention. Much, also, may be gathered from contemporary history, and contemporary interpretation, to aid us in just conclusions.1

§ 406. It is obvious, however, that contemporary interpretation must be resorted to with much qualification and reserve. In the first place, the private interpretation of any particular man, or body of men, must manifestly be open to much observation. The constitution was adopted by the people of the United States; and it was submitted to the whole upon a just survey of its provisions, as they stood in the text itself. In different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favour. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single

1 The value of contemporary interpretation is much insisted on by the Supreme Court, in Stuart v. Laird, 2 Cranch, 299, 309, in Martin v. Hunter, 1 Wheat. R. 304, and in Cohens v. Virginia, 6 Wheat. R. 264, 418 to 421. There are several instances, however, in which the contemporary interpretations by some of the most distinguished founders of the constitution have been overruled. One of the most striking is to be found in the decision of the Supreme Court of the suability of a state by any citizen of another state; * and another in the decision by the Executive and the Senate, that the consent of the latter is not necessary to removals from office, although it is for appointments.#

*** Chisholm v. Georgia, 2 Dall. 419.**

 # The Federalist, No. 77.

state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it. In the interpretation of a state statute, no man is insensible of the extreme danger of resorting to the opinions of those, who framed it, or those who passed it. Its terms may have differently impressed different minds. Some may have

implied limitations and objects, which others would have rejected. Some may have taken a cursory view of its enactments, and others have studied them with profound attention. Some may have been governed by a temporary interest or excitement, and have acted upon that exposition, which most favoured their present views. Others may have seen lurking beneath its text, what commended it to their judgment against even present interests. Some may have interpreted its language strictly and closely; others from a different habit of thinking may have given it a large and liberal meaning. It is not to be presumed, that, even in the convention, which framed the constitution, from the causes above mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could, or ought to be, conclusive upon that of others. The known diversity of construction of different parts of it, as well of the mass of its powers, in the different state conventions; the total silence upon many objections, which have since been started; and the strong reliance upon others, which have since been universally abandoned, add weight to these suggestions. Nothing but the text itself was adopted by the people. And it would certainly be a most extravagant doctrine to give to any commentary then made, and, a fortiori, to any

commentary since made under a very different posture of feeling and opinion, an authority, which should operate an absolute limit upon the text, or should supersede its natural and just interpretation.

§ 407. Contemporary construction is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit, to which it is entitled. It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.1

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1 Mr. Jefferson has laid down two rules, which he deems perfect canons for the interpretation of the constitution.* The first is " The capital and lending object of the constitution was, to leave with the states all authorities, which respected their own citizens only, and to transfer to the United States those, which respected citizens of foreign or other states; to make us several as to ourselves, but one as to all others. In the latter case, then, constructions should lean to the general jurisdiction, if the words will bear it; and in favour of the states in the former, if possible, to be so construed." Now, the very theory, on which this canon is founded, is contradicted by the provisions of the constitution itself. I many instances authorities and powers are given, which respect citizens of the respective states, without reference to foreigners, or the citizens of other states.# But if this general theory were true, it would furnish no just rule of interpretation, since a particular clause might form an exception to it; and, indeed, every clause ought, at all events, to be construed according to its fair intent and objects, as disclosed in its language. What sort of a rule is that, which, without regard to the intent or objects of a particular clause, insists, that it shall, if possible, (not if reasonable) be construed in favour of the states, simply because it respects their citizens? The second canon is, " On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed." Now, who does not see the utter looseness, and incoherence

*** Jefferson's Corresp. 373; Id. 391, 392; Id. 396.**

 # Jefferson's Corresp. 391, 392, 396.

We shall have abundant reason hereafter to observe, when we enter upon the analysis of the particular clauses of the constitution, how many loose interpreta-

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of this canon. How are we to know, what was thought of particular clauses of the constitution at the time of its adoption? In many cases, no printed debates give any account of any construction; and where any is given, different persons held different doctrines. Whose is to prevail? Besides; of all the state conventions, the debates of five only are preserved, and these very imperfectly. What is to be done, as to the other eight states? What is to be done, as to the eleven new states, which have come into the Union under constructions, which have been established, against what some persons may deem the meaning of the framers of it? How are we to arrive at what is the most probable meaning? Are Mr. Hamilton, and Mr. Madison, and Mr. Jay, the expounders in the Federalist, to be followed. Or are others of a different opinion to guide us? Are we to be governed by the opinions of a few, now dead, who have left them on record? Or by those of a few now living, simply because they were actors in those days, (constituting not

one in a thousand of those, who were called to deliberate upon the constitution, and not one in ten thousand of those, who were in favour or against it, among the people)? Or arc we to be governed by the opinions of those, who constituted a majority of those, who were called to act on that occasion, either as framers of, or voters upon, the constitution? If by the latter, in what manner can we know those opinions? Are we to be governed by the sense of a majority of a particular state, or of all of the United States? If so, how are we to ascertain, what that sense was? Is the sense of the constitution to be ascertained, not by its own text, but by the "probable meaning" to be gathered by conjectures from scattered documents, from private papers, from the table talk of some statesmen, or the jealous exaggerations of others? Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text? What would be said of interpreting a statute of a state legislature, by endeavouring to find out, from private sources, the objects and opinions of every member; how every one thought; what he wished; how he interpreted it? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed, as to " the probable meaning " of the framers or of the people, what interpretation is to be followed? These, and many questions of the same sort, might be asked. It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the "probable meaning" of persons, whom

tions, and plausible conjectures were hazarded at an early period, which have since silently died away, and are now retained in no living memory, as a topic either of praise or blame, of alarm or of congratulation. **§ 408.** And, after all, the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions; and have the same general recommendation, that belongs to the latter. They are decided upon solemn argument, pro re nata, upon a doubt raised, upon a lis mota, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to present action, in the midst of jealous interests, and by men capable of urging, or repelling the grounds of argument, from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet, or the retired speculations of ingenious minds, intent on theory, or general views, and unused to encounter a practical difficulty at every step!

§ 409. But to return to the rules of interpretation arising ex directo from the text of the constitution.

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they never knew, and whose opinions, and means of information, may be no better than their own? The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men. The opinions of the latter may sometimes aid us in arriving at just results; but they can never be conclusive. The Federalist denied, that the president could remove a public officer without the consent of the senate. The first congress affirmed his right by a mere majority. Which is to be followed?

And first the rules to be drawn from the nature of the instrument. (1.) It is to be construed, as a frame, or fundamental law of government, established by the PEOPLE of the United States, according to their own free pleasure and sovereign will. In this respect it is in no wise distinguishable from the constitutions of the state governments. Each of them is established by the people for their own purposes, and each is founded on their supreme authority. The powers, which are conferred, the restrictions, which are imposed, the authorities, which are exercised, the organization and distribution thereof, which are provided, are in each case for the same object, the common benefit of the governed, and not for the profit or dignity of the rulers.

§ 410. And yet it has been a very common mode of interpretation to insist upon a diversity of rules in construing the state constitutions, and that of the general government. Thus, in the Commentaries of Mr Tucker upon Blackstone, we find it laid down, as if itwere an incontrovertible doctrine in regard to the constitution of the United States, that " as federal, it is to be construed strictly, in all cases, where the antecedent rights of a state may be drawn in question. As a social compact, it ought likewise " to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the object of dispute; because every person, whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society, to whose regulations he had submitted himself, and under whose authority and protection he still remains,

in all cases not expressly submitted to the new government."1

§ 411. We here see, that the whole reasoning is founded, not on the notion, that the rights of the people are concerned, but the rights of the states. And by strict construction is obviously meant the most limited sense belonging to the words. And the learned author relies, for the support of his reasoning, upon some rules laid down by Vattel in relation to the interpretation of treaties in relation to odious things. It would seem, then, that the constitution of the United States is to be deemed an odious instrument. And why, it may be asked? Was it not framed for the good of the people, and by the people? One of the sections of Vattel, which is relied on, states this proposition,2 "That whatever tends to change the present state of things, is also to be ranked in the class of odious things." Is it not most manifest, that this proposition is, or at least may be, in many cases, fundamentally wrong? If a people free themselves from a despotism, is it to be said, that the change of government is odious, and ought to be construed strictly? What, upon such a principle, is to become of the American Revolution; and of our state governments, and state constitutions? Suppose a well-ordered government arises out of a state of disorder and anarchy, is such a government to be considered odious? Another section3 adds, "Since odious things are those, whose restriction tends more certainly to equity than their extension, and since we ought to pursue that line, which is most conformable to equity, when the will of the legislature or of the contracting parties is not exactly known, we should, where there is a

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1 1 Tucker's Black. Comm. App. 151.
2 B. 2, §305.
3 § 508.

question of odious things, interpret the terms in the most limited sense. We may even, to a certain degree, adopt a figurative meaning in order to avert the oppressive consequences of the proper and literal sense, or any thing of an odious nature, which it would involve." Does not this section contain most lax and unsatisfactory ingredients for interpretation? Who is to decide, whether it is most conformable to equity to extend, or to restrict the se se? Who is to decide, whether the provision is odious? According to this rule, the most opposite interpretations of the same words would be equally correct, according as the interpretator should deem it odious or salutary. Nay, the words are to be deserted, and a figurative sense adopted, whenever he deems it advisable, looking to the odious nature or consequence of the common sense. He, who believes the general government founded in wisdom, and sound policy, and the public safety, may extend the words. He, who deems it odious, or the state governments the truest protection of all our rights, must limit the words to the narrowest meaning.

§ 412. The twelfth amendment to the constitution is also relied on by the same author, which declares, " that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." He evidently supposes, that this means " in all cases not expressly submitted to the new government "; yet the word " expressly " is no where found in the amendment. But we are not considering, whether any powers can be implied; the only point now before us is, how the express powers are to be construed. Are they to be construed strictly, that is, in their most limited sense? Or are they to receive a fair and reason-

able construction, according to the plain meaning of the terms and the objects, for which they are used?

§ 413. When it is said, that the constitution of the United States should be construed strictly, viewed as a social compact, whenever it touches the rights of property, or of personal security, or liberty, the rule is equally applicable to the state constitutions in the like eases. The principle, upon which this interpretation rests, if it has any foundation, must be, that the people ought not to be presumed to yield up their rights of property or liberty, beyond what is the clear sense of the language and the objects of the constitution. All governments are founded on a surrender of some natural rights, and impose some restrictions. We may not be at liberty to extend the grants of power beyond the fair meaning of the words in any such case; but that is not the question here under discussion. It is, how we are to construe the words as used, whether in the most confined, or in the more liberal sense properly belonging to them. Now, in construing a grant, or surrender of powers by the people to a monarch, for his own benefit or use, it is not only natural, but just, to presume, as in all other cases of grants, that the parties had not in view any large sense of the terms, because the objects were a derogation permanently from their rights and interests. But in construing a constitution of government, framed by the people for their own benefit and protection, for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessa-

riIy arises. The strict, or the more extended sense, both being within the letter, may be fairly held to be within their intention, as either shall best promote the very objects of the people in the grant; as either shall best promote or secure their rights, property, or liberty. The words are not, indeed, to be stretched beyond their fair sense; but within that range, the rule of interpretation must be taken, which best follows out the apparent intention.1 This is the mode (it is believed) universally adopted in construing the state constitutions. It has its origin in common sense. And it never can be a matter of just jealousy; because the rulers can have no permanent interest in a free government, distinct from that of the people, of whom they are a part, and to whom they are responsible. Why the same reasoning should not apply to the government of the United States, it is not very easy to conjecture.

§ 414. But it is said, that the state governments being already in existence, and the people subjected to them, their obedience to the new government may endanger their obedience to the states, or involve them in a conflict of authority, and thus produce inconvenience. In the first place, it is not true, in a just sense, (if we are right in our view of the constitution of the United States,) that such a conflict can ultimately exist. For if the powers of the general government are of paramount and supreme obligation, if they constitute the supreme law of the land, no conflict, as to obedience, can be found. Whenever the question arises, as to whom obedience is due, it is to be judicially settled; and being settled, it regulates, at once, the rights and duties of all the citizens.

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1 Rawle on the Constitution, ch. 1, p. 31.

§ 415. In the next place, the powers given by the people to the general governmentare not necessarily carved out of the powers already confided by them to the state governments. They may be such, as they originally reserved to themselves. And, if they are not, the authority of the people, in their sovereign capacity, to withdraw power from their state functionaries, and to confide it to the functionaries of the general government, cannot be doubted or denied.1 If they withdraw the power from the state functionaries, it must be presumed to be, because they deem it more useful for themselves, more for the common benefit, and common protection, than to leave it, where it has been hitherto deposited. Why should a power in the hands of one functionary be differently construed in the hands of another functionary, if, in each case, the same object is in view, the safety of the people " The state governments have no right to assume, that the power is more safe or more useful with them, than with the general government; that they have a higher capacity and a more honest desire to preserve the rights and liberties of the people, than the general government; that there is no danger in trusting them; but that all the peril and all the oppression impend on the other side. The people have not so said, or thought; and they have the exclusive right to judge for themselves on the subject. They avow, that the constitution of the United States was adopted by them, "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." It would be a mockery to

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1 Martin v. Hunter, 1 Wheat. R. 304, 325.

ask, if these are odious objects. If these require every grant of power, withdrawn from the state governments, to be deemed strictissimi juris, and construed in the most limited sense, even if it should defeat these objects. What peculiar sanctity have the state governments in the eyes of the people beyond these objects? Are they not framed for the same general ends? Was not the very inability of the state governments suitably to provide for our national wants, and national independence, and national protection, the very groundwork of the whole system?

§ 416. If this be the true view of the subject, the constitution of the United States is to receive as favourable a construction, as those of the states. Neither is to be construed alone; but each with a reference to the other. Each belongs to the same system of government; each is limited in its powers; and within the scope of its powers each is supreme. Each, by the theory of our government, is essential to the existence and due preservation of the powers and obligations of the other. The destruction of either would be equally calamitous, since it would involve the ruin of that beautiful fabric of balanced government, which has been reared with so much care and wisdom, and in which the people have reposed their confidence, as the truest safeguard Or their civil, religious, and political liberties. The exact limits of the powers confided by the people to each, may not always be capable, from the inherent difficulty of the subject, of being defined, or ascertained in all cases with perfect certainty.1 But the lines are generally marked out with sufficient broadness and clearness; and in the progress of the development of

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1 The Federalist, No. 37.

the peculiar functions of each, the part of true wisdom would seem to be, to leave in every practicable direction a wide, if not an unmeasured, distance between the actual exercise of the sovereignty of each. In every complicated machine slight causes may disturb the operations; and it is often more easy to detect the defects, than to apply a safe and adequate remedy.

§ 417. The language of the Supreme Court, in the case of Martin v. Hunter,1 seems peculiarly appropriate to this part of our subject. " The constitution of the United States," say the court, " was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States.2 There can be no doubt, that it was competent to the people to invest the general government with all the powers, which they might deem proper and necessary; to extend or restrain those powers according to their own good pleasure; and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers, which were in their judgment incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation; or to reserve to themselves those sovereign authorities, which they might not choose to delegate to either. The constitution was hot, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions. For the powers of

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1 Wheat. R. 304; S. C. 3 Peters's Cond. R. 575.

2 This is still more forcibly stated by Mr. Chief Justice Marshall in delivering the opinion of the court in McCulloch v. Maryland, in a passage already cited. 4 Wheat. R. 316, 402 to 405.

the state governments depend upon their own constitutions; and the people of every state had a right to modify or restrain them according to their own views of policy or principle. On the other hand, it is perfectly clear, that the sovereign powers, vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." These deductions do not rest upon general reason, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that " the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."1

" The government, then, of the United States, can claim no powers, which are not granted to it by the constitution; and the powers actually granted must be such, as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms. And where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

§ 418. A still more striking response to the argument for a strict construction of the constitution will be found in the language of the court, in the case of Gibbons v. Ogden,(9 Wheat. 1, &c.) Mr. Chief Justice Marshall, in delivering the opinion of the court, says,

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1 See also McCulloch v. Maryland, 4 Wheat. R. 316, 402 to 406.

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution, which gives countenance to this rule? In the last of the enumerated powers, that, which grants expressly the means for carrying all others into execution, congress is authorized " to make all laws, which shall be necessary and proper" for the purpose. But this limitation on the means, which may be used, is not extended to the powers, which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the terms, but should not controvert the principle. If they contend for that narrow construction, which, in support of some theory not to be found in the constitution, would deny to the government those powers, which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule, by which the constitution is to be expounded. As men, whose intentions require no

concealment, generally employ the words, which most directly and aptly express the ideas they intend to convey; the enlightened patriots, who framed our constitution, and the people, who adopted it, must be understood to have employed words in their natural sense, and to have intended, what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects, for which it was given, especially, when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power, which might be beneficial to the grantor, if retained by himself, or which can ensure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument, which confers them, taken in connexion with the purposes, for which they were conferred."1

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1 See also Id. 222, and Mr. Chief Justice Marshall's opinion in Ogden v. Saunders, 12 Wheat. R. 332. It has been remarked by President J. Q. Adams, that " it is a circumstance, which will not escape the observation of a philosophical historian, that the constructive powers of the national government have been stretched to their extremest tension by that party when in power, which has been most tenderly scrupulous of the state sovereignty, when uninvested with the authority of the union themselves." He Adds, "Of these inconsistencies, our two great parties can have little to say in reproof of each other." Without inquiring into the justice of the remark in general, it may be truly stated. that the Embargo of 1807, and the admission of Louisiana into the Union, are very striking illustrations of the application of constructive powers.

§ 419. IV. From the foregoing considerations we deduce the conclusion, that as a frame or fundamental law of government, (2.) The constitution.. of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the constitution; that, which will give it efficacy and force, as a government, rather than that, which will impair its operations, and reduce it to a state of imbecility. Of course we do not mean, that the words for this purpose are to be strained beyond their common and natural sense; but keeping within that limit, the exposition is to have a fair and just latitude, so as on the one hand to avoid obvious mischief, and on the other hand to promote the public good.1

§ 420. This consideration is of great importance in construing a frame of government; and a fortiori a frame of government, the free and voluntary institution of the people for their common benefit, security, and happiness. It is wholly unlike the case of a municipal charter, or a private grant, in respect both to its means and its ends. When a person makes a private grant of a particular thing , or of a license to do a thing, or of an easement for the exclusive benefit of the grantee, we naturally confine the terms, however general, to the objects clearly in the view of the parties. But even in such cases, doubtful words, within the scope of those objects, are construed most favourably

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1 See Ogden v. Saunders, 12 Wheat. R. 332, Opinion of Mr. Chief Justice Marshall.

for the grantee; because, though in derogation of the rights of the grantor, they are promotive of the general rights secured to the grantee. But, where the grant enures, solely and exclusively, for the benefit of the grantor himself, no one would deny the propriety of giving to the words of the grant a benign and liberal interpretation. In cases, however, of private grants, the objects generally are few; they are certain; they are limited; they neither require, nor look to a variety of means or changes, which are to control, or modify either the end, or the means.

§ 421. In regard also to municipal charters, or public grants, similar considerations usually apply. They are generally deemed restrictive of the royal or public prerogative, or of the common rights secured by the actual organization of the government to other individuals, or communities. They are supposed to be procured, not so much for public good, as for private or local convenience. They are supposed to arise from personal solicitation, upon general suggestions, and not ex certa causa, or ex mero motu of the king, or government itself. Hence, such charters are often required by the municipal jurisprudence to be construed strictly, because they yield something, which is common, for the benefit of a few. And yet, where it is apparent, that they proceed upon greater or broader motives, a liberal exposition is not only indulged, but is encouraged, if it manifestly promotes the public good.1 So that we

see, that even in these cases, common sense often dictates a departure from a narrow and strict construction of the terms, though the ordinary rules of mere municipal law may not have favoured it.

1 See Gibbons v. Ogden, 9 Wheat. R. 189.

§ 422. But a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires, that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words, in which those powers are granted, can be a sound one, which narrows down their ordinary import, so as to defeat those objects. That would be to destroy the spirit, and to cramp the letter. It has been justly observed, that " the constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specification of its powers, or to declare the means, by which those powers should be carried into execution. It was foreseen, that it would be a perilous, and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years; but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen,what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."1 Lan-

1 Hunter v. Martin, 1 Wheat. R. 304, 326, 327; S. C. 3 Peters's Cond. R. 575, 583.

guage to the same effect will be found in other judgments of the same tribunal.1

§ 423. If, then, we are to give a reasonable construction to this instrument, as a constitution of government established for the common good, we must throw aside all notions of subjecting it to a strict interpretation, as if it were subversive of the great interests of society, or derogated from the inherent sovereignty of the people. And this will naturally lead us to some other rules properly belonging to the subject.

§ 424. V. Where the power is granted in general terms, the power is to be construed, as co-extensive with the terms, unless some clear restriction upon it is deducible from the context. We do not mean to assert, that it is necessary, that such restriction should be expressly found in the context. It will be sufficient, if it arise by necessary implication. But it is not sufficient to show, that there was, or might have been, a sound or probable motive to restrict it. A restriction founded on conjecture is wholly inadmissible. The reason is obvious: the text was adopted by the people in its obvious, and general sense. We have no means of knowing, that any particular gloss, short of this sense, was either contemplated, or approved by the people; and such a gloss might, though satisfactory in one state, have been the very ground of objection in another. It might have formed a motive to reject it in one, and to adopt it in another. The sense of a part of the people has no title to be deemed the sense of the whole. Motives of state policy, or state interest, may properly have influence in the question of ratifying it; but the constitution itself must be expounded, as it stands; and

1 See Gibbons v. Ogden, 9 Wheat. R. 1,187, &c. 222, &c.

not as that policy, or that interest may seem now to dictate. We are to construe, and not to frame the instrument.1

§ 425. VI. A power, given in general terms, is not to be restricted to particular cases, merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences. This argument is often used in public debate; and in its common aspect addresses itself so much to popular fears and prejudices, that it insensibly acquires a weight in the public mind, to which it is no wise entitled. The argument ab inconvenienti is sufficiently open to question, from the laxity of application, as well as of opinion, to which it leads. But the argument from a possible abuse of a power against its existence or use, is, in its nature, not only perilous, but, in respect to governments, would shake their very foundation. Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies, which may arise in the progress of events, connected with the rights, duties, and operations of a government. If they could be foreseen, it would be impossible ab ante to provide for them. The means must be subject to perpetual modification, and change; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary;

to the pressure of dangers, or necessities; to the ends in view; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized at every critical period, and remodeled in every generation, there must be

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1 See Sturgis v. Crowninshield, 4 Wheat. R. 112, 202.

left to those, who administer the government, a very large mass of discretionary powers, capable of greater or less actual expansion according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No constitution can provide perfect guards against it. Confidence must be reposed some where; and in free governments, the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise; and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies. Few cases are to be supposed, in which a power, however general, will be exerted for the permanent oppression of the people.1 And yet, cases may easily be put, in which a limitation upon such a power might be found in practice to work mischief; to incite foreign aggression; or encourage domestic disorder. The power of taxation, for instance, may be carried to a ruinous excess; and yet, a limitation upon that power might, in a given case, involve the destruction of the independence of the country.

§ 426. VII. On the other hand, a rule of equal importance is, not to enlarge the construction of a given

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1 Mr. Justice Johnson, in delivering the opinion of the court in Anderson v. Dunn, (6 Wheat. 204, 226,) uses the following expressive language: " The idea is Utopian, that government can exist without leaving the exercise of discretion some where. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their own wills, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger."

power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous.1 If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. If they do not choose to apply the remedy, it may fairly be presumed, that the mischief is less than what would arise from a further extension of the power; or that it is the least of two evils. Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, pro tanto, the establishment of a new constitution. It is doing for the people, what they hare not chosen to do for themselves It is usurping the functions of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, ita lex scripta est, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice, than mere policy and convenience Men on such subjects complexionally differ from each other. The same men differ from themselves at different times. Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes, or the policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever.

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1 See United States v. Fisher, 2 Cranch, 358; S. C. Peters's Cond. R. 421.

§ 427. It has been observed with great correctness, that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from the letter. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case, for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be

one, where the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.1 This language has reference to a case where the words of a constitutional provision are sought to be restricted. But it appears with equal force where they are sought to be enlarged.

§ 428. VIII. No construction of a given power is to be allowed, which plainly defeats, or impairs its avowed objects. If, therefore, the words are fairly susceptible of two interpretations, according to their common sense and use, the one of which would defeat one, or all of the objects, for which it was obviously given, and the other of which would preserve and promote all, the former interpretation ought to be rejected, and the lat-

1 Sturgis v. Crowninshield, 4 Wheat R 122, 202.

ter be held the true interpretation. This rule results from the dictates of mere common sense; for every instrument ought to be so construed, ut magis valeat, quam pereat.1 For instance, the constitution confers on congress the power to declare war. Now the word declare has several senses. It may mean to proclaim, or publish. But no person would imagine, that this was the whole sense, in which the word is used in this connexion. It should be interpreted in the sense, in which the phrase is used among nations, when applied to such a subject matter. A power to declare war is a power to make, and carry on war. It is not a mere power to make known an existing thing, but to give life and effect to the thing itself.2 The true doctrine has been expressed by the Supreme Court: "If from the imperfection of human language there should be any serious doubts respecting the extent of any given power, the objects, for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."3

§ 429. IX. Where a power is remedial in its nature, there is much reason to contend, that it ought to be construed liberally. That was the doctrine of Mr. Chief Justice Jay, in Chisholm v. Georgia;4 and it is generally adopted in the interpretation of laws.5 But this liberality of exposition is clearly inadmissible, if it extends beyond the just and ordinary sense of the terms.

§ 430. X. In the interpretation of a power, all the ordinary and appropriate means to execute it are to be

1 See Bacon's Abridg. Statute I; Vattel, B. 2, ch. 17, § 277 to 285, 299 to 302.

2 See Bas v. Tingey 4 Dall. R. 37; S. C. 1 Peters's Cond. R. 221.

3 Gibbons v. Ogden, 9 Wheat. R. 1,188, 189.

4 2 Dall. R. 419; S. C. 2 Cond. R. 635, 652.

5 Bacon's Abridg. Statute 1. 8.

deemed a part of the power itself. This results from the very nature and design of a constitution. In giving the power, it does not intend to limit it to any one mode of exercising it, exclusive of all others. It must be obvious, (as has been already suggested,) that the means of carrying into effect the objects of a power may, nay, must be varied, in order to adapt themselves to the exigencies of the nation at different times.1 A mode efficacious and useful in one age, or under one posture of circumstances, may be wholly vain, or even mischievous at another time. Government presupposes the existence of a perpetual mutability in its own operations on those, who are its subjects; and a perpetual flexibility in adapting itself to their wants, their interests, their habits, their occupations, and their infirmities.2

1 The Federalist, No. 44.

2 The reasoning of Mr. Chief Justice Marshall on this subject, in McCulloch v. Maryland, (4 Wheat. 316,) is so cogent and satisfactory, that we shall venture to cite it at large. After having remarked, that words have various senses, and that what is the true construction of any used in the constitution must depend upon the subject, the context, and the intentions of the people, to he gathered-from the instrument, he proceeds thus:

"The subject is the execution of those great powers, on which the welfare of a nation essentially depends. It must have been the intention of those, who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits, as not to leave it in the power of congress to adopt any, which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means, by which government should, in all future time, execute its powers, would have been to change

entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies, which, if foreseen at all, must have been seen dimly, and which can be best provided for, as they occur. To have declared, that the best means shall not be used, but

§ 431. Besides; if the power only is given, without pointing out the means, how are we to ascertain, that any one means, rather than another, is exclusively within its scope? The same course of reasoning, which

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those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it. The powers vested in congress may certainly be curried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility, as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath, which might be exacted--that of fidelity to the constitution--is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office, as its wisdom might suggest.

"So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered ' to provide for the punishment of counterfeiting the securities and current coin of the United States,' and ' to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.' The several powers of congress may exist, in a very imperfect state to be sure, but they may exist, and be carried into execution, although no punishment should be inflicted in cases, where the right to punish is not expressly given.

"Take, for example, the power 'to establish post offices and post roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power, and duty of carrying the mail along the post road, from one post office to another. And, from this implied power has again been inferred the right to punish those, who steal letters from the post office, or rob the mail. It may be

would deny a choice of means to execute the power, would reduce the power itself to a nullity. For, as it never could be demonstrated, that any one mode in particular was intended, and to be exclusively employed; and, as it might be demonstrated, that other means might be employed, the question, whether the power were rightfully put into exercise, would for ever be subject to doubt and controversy.1 If one means is adopted to give it effect, and is within its scope, because it is appropriate, how are we to escape from the argument, that another, falling within the same predicament, is equally within its scope? If each is equally appropriate, how is the choice to be made between them? If one is selected, how does that exclude all others? If one is more appropriate at one time, and another at another time, where is the restriction to be found, which allows the one, and denies the other? A

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said, with some plausibility, that the right to carry the mail, and to punish those, who rob it, is not indispensably necessary to the establishment of a post office, and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record, or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

"The baneful influence of this narrow construction, on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced without hesitation, that the power of punishment appertains to

sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise."

1 See United States v. Fisher, 2 Cranch, 358; S. C. 1 Peters's Cond. R. 421, 429.

power granted in a frame of government is not contemplated to be exhausted in a single exertion of it, or uno flatu. It is intended for free and permanent exercise; and if the discretion of the functionaries, who are to exercise it, is not limited, that discretion, especially, as those functionaries must necessarily change, must be coextensive with the power itself. Take, for instance, the power to make war. In one age, this would authorize the purchase and employment of the weapons then ordinarily used for this purpose. But suppose these weapons are wholly laid aside, and others substituted, more efficient and powerful; is the government prohibited from employing the new modes of offence and defence? Surely not. The invention of gunpowder superseded the old modes of warfare, and may perhaps, by future inventions, be superseded in its turn. No one can seriously doubt, that the new modes would be within the scope of the power to make war, if they were appropriate to the end. It would, indeed, be a most extraordinary mode of interpretation of the constitution, to give such a restrictive meaning to its powers, as should obstruct their fair operation. A power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to be their intention, to clog and embarrass its execution, by withholding the most appropriate means. There can be no reasonable ground for preferring that construction, which would render the operations of the government difficult, hazardous, and expensive; or for imputing to the framers of the constitution a design to impede the exercise of its powers, by withholding a choice of means.1

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1 McCulloch v. Maryland, 4 Wheat. R. 316, 408.

§ 432. In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers, with which the people by the constitution and laws have entrusted them. They must have a wide discretion, as to the choice of means; and the only limitation upon that discretion would seem to be, that the means are appropriate to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end has has been justly remarked) is not always so direct and palpable, as to strike the eye of every observer.1 If the end be legitimate and within the scope of the constitution, all the means, which are appropriate, and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect.2 When, then, it is asked, who is to judge of the necessity and propriety of the laws to be passed for executing the powers of the Union, the true answer is, that the national government, like every other, must judge in the first instance of the proper exercise of its powers; and its constituents in the last. If the means are within the reach of the power, no other department can inquire into the policy or convenience of the use of them. If there be an excess by overleaping the just boundary of the power, the judiciary may generally afford the proper relief; and in the last resort the people, by adopting such measures to redress it, as the exigency may suggest, and prudence may dictate.3

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1 See the remarks of Mr. Justice Johnson, in delivering the opinion of the court in Anderson v. Dunn, 6 Wheat. R. 204, 226; United States v. Fisher, 2 Cranch. 358; S. C. 1 Peters's Cond. R. 421, 429.

2 McCulloch v. Maryland, 4 Wheat. R, 316, 409, 410, 421, 423; United States v. Fisher, 2 Cranch, 358; S. C. 1 Peters's Cond. R. 421.

3 The Federalist, No. 33, 44; McCulloch v. Maryland, 4 Wheat. R. 316, 423.

§ 433. XI. And this leads us to remark, in the next place, that in the interpretation of the constitution there is no solid objection to implied powers.1 Had the faculties of man been competent to the framing of a system of government, which would leave nothing to implication, it cannot be doubted, that the effort would have been made by the framers of our constitution. The fact, however, is otherwise. There is not in the whole of that admirable instrument a grant of powers, which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.2 There is no phrase in it, which, like the articles of confederation,3 excludes incidental and implied powers, andwhich requires, that every thing granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies, which had been excited, omits the word "expressly," (which was contained in the articles of confederation,) and declares only, that "the powers, not delegated to the United States, nor prohibited by it to the

states, are reserved to the states respectively, or to the people;" thus leaving the question, whether the particular power, which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend upon a fair construc-

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1 In the discussions, as to the constitutionality of the Bank of the United States, in the cabinet of President Washington, upon the original establishment of the Bank, there was a large range of argument, pro el contra, in respect to implied powers. The reader will find a summary of the lending views on each side in the fifth volume of Marshall's Life of Washington, App. p. 3, note 3, &c.; 4 Jefferson's Corresp. 523 to 526; and in Hamilton's Argument on Constitutionality of Bank, 1 Hamilton's Works, 111 to 155.

2 Anderson v. Dunn, 6 Wheat. 204, 226.

3 Article 2.

tion of the whole instrument. The men, who drew and adopted this amendment, had experienced the embarrassments, resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions, of which its great powers will admit, and of all the means, by which these may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredient which compose those objects, be deduced from the nature of those objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why, else, were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term, which might prevent its receiving a fair and just interpretation. In considering this point, we should never forget, that it is a constitution we are expounding.1

§ 434. The reasoning of the Federalist is to the same effect. Every power, which is the means of carrying into effect a given power, is implied from the very nature of the original grant. It is a necessary and unavoidable implication from the act of constituting a government, and vesting it with certain specified powers. What is a power, but the ability or faculty of doing a

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1 Per Mr. Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat R. 316, 406, 407, 421.

thing? What is the ability to do a thing, but the power of employing the means necessary to its execution? What is a legislative power, but a power of making laws? What are the means to execute a legislative power, but laws?1 No axiom, indeed, is more clearly established in law or in reason, than that, where the end is required, the means are authorized. Whenever a general power to do a thing is given, every particular power necessary for doing it is included. In every new application of a general power, the particular power, which are the means of attaining the object of the general power, must always necessarily vary with that object; and be often properly varied, whilst the object remains the same.2 Even under the confederation, where the delegation of authority was confined to express powers, the Federalist remarks, that it would be easy to show, that no important power delegated by the articles of confederation had been, or could be, executed by congress, without recurring more or less to the doctrine of construction or implication!3

§ 435. XII. Another point, in regard to the interpretation of the constitution, requires us to advert to the rules applicable to cases of concurrent and exclusive powers. In what cases are the powers given to the general government exclusive, and in what cases may the states maintain a concurrent exercise? Upon this subject we have an elaborate exposition by the authors of the Federalist;4 and as it involves some of the most delicate questions growing out of the constitution, and those, in which a conflict with the states is most likely to arise, we cannot do better than to quote the reasoning.

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1 The Federalist, No. 33.

2 The Federalist, No. 44.

3 The Federalist, No. 44.

4 The Federalist, No. 32.

§ 436. "An entire consolidation of the states into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty, which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. I use these terms to distinguish this last case from another, which might appear to resemble it; but which would, in fact, be essentially different: I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government, may be exemplified by the following instances. The last clause but one in the eighth section of the first article, provides expressly, that congress shall exercise 'exclusive legislation ' over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers congress 'to lay and collect taxes, duties, imposts, and excises; ' and the second clause of

the tenth section of the same article declares, that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except for the purpose of executing its inspection laws;' Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned. But this power is abridged by another clause, which declares, that no tax or duty shall be laid on articles exported from any state; in consequence of which qualification, it now only extends to the duties on imports. This answers to the second case. The third will be found in that clause, which declares, that congress shall have power ' to establish an uniform rule of naturalization throughout the United States.' This must necessarily be exclusive; because, if each state had power to prescribe a distinct rule, there could be no uniform, rule." The correctness of these rules of interpretation has never been controverted; and they have been often recognised by the Supreme Court.1

§ 437. The two first rules are so completely selfevident, that every attempt to illustrate them would be vain, if it had not a tendency to perplex and confuse. The last rule, viz. that which declares, that the power is exclusive in the national government, where an authority is granted to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant, is that alone, which may be thought to require comment. This rule seems, in its own nature, as little susceptible of doubt, as the others in reference to the constitution. For, since the constitution has declared, that the constitution and laws, and treaties in

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1 See Huston v. More, 5 Wheat. R. 1, 22, 24, 48; Ogden v. Gibbons, 9 Wheat. R. 1, 198, 210, 228, 235; Sturgis v. Crowninshield, 4 Wheat. R. 122, 192, 193; Ogden v. Saunders, 12 Wheat. 1, 275, 307, 322, 334, 335.

pursuance of it shall be the supreme law of the land; it would be absurd to say, that a state law, repugnant to it, might have concurrent operation and validity; and especially, as it is expressly added, any thing in the constitution or laws of any state to the contrary notwithstanding. The repugnancy, then, being made out, it follows, that the state law is just as much void, as though it had been expressly declared to be void; or the power in congress had been expressly declared to be exclusive. Every power given to congress is by the constitution necessarily supreme; and if, from its nature, or from the words of the grant, it is apparently intended to be exclusive, it is as much so, as if the states were expressly forbidden to exercise it.1

§ 438. The principal difficulty lies, not so much in the rule, as in its application to particular cases. Here, the field for discussion is wide, and the argument upon construction is susceptible of great modifications, and of very various force. But unless, from the nature of the power, or from the obvious results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion, that the power was intended to be exclusive, the true rule of interpretation is, that the power is merely concurrent. Thus, for instance, an affirmative power in congress to lay taxes, is not necessarily incompatible with a like power in the States. Both may exist without interference; and if any interference should arise in a particular case, the question of supremacy would turn, not upon the nature of the power, but upon supremacy of right in the exercise of the power in that case.2 In our complex system, presenting

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1 Sturgis v. Crowninshield, 4 Wheat. R. 122, 192, 193; Giobbons v. Ogden, 9 Wheat. R. 1, 198, &c.
2 The Federalist, No. 32; Gibbons v. Ogden,9 Wheat. R. 1,198, 199 to 205; McCulloch v. Maryland, 4 Wheat, R. 316, 425.

the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only enumerated powers, and of numerous state governments, which retain and exercise many powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would be often of the same description, and might sometimes interfere. This, however, does not prove, that the one is exercising, or has a right to exercise, the powers of the other.1

§ 439. And this leads us to remark, that in the exercise of concurrent powers, if there be a conflict between the laws of the Union and the laws of the state, the former being supreme, the latter must of course yield. The possibility, nay the probability, of such a conflict was foreseen by the framers of the constitution, and was accordingly expressly provided for. If a state passes a law inconsistent with the constitution of the United States it is a mere nullity. If it passes a law clearly within its own constitutional powers, still if it conflicts with the exercise of a power given to congress, to the extent of the interference its operation is suspended; for, in a conflict of laws, that which is supreme must govern. Therefore, it has often been adjudged, that if a state law is in conflict with a treaty, or an act of congress, it becomes ipso facto inoperative to the extent of the conflict.2

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1 Gibbons v. Ogden, 9 Wheat. R. 1, 205. -- Mr. Chancellor Kent has given this whole subject of exclusive and concurrent power a thorough examination; and the result will be found most ably stated in his learned Commentaries, Lecture 18. 1 Kent Comm. 364 to 379, 2d edit. p. 387 to 405.
2 Ware v. Hylton, 3 Dall. 199, S. C. 1, Conden. R. 99, 112,127, 128, 129; Gibbons v. Ogden, 9 Wheat. R. 1, 210, 211; McCulloch v. Maryland, 4 Wheat. R. 316, 405, 406, 425 to 436 Houston v. Moore. 5 Wheat.

§ 440. From this great rule, that the constitution and laws, made in pursuance thereof, are supreme; and that they control the constitutions and laws of the states, and cannot be controlled by them, from this, which may be deemed an axiom, other auxiliary corollaries may be deduced. In the first place, that, if a power is given to create a thing, it implies a power to preserve it. Secondly, that a power to destroy, if wielded by a different hand, is hostile to and incompatible with this power to create and preserve. Thirdly, that where this repugnancy exists, the authority, which is supreme, must control, and not yield to that, over which it is supreme.1 Consequently, the inferior power becomes a nullity.2

§ 441. But a question of a still more delicate nature may arise; and that is, how far in the exercise of a concurrent power, the actual legislation of congress supersedes the state legislation, or suspends its operation over the subject matter. Are the state laws inoperative only to the extent of the actual conflict; or does the legislation of congress suspend the legislative power of the states over the subject matter? To such an inquiry, probably, no universal answer could be given. It may depend upon the nature of the power, the effect of the actual exercise, and the extent of the subject matter.

§ 442. This may, perhaps, be best illustrated by putting a case, which has been reasoned out by a very learned judge, in his own words:3 "Congress has

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R. 1, 22, 24, 49, 51, 53, 56; Sturgis v. Crowninshield, 2 Wheat. R. 1, 190,196; Golden v. Prince, 3 Wash. C. C. R. 313, 321; The Federalist, No. 32; Brown v. Maryland,12 Wheat. R. 419, 419.
1 McCulloh v. Maryland, 4 Wheat. R. 316, 426.
2 Sturgis v. Crowninshield, 4 Wheat. R. 1, 193.
3 Mr. Justice Washington, Houston v. Moore, 5 Wheat. R. 1, 21, 22.

power," says he, "to provide for organizing, arming, and disciplining the militia; and it is presumable, that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if congress had declined to exercise them, it was competent to the state governments to provide for organizing, arming, and disciplining their respective militia in such manner, as they might think proper. But congress has provided for these subjects in the way, which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the state governments enter upon the same ground, provide for the same objects, as they may think proper, and punish, in their own way, violations of the laws they have so enacted? The affirmative of this question is asserted by counsel, &c. who contend, that unless such state laws are in direct contradiction to those

of the United States, they are not repugnant to the constitution of the United States.--From this doctrine I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution without violating the injunctions of the other; and yet the will of the one legislature may be in direct collision with that of the other. This will is to be discovered, as well by what the legislature has not declared, as by what they have expressed. Congress, for example, have declared, that the punishment for disobedience of the act of congress shall be a certain fine. If that provided by the state legislature for the same offence be a similar fine with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress

is nevertheless thwarted and opposed."1 He adds, " I consider it a novel and unconstitutional doctrine, that in cases, where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject, on which congress has acted, provided the two laws are not in terms, or in their operation contradictory and repugnant to each other."2

§ 443. Another illustration may be drawn from the opinion of the court in another highly important case. One question was, whether the power of congress to establish uniform laws on the subject of bankruptcies was exclusive, or concurrent with the states. " It does not appear," it was then said, "to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases, as the laws of the Union may not reach. Be this as it may, the power of congress may be exercised, or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws; but their actual establishment, which is inconsistent with the partial acts of the states. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished. It can only be suspended by the enactment of a general bankrupt law. The repeal of that

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1 5 Wheat R. p. 22.

2 Id. 24. See also Golden v. Prince, 3 Wash. C. C. R. 313, 324, &c.

law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress"1

It is not our intention to comment on these cases; but to offer them as examples of reasoning in favour and against the exclusive power, where a positive repugnancy cannot be predicated.

§ 444. It has been sometimes argued, that when a power is granted to congress to legislate in specific cases, for purposes growing out of the Union, the natural conclusion is, that the power is designed to be exclusive; that the power is to be exercised for the good of the whole by the will of the whole, and consistently with the interests of the whole; and that these objects can no where be so clearly seen, or so thoroughly weighed, as in congress, where the whole nation is represented. But the argument proves too much; and pursued to its full extent, it would establish, that all the powers granted to congress are exclusive, unless where concurrent authority is expressly reserved to the states.2 For instance, upon this reasoning the power of taxation in congress would annul the whole power of taxation of the states; and thus operate a virtual dissolution of their sovereignty. Such a pretension has been constantly disclaimed.

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1 Sturgis v. Crowninshield, 4 Wheat. R. 122, 195, 196. See also Gibbons v. Ogden, 9 Wheat. R. 1, 197, 227, 235, 238; Houston v. Moore, 5 wheat. R. 34, 49, 52, 54, 55. -- This opinion, that the power to pass bankrupt laws is not exclusive, has not been unanimously adopted by the Supreme Court. Mr. Justice Washington maintained at all times an opposite opinion; and his opinion is known to have been adopted by at least one other of the judges of the Supreme Court. The reasons, on which Mr. J. Washington's opinion is founded, will be found at large in the case of Golden v. Prince, 3 Wash. C. C. R. 313, 322, &c. See also Ogden v. Saunders, 12 Wheat. R. 213, 264, 265, and Gibbons v. Ogden, 9 Wheat. R. 1, 209, 226, 238.

2 Houston v. Moore, 5 Wheat. R. 1, 49, 55, 56.

§ 445. On the other hand, it has been maintained with great pertinacity, that the states possess concurrent authority with congress in all cases, where the power is not expressly declared to be exclusive, or expressly prohibited to the states; and if, in the exercise of a concurrent power, a conflict arises, there is no reason, why each should not be deemed equally rightful.1 But it is plain, that this reasoning goes to the direct overthrow of the principle of supremacy; and, if admitted, it would enable the subordinate sovereignty to annul the powers of the superior. There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to these very measures, is declared to be supreme over that, which exerts the control.2 For instance, the states have acknowledgedly a concurrent power of taxation. But it is wholly inadmissible to allow that power to be exerted over any instrument employed by the general government to execute its own powers; for such a power to tax involves a power to destroy; and this power to destroy may defeat, and render useless the power to create.3 Thus a state may not tax the mail, the mint, patent rights, custom-house papers, or judicial process of the courts of the United States.4 And yet there is no clause in the constitution, which prohibits the states from exercising the power; nor any exclusive grant to the United States. The apparent repugnancy creates, by implication, the prohibition. So congress, by the constitution, possess power to provide for governing such part of

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1 See Gibbons v. Ogden, 9 Wheat. R. 1,197, 210; McCulloh v. Maryland, 4 Wheat. R. 316, 527.
2 McCulloh v. Maryland, 4 Wheat. R. 316, 431.
3 Ibid.
4 Id. 432.

the militia, as may be employed in the service of the United States. Yet it is not said, that such power of government is exclusive. But it results from the nature of the power. No person would contend, that a state militia, while in the actual service and employment of the United States, might yet be, at the same time, governed and controlled by the laws of the state. The very nature of military operations would, in such case, require unity of command and direction. And the argument from inconvenience would be absolutely irresistible to establish an implied prohibition.1 On the other hand, congress have power to provide for organizing, arming, and disciplining the militia; but if congress should make no such provision, there seems no reason, why the states may not organize, arm, and discipline their own militia. No necessary incompatibility would exist in the nature of the power; though, when exercised by congress, the authority of the states must necessarily yield. And, here, the argument from inconvenience would be very persuasive the other way. For the power to organize, arm, and discipline the militia, in the absence of congressional legislation,-would seem indispensable for the defence and security of the states.2 Again, congress have power to call forth the militia to execute the laws of the Union, to suppress insurrections, and repel invasions. But there does not seem any incompatibility in the states calling out their own militia as auxiliaries for the same purpose.3

§ 446. In considering, then, this subject, it would be impracticable to lay down any universal rule, as to what powers are, by implication, exclusive in the general

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1 Huston v. Moore, 5 Wheat. R. 1, 53.
2 Houston v Moore, 5 Wheat. R. 50, 51, 52.
3 Id. 54, 55.

government, or concurrent in the states; and in relation to the latter, what restrictions either on the power itself, or on the actual exercise of the power, arise by implication. In some cases, as we have seen, there may exist a concurrent power, and yet restrictions upon it must exist in regard to objects. In other cases, the actual operations of the power only are suspended or controlled, when there arises a conflict with the actual operations of the Union. Every question of this sort must be decided by itself upon its own circumstances and reasons. Because the power to regulate commerce, from its nature and objects, is exclusive, it does not follow, that the power to pass bankrupt laws also is exclusive.1

§ 447. We may, however, lay down some few rules, deducible from what has been already said, in respect to cases of implied prohibitions upon the existence or exercise of powers by the states, as guides to aid our inquiries. (1.) Wherever the power given to the general government requires, that, to be efficacious and adequate to its end, it should be exclusive, there arises a just implication for deeming it exclusive. Whether exercised, or not, in such a case makes no difference. (2.) Wherever the power in its own nature is not incompatible with a concurrent power in the states, either in its nature or exercise, there the power belongs to the states. (3.) But in such a case, the

concurrency of the power may admit of restrictions or qualifications in its nature, or exercise. In its nature, when it is capable from its general character of being applied to objects or purposes, which would control, defeat, or de-

1 Sturgis v. Crowninshield, 4 Wheat. 122,195, 197, 199; Gibbons v. Ogden, 9 Wheat. R. 1,196,197, 209.

stroy the powers of the general government. In its exercise, when there arises a conflict in the actual laws and regulations made in pursuance of the power by the general and state governments. In the former case there is a qualification engrafted upon the generality of the power, excluding its application to such objects and purposes. In the latter, there is (at least generally) a qualification, not upon the power itself, but only upon its exercise, to the extent of the actual conflict in the operations of each. (4.) In cases of implied limitations or prohibitions of power, it is not sufficient to show a possible, or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, leading irresistibly to the same conclusion. (5.) If such incompatibility, repugnancy, or extreme inconvenience would result, it is no answer, that in the actual exercise of the power, each party may, if it chooses, avoid a positive interference with the other. The objection lies to the power itself, and not to the exercise of it. If it exist, it may be applied to the extent of controlling, defeating, or destroying the other. It can never be presumed, that the framers of the constitution, declared to be supreme, could intend to put its powers at hazard upon the good wishes, or good intentions, or discretion of the states in the exercise of their acknowledged powers. (6.) Where no such repugnancy, incompatibility, or extreme inconvenience would result, then the power in the states is restrained, not in its nature, but in its operations, and then only to the extent of the actual interference. In fact, it is obvious, that the same means may often be applied to carry into operation different powers. And a state may use the same means to effectuate an acknowledged power in itself, which congress may apply for an-

other purpose in the acknowledged exercise of a very different power. Congress may make that a regulation of commerce, which a state may employ as a guard for its internal policy, or to preserve the public health or peace, or to promote its own peculiar interests.1 These rules seem clearly deducible from the nature of the instrument; and they are confirmed by the positive injunctions of the tenth amendmentof the constitution.

§ 448. XIII. Another rule of interpretation deserves consideration in regard to the constitution. There are certain maxims, which have found their way, not only into judicial discussions, but into the business of common life, as founded in common sense, and common convenience. Thus, it is often said, that in an instrument a specification of particulars is an exclusion of generals; or the expression of one thing is the exclusion of another. Lord Bacon's remark, " that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated," has been perpetually referred to, as a fine illustration. These maxims, rightly understood, and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition. But they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text, and the objects of the instrument. Thus, it has been suggested, that an affirmative provision in a particular case excludes the existence of the like provision in every other case; and a negative provision in a particular case admits the existence of the same thing in every other case.2 Both of these deductions are, or rather may be, unfounded in solid

1 See Gibbons v. Ogden, 9 Wheat. R. 1, 203 to 210.

2 See The Federalist, No. 83, 84.

reasoning.1 Thus, it was objected to the constitution, that, having provided for the trial by jury in criminal cases, there was an implied exclusion of it in civil cases. As if there was not an essential difference between silence and abolition, between a positive adoption of it in one class of cases, and a discretionary right (it being clearly within the reach of the judicial powers confided to the Union) to adopt, or reject it in all or any other cases.2 One might with just as much propriety hold, that, because congress has power "to declare war," but no power is expressly given to make peace, the latter is excluded; or that, because it is declared, that " no bill of attainder, or ex post facto law shall be passed" by congress, therefore congress possess in all other cases the right to pass any laws. The truth is, that in order to ascertain, how far an affirmative or negative provision excludes, or implies others, we must look to the nature of the provision, the subject matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt, that an affirmative grant of powers in many cases will imply an exclusion of all others. As, for instance, the constitution declares, that the powers of congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretensions to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as

useless, if a general authority were intended.3 In relation, then, to such a subject as a constitution, the natural and obvious sense

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1 Cohens v. Virginia, 6 Wheat. R. 395 to 401.

2 The Federalist, No. 83.

3 The Federalist, No. 83. See Vattel, B. 2, ch, 17, §282.

of its provisions, apart from any technical or artificial rules, is the true criterion of construction.1

§ 449. XIV. Another rule of interpretation of the constitution, suggested by the foregoing, is, that the natural import of a single clause is not to be narrowed, so as to exclude implied powers resulting from its character, simply because there is another clause, which enumerates certain powers, which might otherwise be deemed implied powers within its scope; for in such cases we are not, as a matter of course, to assume, that the affirmative specification excludes all other implications. This rule has been put in a clear and just light by one of our most distinguished statesmen; and his illustration will be more satisfactory, perhaps, than any other, whichcan be offered. " The constitution," says he, " vests in congress, expressly, the power to lay and collect taxes, duties, imposts, and excises, and the power to regulate trade. That the former power, if not particularly expressed, would have been included in the latter, as one of the objects of a general power to regulate trade, is not necessarily impugned by its being so expressed. Examples of this sort cannot sometimes be easily avoided, and are to be seen elsewhere in the constitution. Thus, the power 'to define and punish offences against the law of nations' includes the power, afterwards particularly expressed, 'to make rules concerning captures,' &c. from offending neutrals. So, also, a power 'to coin money' would, doubtless, include that of ' regulating its value,' had not the latter power been expressly inserted. The term taxes, if standing alone, would certainly have included 'duties, imposts, and excises.' In another clause it is said, ' no tax or duty shall be laid on exports.' Here the two

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1 The Federalist, No. 83.

terms are used as synonymous. And in another clause, where it is said 'no state shall lay any imposts or duties,' &c. the terms imposts and duties are synonymous. Pleonasms, tautologies, and the promiscuous use of terms and phrases, differing in their shades of meaning, (always to be expounded with reference to the context, and under the control of the general character and scope of the instrument, in which they are found,) are to be ascribed, sometimes to the purposes of greater caution, sometimes to the imperfection of language, and sometimes to the imperfection of man himself. In this view of the subject it was quite natural, however certainly the power to regulate trade might include a power to impose duties on it, not to omit it in a clause enumerating the several modes of revenue authorized by the construction. In few cases could the [rule], ex majori cautela, occur with more claim to respect."1

§ 450. We may close this view of some of the more important rules to be employed in the interpretation of the constitution, by adverting to a few belonging to mere verbal criticism, which are indeed but corollaries from what has been said, and have been already alluded to; but which, at the same time, it may be of some use again distinctly to enunciate.

§ 451. XV. In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades Or meaning, or for the exercise of philosophical acuteness, or judicial research.

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1 Mr. Madison's Letter to Mr. Cabell, 18th September, 1828.

They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.

§ 452. XVI. But, in the next place, words, from the necessary imperfection of all human language, acquire different shades of meaning, each of which is equally appropriate, and equally legitimate; each of which recedes in a wider or narrower degree from the others, according to circumstances; and each of which receives from its general use some indefiniteness and obscurity, as to its exact boundary and extent.1 We are, indeed, often driven to multiply commentaries from the vagueness of words in themselves; and perhaps still more often from the different manner, in which different minds are accustomed to employ them. They expand or contract, not only from the conventional

modifications introduced by the changes of society; but also from the more loose or more exact uses, to which men of different talents, acquirements, and tastes, from choice or necessity apply them. No person can fail to remark the gradual deflections in the meaning of words from one age to another; and so constantly is this process going on, that the daily language of life in one generation sometimes requires the aid of a glossary in another. It has been justly remarked,2 that no language is so copious, as to supply words and phrases for every complex idea; or so correct, as not to include many, equiv-

1 See Vattel, B. 2, ch. 17, §262, §299.

2 The Federalist, No. 37.

ocally denoting different ideas. Hence it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms, in which it is delivered. We must resort then to the context, and shape the particular meaning, so as to make it fit that of the connecting words, and agree with the subject matter.

§ 453. XVII. In the next place, where technical words are used, the technical meaning is to be applied to them, unless it is repelled by the context.1 But the same word often possesses a technical, and a common sense. In such a case the latter is to be preferred, unless some attendant circumstance points clearly to the former. No one would doubt, when the constitution has declared, that "the privilege of the writ of habeas corpus shall not be suspended, unless" under peculiar circumstances, that it referred, not to every sort of writ, which has acquired that name; but to that, which has been emphatically so called, on account of its remedial power to free a party from arbitrary imprisonment.2 So, again, when it declares, that in suits at common law, &c. the right of trial by jury shall be preserved, though the phrase "common law" admits of different meanings, no one can doubt, that it is used in a technical sense. When, again, it declares, that congress shall have power to provide a navy, we readily comprehend, that authority is given to construct, prepare, or in any other manner to obtain a navy. But when congress is further authorized to provide for calling forth the militia, we

1 See Vattel, B. 2, ch. 17, §276, 277.

2 Ex parte Bollman & Swartout, 4 Cranch, 75; S. C. 2 Peters's Cond. R. 33.

perceive at once, that the word " provide " is used in a somewhat different sense.

§ 454. XVIII. And this leads us to remark, in the next place, that it is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument. It does not follow, either logically or grammatically, that because a word is found in one connexion in the constitution, with a definite sense, therefore the same sense is to be adopted in every other connexion, in which it occurs.1 This would be to suppose, that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen, and practical reasoners. And yet nothing has been more common, than to subject the constitution to this narrow and mischievous criticism. Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the constitution a word used in some sense, which falls in with their favourite theory of interpreting it, have made that the standard, by which to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes, lopping off its meaning, when it seemed too large for their purposes, and extending it, when it seemed too short. They have thus distorted it to the most unnatural shapes, and crippled, where they have sought only to adjust its proportions according to their own opinions. It was very justly observed by Mr. Chief Justice Marshall, in The Cherokee Nation v. The State of Georgia,2 that " it has been said, that the same words have not necessarily the same meaning attached to

1 Vattel, B. 2, ch. 17, §281. 5 Peters's Rep. 1, 19.

them, when found in different parts of the same instrument Their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings; and the peculiar sense, in which it is used in any sentence, is to be determined by the context." A very easy example of this sort will be found in the use of the word " establish," which is found in various places in the constitution. Thus, in the preamble, one object of the constitution is avowed to be "to establish justice," which seems here to mean to settle firmly, to fix unalterably, or rather, perhaps, as justice, abstractedly considered, must be considered as forever fixed and unalterable, to dispense or administer justice. Again, the constitution declares, that congress shall have power " to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies," where it is manifestly used as

equivalent to make, or form, and not to fix or settle unalterably and forever. Again, " congress shall have power to establish postoffices and post-roads," where the appropriate sense would seem to be to create, to found, and to regulate, not so much with a view to permanence of form, as to convenience of action. Again, it is declared, that " congress shall make no law respecting an establishment of religion," which seems to prohibit any laws, which shall recognise, found, confirm, or patronize any particular religion, or form of religion, whether permanent or temporary, whether already existing, or to arise in future. In this clause, establishment seems equivalent in meaning to settlement, recognition, or support. And again, in the preamble, it is said, " We, the people, &c. do ordain and establish this constitution," &c. where the most appropriate sense seems to be to

create, to ratify, and to confirm. So, the word "state" will be found used in the constitution in all the various senses, to which we have before alluded. It sometimes means, the separate sections of territory occupied by the political societies within each; sometimes the particular governments established by these societies; sometimes these societies as organized into these particular governments; and lastly, sometimes the people composing these political societies in their highest sovereign capacity.1

§ 455. XIX. But the most important rule, in cases of this nature, is, that a constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate, or unfold the appropriate sense; but unless it stands well with the context and subject-matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget, that it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition, which best harmonizes with its design, its objects, and its general structure.2

§ 456. The remark of Mr. Burke may, with a very slight change of phrase be addressed as an admonition to all those, who are called upon to frame, or to interpret a constitution. Government is a practical thing made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of

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1 Mr. Madison's Virginia Report, 7 January, 1800, p. 5; ante, §208, p. 193.

2 See Vattel, B. 2, ch. 17, §285, 286.

visionary politicians. The business of those, who are called to administer it, is to rule, and not to wrangle. It would be a poor compensation, that one had triumphed in a dispute, whilst we had lost an empire;1 that we had frittered down a power, and at the same time had destroyed the republic.

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1 Burke's Letter to the Sheriffs of Bristol in 1777.

CHAPTER VI.

THE PREAMBLE.

§ 457. Having disposed of these preliminary inquiries, we are now arrived at that part of our labours, which involves a commentary upon the actual provisions of the constitution of the United States. It is proposed to take up the successive clauses in the order in which they stand in the instrument itself, so that the exposition may naturally flow from the terms of the text.

§ 458. We begin then with the preamble of the constitution. It is in the following words:

"We , the people of the United States, in order to form a more perfect union, establish justice, insure "domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and "establish this constitution for the United States of America."

§ 459. The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute. We find it laid down in some of our earliest authorities in the common law; and civilians are accustomed to a similar expression,

cessante legis praemio, cessat et ipsa lex.1 Probably it has a foundation in the exposition of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature is to be regarded and followed. It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if

they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble.

§ 460. There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.2

§ 461. The language of the preamble of the constitution was probably in a good measure drawn from that of the third article of the confederation, which declared, that " The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare. And we accordingly find, that the first resolution proposed, in the convention which framed the constitution, was, that the articles of the confederation ought to be so corrected and enlarged, as to accomplish the objects proposed by their institution, namely, common defence, security of liberty, and general welfare.3

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1 Bac. Abridg. Statute 1.; 2 Plowden R. 369; 1 Inst. 79.

2 See Chisholm v. Georgia, Chief Justice Jay's opinion, 2 Dall. 419; 2 Cond. Rep. 635, 671.

3 Journal of Convention, 67; Id. 83.

§ 462. And, here, we must guard ourselves against an error, which is too often allowed to creep into the discussions upon this subject. The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application ofthe powers actually conferred by the constitution, and not substantively to create them. For example, the preamble declares one object to be, " to provide for the common defence." No one can doubt, that this does not enlarge the powers of congress to pass any measures, which they may deem useful for the common defence.1 But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one would promote, and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation to be adopted? Are we at liberty, upon any principles of reason, or common sense, to adopt a restrictive meaning, which will defeat an avowed object of the constitution, when another equally natural and more appropriate to the object is before us? Would not this be to destroy an instrument by a measure of its words, which that instrument itself repudiates?

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1 Yet, strangely enough, this objection was urged very vehemently against the adoption of the constitution; 1 Elliot's debates, 293, 300.

§ 463. We have already had occasion, in considering the nature of the constitution, to dwell upon the terms, in which the preamble is conceived, and the proper conclusion deducible from it. It is an act of the people, and not of the states in their political capacities.1 It is an ordinance or establishment of government and not a compact, though originating in consent; and it binds as a fundamental law promulgated by the sovereign authority, and not as a compact or treaty entered into and in fieri, between each and all the citizens of the United States, as distinct parties. The language is, " We, the people of the United States," not, We, the states, "do ordain and establish;" not, do contract and enter into a treaty with each other; "this constitution for the United States of America," not this treaty between the several states. And it is, therefore, an unwarrantable assumption, not to call it a most extravagant stretch of interpretation, wholly at variance with the language, to substitute other words and other senses for the words and senses incorporated, in this solemn manner, into the substance of the instrument itself. We have the strongest assurances, that this preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the government. The obvious object was to substitute a government of the people, for a confederacy of states; a constitution for a compact.2 The difficulties arising from this source

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1 See 2 Lloyd's Debates, 1789, p. 178,180,181.

2 By a constitution, is to, be understood (says Mr. Justice Wilson) a supreme law, made and ratified by those, in whom the sovereign power of the state resides, which prescribes the manner, in which that sovereign power wills that the government should be instituted and administered.*

It contributed not a little to the infirmities of the articles of the confederation, that it never had A ratification by the people. The Federalist, 22.
*** 1 Wilson's Lect. 417.**

were not slight; for a notion commonly enough, however incorrectly, prevailed, that, as it was ratified by the states only, the states respectively, at their pleasure, might repeal it; and this, of itself, proved the necessity of laying the foundations of a national government deeper than in the mere sanction of delegated power. The convention determined, that the fabric of American empire ought to rest and should rest on the solid basis of the consent of the people. The streams of national power ought to flow and should Dow immediately from the highest original fountain of all legitimate authority.1 And, accordingly, the advocates of the constitution so treated it in their reasoning in favour of its adoption. "The constitution," said the Federalist, "is to be founded on the assent and ratification of the people of America, given by deputies elected for that purpose; but this assent and ratification is to be given by the people, not as individuals composing a whole nation, but as composing the distinct and independent states, to which they belong."2 And the uniform doctrine of the highest judicial authority has accordingly been, that it was the act of the people, and not of the states; and that it bound the latter, as subordinate to the people. "Let us turn," said Mr. Chief Justice Jay, "to the constitution. The people therein declare, that their design in establishing it comprehended six objects: (1.) To form a more perfect union; (2.) to establish justice; (3.) to insure domestic tranquillity; (4.) to provide for the common defence; (5.) to promote the general welfare; (6.) to secure the blessings of liberty to themselves and their posterity. It would," he added, "be pleasing and useful

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1 The Federalist, No. 22; see also No. 43; 4 Elliot's Debates, 75; ante, p. 248.
2 The Federalist, No. 39; Id. No. 84.

to consider and trace the relations, which each of these objects bears to the others; and to show, that, collectively, they comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy."1 In Hunter v. Martin, (1 Wheat. R. 305, 324,) the Supreme Court say, (as we have seen,) "the constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States;" and language still more expressive will be found used on other solemn occasions.2

§ 464. But this point has been so much dwelt upon in the discussion of other topics,3 that it is wholly unnecessary to pursue it further. It does, however, deserve notice, that this phraseology was a matter of much critical debate in some of the conventions called to ratify the constitution. On the one hand, it was pressed, as a subject of just alarm to the states, that the people were substituted for the states; that this would involve a destruction of the states in one consolidated national government; and would terminate in the subversion of the public liberties. On the other hand, it was urged, as the only safe course for the preservation of the Union and the liberties of the people, that the government should emanate from the people, and not from the states; that it should not be, like the confederation, a mere treaty, operating by requisitions on the states; and that the people, for whose benefit it

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1 Chisholm v. Georgia, 2 Dall. 419; 2 Cond. R. p. 635, 671.
2 See McCulloh v. Maryland, 4 Wheat. R. 316, 404, 405; Cohens v. Virginia, 6 Wheat. R. 264, 413, 414; see also 1 Kent's Comm. Lect. 10, p. 189.
3 Ante, p. 318 to 322.

was framed, ought to have the sole and exclusive right to ratify, amend, and control its provisions.1

§ 465. At this distance of time, after all the passions and interests, which then agitated the country have passed away, it cannot but be matter of surprise, that it should have been urged, as a solid objection to a government intended for the benefit of the people, and to operate directly on them, that it was required to be ratified by them, and not by bodies politic created by them for other purposes, and having no implied authority to act on the subject.

§ 466. The constitution having been in operation more than forty years, and being generally approved, it may, at first sight, seem unnecessary to enter upon any examination of the manner and extent, to which it is calculated to accomplish the objects proposed in the preamble, or the importance of those objects, not merely to the whole, in a national view, but also to the individual states. Attempts have, however, been made at different times, in different parts of the Union, to stir up a disaffection to the theory, as well as the actual exercise of the powers of the general government; to doubt its advantages; to exaggerate the unavoidable inequalities of its operations; to accustom the minds of the people to contemplate the consequences of a division, as fraught with no dangerous evils; and thus to

1 The debates in the Virginia Convention are very pointed on this subject. Mr. Henry, in an especial manner, urged these objections against it in a very forcible manner; (2 Elliot's Virginia Debates, 47, 61, 131;) and he was replied to, and the preamble vindicated with great ability by Mr. Randolph, Mr. Pendleton, Mr. Lee, Mr. Nicholas, and Mr. Corbin. 2 Elliot's Virginia Debates, 51, 57, 97, 98. The subject is also discussed in the North Carolina Debates, 3 Elliot's Deb. 134,145,) and in the Massachusetts Debates. 1 Elliot's Deb. 72, 110. See also 2 Pitk. Hist. 270; 3 Amer. Museum, 536, 546.

lead the way, if not designedly, at least insensibly, to a separation, as involving no necessary sacrifice of important blessings, or principles, and, on the whole, under some circumstances, as not undesirable or improbable.

§ 467. It is easy to see, how many different, and even opposite motives may, in different parts of the Union, at different times, give rise to, and encourage such speculations. Political passions and prejudices, the disappointments of personal ambition, the excitements and mortifications of party strife, the struggles for particular systems and measures, the interests, jealousies, and rivalries of particular states, the unequal local pressure of a particular system of policy, either temporary or permanent, the honest zeal of mere theorists and enthusiasts in relation to government, the real or imaginary dread of a national consolidation, the debasive and corrupt projects of mere demagogues; these, and many other influences of more or less purity and extent, may, and we almost fear, must, among a free people, open to argument, and eager for discussion, and anxious for a more perfect organization of society, for ever preserve the elements of doubt and discord, and bring into inquiry among many minds, the question of the value of the Union.

§ 468. Under these circumstances it may not be without some use to condense, in an abridged form, some of those reasons, which became, with reflecting minds, the solid foundation, on which the adoption of the constitution was originally vested, and which, being permanent in their nature, ought to secure its perpetuity, as the sheet anchor of our political hopes. Let us follow out, then, the suggestion of Mr. Chief Justice Jay, in the passage already cited.1

1 Chisholm v. Georgia, 2 Dall. R. 419. -- We shall freely use the admirable reasoning of the Federalist on the subject of the Union, with-

§ 469. The constitution, then, was adopted first "to form a more perfect union." Why this was desirable has been in some measure anticipated in considering the defects of the confederation. When the constitution, however, was before the people for ratification, suggestions were frequently made by those, who were opposed to it, that the country was too extensive for a single national government, and ought to be broken up into several distinct confederacies, or sovereignties; and some even went so far, as to doubt, whether it were not, on the whole, best, that each state should retain a separate, independent, and sovereign political existence.1 Those, who contemplated several confederacies, speculated upon a dismemberment into three great confederacies, one of the northern, another of the middle, and a third of the southern states. The greater probability, certainly, then was of a separation into two confederacies; the one composed of the northern and middle states, and the other of the southern. The reasoning of the Federalist on this subject seems absolutely irresistible.2 The progress of the population in the western territory, since that period, has materially changed the basis of all that reasoning. There could scarcely now, upon any dismemberment, exist, with a new to local interests, political associations, or public safety, less than three confederacies, and most probably four. And it is more than probable, that the line of division would be traced out by geographical boundaries, which would separate the slave-holding from the non-slave-

out in every instance quoting the particular citations, as they would incumber the text. 1 The Federalist, No. 1, 2, 9,13,14; 3 Wilson's Works, 285, 286; Paley's Moral and Political Philosophy, B. 4, ch. 6.
2 The Federalist, No. 13,14.

holding states. Such a distinction in government is so fraught with causes of irritation and alarm, that no honest patriot could contemplate it without many painful and distressing fears.

§ 470. But the material consideration, which should be kept steadily in view, is, that under such circumstances a national government, clothed with powers at least equally extensive with those given by the constitution, would be indispensable for the preservation of each separate confederacy. Nay, it cannot be doubted, that much larger powers, and much heavier expenditures would be necessary. No nation could long maintain its public liberties, surrounded by powerful and vigilant neighbours, unless it possessed a government clothed with powers of great efficiency, prompt to act, and able to repel every invasion of its rights. Nor would it afford the slightest security, that all the

confederacies were composed of a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, and possessing similar manners, habits, and customs. If it be true, that these circumstances would not be sufficient to hold them in a bond of peace and union, when forming one government, acting for the interests, and as the representatives of the rights of the whole; how could a better fate be expected, when the interests and the representation were separate; and ambition, and local interests, and feelings, and peculiarities of climate, and products, and institutions, and imaginary or real aggressions and grievances, and the rivalries of commerce, and the jealousies of dominion, should spread themselves over the distinct councils, which would regulate their concerns by inde-

pendent legislation?1 The experience of the whole world is against any reliance for security and peace between neighbouring nations, under such circumstances The Abbe Mably has forcibly stated in a single passage the whole result of human experience on this subject. " Neighbouring states," say he, are naturally enemies of each other, unless their common weakness forces them to league in a confederative republic; and their constitution prevents the differences, that neighbourhood occasions, extinguishing that secret jealousy, which disposes all states to aggrandize themselves at the expense of their neighbours." This passage, as has been truly observed, at the same time points out the evil, and suggests the remedy.2 § 471. The same reasoning would apply with augmented force to the case of a dismemberment, when each state should by itself constitute a nation. The very inequalities in the size, the revenues, the population, the products, the interests, and even in the institutions and laws of each, would occasion a perpetual petty warfare of legislation, of border aggressions and violations, and of political and personal animosities, which, first or last, would terminate in the subjugation of the weaker to the arms of the stronger.3 In our further observations on this subject, it is not proposed to distinguish the case of several confederacies from that of a complete separation of all the states; as in a general sense the remarks apply with irresistible, if not with uniform, force to each.

§ 472. Does, then, the extent of our territory form

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1 The Federalist, No. 2, 5, 6, 7; 3 Wilson's Works, 286; Paley's Moral and Political Philosophy, B. 4, ch. 6.

2 The Federalist, No. 6.

3 The Federalist, No. 5, 6, 7.

any solid objection against forming " this more perfect union? " This question, so far as respects the original territory included within the boundaries of the United States by treaty of peace of 1783, seems almost settled by the experience of the last forty years. It is no longer a matter of conjecture, how far the government is capable (all other things being equal) of being practically applied to the whole of that territory. The distance between the utmost limits of our present population, and the diversity of interests among the whole, seem to have presented no obstacles under the beneficent administration of the general government, to the most perfect harmony and general advancement of all. Perhaps it has been demonstrated, (so far as our limited experience goes,) that the increased facilities of intercourse, the uniformity of regulations and laws, the common protection, the mutual sacrifices of local interests, when incompatible with that of all, and the pride and confidence m a government, in which all are represented, and all are equal in rights and privileges; perhaps, we say, it has been demonstrated, that these effects of the Union have promoted, in a higher degree, the prosperity of every state, than could have been attained by any single state, standing alone, in the freest exercise of all its intelligence, its resources, and its institutions, without any check or obstruction during the same period. The great change, which has been made in our internal condition, as well as in our territorial power, by the acquisition of Louisiana and Florida, have, indeed, given rise to many serious reflections, whether such an expansion of our empire may not hereafter endanger the original system. But time alone can solve this question; and to time it is the part of wisdom and patriotism to leave it.

§ 473. When, however, the constitution was before the people for adoption, objections, as has been already suggested, were strenuously urged against a general government, founded upon the then extent of our territory. And the authority of Montesquieu was relied on in support of the objections.1 It is not a little surprising, that Montesquieu should have been relied on for this purpose. He obviously had in view, when he recommends a moderate extent of territory, as best suited to a republic, small states, whose dimensions were far less than the limits of one half of those in the Union; so that upon strictly following out his suggestions, the latter ought to have been divided. But he suggests the appropriate remedy of a confederate republic, (the very form adopted in the constitution,) as the proper means of at once securing safety and liberty with extensive territory.2 The truth is, that what size is safe for a nation, with a view to the protection of its rights and liberties, is a question, which admits of

no universal solution. Much depends upon its local position, its neighbours, its resources, the facilities of invasion, and of repelling, invasion, the general state of the world, the means and weapons of warfare, the interests of other nations in preserving or destroying it, and other circumstances, which scarcely admit of enumeration. How far a republican government can, in a confederated form, be extended, and be at once efficient abroad and at home, can ensure general happiness to its own citizens, and perpetuate the principles of liberty, and preserve the substance of justice, is a great problem in the

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1 1 Montesquieu's Spirit of Laws, B. 9, ch. 1. See also Beccaria, ch. 26.

2 The Federalist, No. 9; 1 Wilson's Works, 347 to 350; 3 Wilson's Works, 276 to 278.

theory of government, which America is now endeavouring, to unfold, and which, by the blessing of God, we must all earnestly hope, that she may successfully demonstrate.

§ 474. In the mean time, the following considerations may serve to cheer our hopes, and dispel our fears. First, (1.) that extent of territory is not incompatible with a just spirit of patriotism; (2.) nor with a general representation of all the interests and population within it; (3.) nor with a due regard to the peculiar local advantages or disadvantages of any part; (4.) nor with a rapid and convenient circulation of information useful to all, whether they are rulers or people. On the other hand, it has some advantages of a very important nature. (1.) It can afford greater protection against foreign enemies. (2.) It can give a wider range to enterprise and commerce. (3.) It can secure more thoroughly national independence to all the great interests of society, agriculture, commerce, manufactures, literature, learning, religion. (4.) It can more readily disarm and tranquillize domestic factions in a single state. (5.) It can administer justice more completely and perfectly. (6.) It can command larger revenues for public objects without oppression or heavy taxation. (7.) It can economise more in all its internal arrangements, whenever necessary. In short, as has been said, with equal truth and force: " One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefit of its foresight and precautions to each. In the formation of treaties, it will regard the interests of the whole, and the par-

ticular interests of the parts, as connected with that of the whole. It can apply the revenues of the whole to the defence of any particular part, and that more easily and expeditiously, than state governments or separate confederacies can possibly do, for want of concert, and unity of system."1 Upon some of these topics, we may enlarge hereafter.

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1 The Federalist, No. 4. -- The following passages from the Federalist, No. 51, present the subject of the advantages of the Union in a striking light: "There are, moreover, two considerations particularly applicable to the federal system of America, which place it in a very interesting point of view.

" First: In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate. departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

"Secondly: It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary, or selfappointed authority. This, at best, is but a precarious security; because A power, independent of the society, may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from, and dependent on the society, the society itself will be broken into many parts, interests, and classes of citizens. that the rights of individuals. or of the minority, will be in little danger from

interested combinations of the majority. In a free government the security for civil rights must be the same, as that for religious rights. It consists, in the one case in the multiplicity of interests and

§ 475. The union of these states, " the more perfect union " is, then, and must for ever be invaluable to all, in

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in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government; since it shows, that in exact proportion, as the territory of the Union may be formed into more circumscribed confederacies, of states, oppressive combinations of a majority will be facilitated; the best security under the republican form, for the rights of every class of citizens, will be diminished; and consequently. the stability and independence of some member of the government, the only other security, must be proportionably increased, Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature, where the weaker individual is not secured against the violence of the stronger. And, as in the latter state, even the stronger individuals are prompted by the uncertainty of their condition to submit to a government, which may protect the weak, as well as themselves: so, in the former state, will the more powerful factions be gradually induced, by a like motive, to wish for a government, which will protect all parties, the weaker, as well as the more powerful. It can be little doubted, that if the state of Rhode-Island was separated from the confederacy, and left to itself, the insecurity of rights, under the popular form of government within such narrow limits, would be displayed by such reiterated oppressions of the factious majorities, that some power, altogether independent of the people, would soon be called for by the voice of the very factions, whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice, and the general good; whilst there being thus less danger to a minor, from the will of the major party, there must be less pretext also to provide for the security of the former, by introducing into the government a will not dependent on the latter; or, in other words, a will independent of the society itself. It is no less certain, that it is important, notwithstanding the contrary opinions, which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the federal principle."

respect both to foreign and domestic concerns. It will prevent some of the causes of war, that scourge of the human race, by enabling the general government, not only to negotiate suitable treaties for the protection of the rights and interests of all, but by compelling a general obedience to them, and a general respect for the obligations of the law of nations. It is notorious, that even under the confederation, the obligations of treaty stipulations, were openly violated, or silently disregarded; and the peace of the whole confederacy was at the mercy of the majority of any single state. If the states were separated, they would, or might, form separate and independent treaties with different nations, according to their peculiar interests. These treaties would, or might, involve jealousies and rivalries at home, as well as abroad, and introduce conflicts between nations struggling for a monopoly of the trade with each state. Retaliatory or evasive stipulations would be made, to counteract the injurious system of a neighbouring or distant state, and thus the scene be again acted over with renewed violence, which succeeded the peace of 1783, when the common interests were forgotten in the general struggle for superiority. It would manifestly be the interest of foreign nations to promote these animosities and jealousies, that, in the general weakness, the states might seek their protection by an undue sacrifice of their interests, or fall an easy prey to their arms.1

§ 476. The dangers, too, to all the states, in case of division, from foreign wars and invasion, must be imminent, independent of those from the neighbourhood of the colonies and dependencies of other governments on this continent. Their very weakness would invite

1 The Federalist, No. 2, 3, 4; 3 Wilson's Works, 291.

aggression. The ambition of the European governments, to obtain a mastery of power in colonies and distant possessions, would be perpetually involving them in embarrassing negotiations or conflicts, however peaceable might be their own conduct, and however inoffensive their own pursuits, and objects. America, as of old, would become the theater of warlike operations, in which she had no interests; and with a view to their own security, the states would be compelled to fall back into a general colonial submission, or sink into dependencies of such of the. great European powers, as might be most favourable to their interests, or most commanding over their resources.1

§ 477. There are also peculiar interests of some of the states, which would, upon a separation, be wholly sacrificed, or become the source of immeasurable calamities. The New-England states have a vital interest in the fisheries with their rivals, England and France; and how could New-England resist either of these powers in a struggle for the common right, if attempted to be restrained or abolished? What would become of Maryland and Virginia, if the Chesapeake were under the dominion of different foreign powers de facto, though not in form? The free navigation of the Mississippi and the lakes, and it may be added, the exclusive navigation of them, seems indispensable to to the security, as well as the prosperity of the western states. How otherwise, than by a general union, could this be maintained or guarantied?2

§ 478. And again, as to commerce, so important to the navigating states, and so productive to the agricultural states, it must be at once perceived, that no adequate pro-

1 The Federalist, No. 3, 4, 5.

2 The Federalist. No. 15.

tection could be given to either, unless by the strong and uniform operations of a general government. Each state by its own regulations would seek to promote its own interests, to the ruin or injury of those of others. The relative situation of these states; the number of rivers, by which they are intersected, and of bays, that wash their shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse; all these circumstances would conspire to render an illicit trade between them matter of little difficulty, and would insure frequent evasions of the commercial regulations of each other.1 All foreign nations would have a common interest in crippling us; and all the evils of colonial servitude, and commercial monopoly would be inflicted upon us, by the hands of our own kindred and neighbours.2 But this topic, though capable of being presented in detail from our past experience in such glowing colours, as to startle the most incredulous into a conviction of the ultimate poverty, wretchedness, and distress, which would overwhelm every state, does not require to be more than hinted at. We have already seen in our former examination of the defects of the confederation, that every state was ruined in its revenues, as well as in its commerce, by the want of a more efficient government.3

§ 479. Nor should it be imagined, that however injurious to commerce, the evils would be less in respect to domestic manufactures and agriculture. In respect to manufactures, the truth is so obvious, that it requires

1 The Federalist, No. 12.

2 The Federalist, No. 11, 12.

3 The Federalist, No. 5, 7, 11, 12; 3 Wilson's Works, 290; I Elliot's Debates, 74, 144; 1 Tucker's Black. Comm. App. 248, 249; Brown v. Maryland, 12 Wheat. R. 419, 445, 446.

no argument to illustrate it. In relation to the agricultural states, however, an opinion has, at some times and in some sections of the country, been prevalent, that the agricultural interests would be equally safe without any general government. The following, among other considerations, may serve to show the fallacy of all such suggestions. A large and uniform market at home for native productions has a tendency to prevent those sudden rises and falls in prices, which are so deeply injurious to the farmer and the planter. The exclusive possession of the home market against all foreign competition gives a permanent security to investments, which slowly yield their returns, and encourages the laying out of capital in agricultural improvements. Suppose cotton, tobacco, and wheat were at all times admissible from foreign states without duty, would not the effect be permanently to check any cultivation beyond what at the moment seems sure

of a safe sale? Would not foreign nations be perpetually tempted to send their surplus here, and thus, from time to time, depress or glut the home market?

§ 480. Again, the neighbouring states would often engage in the same species of cultivation; and yet with very different natural, or artificial means of making the products equally cheap. This inequality would immediately give rise to legislative measures to correct the evil, and to secure, if possible, superior advantages over the rival state. This would introduce endless crimination and retaliation, laws for defence, and laws for offence. Smuggling would be every where openly encouraged, or secretly connived at. The vital interests of a state would lie in many instances at the mercy of its neighbours, who might, at the same time,

feel, that their own interests were promoted by the ruin of their neighbours. And the distant states, knowing, that their own wants and pursuits were wholly disregarded, would become willing auxiliaries in any plans to encourage cultivation and consumption elsewhere. Such is human nature! Such are the infirmities, which history severely instructs us belong to neighbours and rivals; to those, who navigate, and those, who plant; to those, who desire, and those, who repine at the prosperity of surrounding states.1

§ 481. Again; foreign nations, under such circumstances, must have a common interest, as carriers, to bring to the agricultural states their own manufactures at as dear a rate as possible, and to depress the market of the domestic products to the minimum price of competition. They must have a common interest to stimulate the neighbouring states to a ruinous jealousy; or by fostering the interests of one, with whom they can deal upon more advantageous terms, or over whom they have acquired a decisive influence, to subject to a corresponding influence others, which struggle for an independent existence.2 This is not mere theory. Examples, and successful examples of this policy, may be traced though the period between the peace of 1783 and the adoption of the constitution.

§ 482. But not to dwell farther on these important inducements "to form a more perfect union," let us pass to the next object, which is to "establish justice." This must for ever be one of the great ends of every wise government; and even in arbitrary governments it must, to a great extent, be practiced, at least in respect to private persons, as the only security against rebel-

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1 The Federalist, No. 7.

2 Id. No. 4, 5, 11.

lion, private vengeance, and popular cruelty. But in a free government it lies at the very basis of all its institutions. Without justice being freely, fully, and impartially administered, neither our persons, nor our rights, nor our property, can be protected. And if these, or either of them, are regulated by no certain laws, and are subject to no certain principles, and are held by no certain tenure, and are redressed, when violated, by no certain remedies, society fails of all its value; and men may as well return to a state of savage and barbarous independence. No one can doubt, therefore, that the establishment of justice must be one main object of all our state governments. Why, then, may it be asked, should it form so prominent a motive in the establishment of the national government?

§ 483 This is now proposed to be shown in a concise manner. In the administration of justice, foreign nations, and foreign individuals, as well as citizens, have a deep stake; but the former have not always as complete means of redress as the latter; for it may be presumed, that the state laws will always provide adequate tribunals to redress the grievances and sustain the rights of their own citizens. But this would be a very imperfect view of the subject. Citizens of contiguous states have a very deep interest in the administration of justice in each state; and even those, which are most distant, but belonging to the same confederacy, cannot but be affected by every inequality in the provisions, or the actual operations of the laws of each other. While every state remains at full liberty to legislate upon the subject of rights, preferences, contracts, and remedies, as it may please, it is scarcely to be expected, that they will all concur in the same general system of policy. The natural tendency of every

government is to favour its own citizens; and unjust preferences, not only in the administration of justice, but in the very structure of the laws, may reasonably be expected to arise. Popular prejudices, or passions, supposed or real injuries, the predominance of home pursuits and feelings over the comprehensive views of a liberal jurisprudence, will readily achieve the most mischievous projects for this purpose. And these,

again, by a natural reaction, will introduce correspondent regulations, and retaliatory measures in other states.

§ 483. Now, exactly what this course of reasoning has led us to presume as probable, has been demonstrated by experience to be true in respect to our own confederacy during the short period of its existence, and under circumstances well calculated to induce each state to sacrifice many of its own objects for the general good. Nay, even when we were colonies, dependent upon the authority of the mother country, these inequalities were observable in the local legislation of several of the states, and produced heart-burnings and discontents, which were not easily appeased.

§ 484. First, in respect to foreign nations. After the confederacy was formed, and we had assumed the general rights of war as a sovereign belligerent nation, authority to make captures, and to bring in ships and cargoes for adjudication naturally flowed from the proper exercise of these rights by the law of nations. The states respectively retained the power of appointing prize tribunals, to take cognizance of these matters in the first instance; and thus thirteen distinct jurisdictions were established, which acted entirely independent of each other. It is true, that the articles of confederation had delegated to the general

government the authority of establishing courts for receiving and determining, finally, appeals in all cases of captures. Congress accordingly instituted proper appellate tribunals, to which the state courts were subordinate, and, upon constitutional principles, were bound to yield obedience. But it is notorious, that the decisions of the appellate tribunals were disregarded, and treated as mere nullities, for no power to enforce them was lodged in congress. They operated, therefore, merely by moral influence and requisition, and, as such, soon sunk into insignificance. Neutral individuals, as well as neutral nations, were left wholly without any adequate redress for the most inexcusable injustice, and the confederacy subjected to imminent hazards. And until the constitution of the United States was established, no remedy was ever effectually administered.1 Treaties, too, were formed by congress with various nations; and above all, the treaty of peace of 1783, which gave complete stability to our independence against Great Britain. These treaties were, by the theory of the confederation, absolutely obligatory upon all the states. Yet their provisions were notoriously violated both by state legislation and state judicial tribunals. The non-fulfilment of the stipulations of the British treaty on our part more than once threatened to involve the whole country again in war. And the provision in that treaty for the payment of British debts was practically disregarded in many, if not in all, the state courts. These debts never were enforced, until the constitution gave them a direct and adequate

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1 See the Resolves of Congress, Journals of 1779, p. 86; Penhallow v. Doane, 3 Dall. 54; Jennings v. Carson, 4 Cranch, 2; Chisholm v. Georgia, 2 Dall. 418, 474.

sanction, independently of state legislation and state courts.1

§ 485. Besides the debts due to foreigners, and the obligations to pay the same, the public debt of the United States was left utterly unprovided for; and the officers and soldiers of the revolution, who had achieved our independence, were, as we have had occasion to notice, suffered to languish in want, and their just demands evaded, or passed by with indifference.2 No efficient system to pay the public creditors was ever carried into operation, until the constitution was adopted; and, notwithstanding the increase of the public debt, occasioned by intermediate wars, it is now on the very eve of a total extinguishment.

§ 486. These evils, whatever might be their magnitude, did not create so universal a distress, or so much private discontent, as others of a more domestic nature, which were subversive of the first principles of justice. Independent of the unjustifiable preferences, which were fostered in favour of citizens of the state over those belonging to other states, which were not few nor slight, there were certain calamities inflicted by the common course of legislation in most of the states, which went to the prostration of all public faith and all private credit. Laws were constantly made by the state legislatures violating, with more or less degrees of aggravation, the sacredness of private contracts. Laws compelling the receipt of a depreciated

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1 See 1 Wait's State Papers, 226 to 388; Ware v. Hylton,3 Dall. R. 199; Hophins v. Bell, 3 Cranch, 454; 3 Wilson's Works, 290; Chisholm v. Georgia, 2 Dall. 419, 474.

2 5 Marshall's Life of Washington, ch. 1, p. 46 to 49; 2 Pitk. Hist. 180 to 183; Journal of Congress, 1783, p. 194 et seq.; 3 Wilson's Works, 290; 4 Elliot's Debates, 84.

and depreciating paper currency in payment of debts were generally, if not universally, prevalent. Laws authorizing the payment of debts by instalments, at periods differing entirely from the original terms of the contract; laws suspending, for a limited or uncertain period, the remedies to recover debts in the ordinary course of legal proceedings, laws authorizing the delivery of any sort of property, however unproductive or undesirable, in payment of debts upon an arbitrary or friendly appraisement; laws shutting up the courts for certain periods and under certain circumstances, were not infrequent upon the statute books of many of the states now composing the Union. In the rear of all these came the systems of general insolvent laws, some of which were of a permanent nature, and others again were adopted upon the spur of the occasion, like a sort of gaol delivery under the Lords' acts in England, which hall so few guards against frauds of every kind by the debtor, that in practice they amounted to an absolute discharge from any debt, without any thing more than a nominal dividend; and sometimes even this vain mockery was dispensed with.1 In short, by the operations of paper currency, tender laws, installment laws, suspension laws, appraisement laws, and insolvent laws, contrived with all the dexterous ingenuity of men oppressed by debt, and popular by the very extent of private embarrassments, the states were almost universally plunged into a ruinous poverty, distrust, debility, and indifference to justice. The local tribunals were bound to obey the legislative will; and in the few instances, in which it was resisted, the independence of the judges was sacrificed to the temper

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1 See Chase J. in Ware v. Hylton, 3 Dall. 199; 1 Cond. R. 99,111.

of the times.1 It is well known, that Shays's rebellion in Massachusetts took its origin from this source. The object was to prostrate the regular administration of justice by a system of terror, which should prevent the recovery of debts and taxes.2 § 487. The Federalist speaks on this subject with unusual emphasis. "The loss, which America has sustained from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the states, chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power; which has been the instrument of it."3 "Laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation."4 And the Federalist dwells on the suggestion, that as such laws amount to an aggression on the rights of the citizens of those states, whose citizens are injured by them, they must necessarily form a probable source of hostilities among the states. Connecticut retaliated in an exem-

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1 The case of Trevett v. Welden, in 1786, in Rhode-Island, is an instance of this sort, which is in point, and illustrates the text, though it would not be difficult to draw others from states of larger extent. The judges in that case decided, that a law making paper money a tender in payment of debts was unconstitutional, and against the principles of magna charta. They were compelled to appear before the legislature to vindicate themselves; and the next year (being chosen annually) they were left out of office for questioning the legislative power.

2 5 Marshall's Life of Washington, 111, 112, &c.; 2 Pitk. Hist. 244; Minot's History of the Insurrection in Massachusetts.

3 The Federalist, No. 44.

4 Id.

plary manner upon enormities of this sort, which she thought had been perpetrated by a neighbouring state upon the just rights of her citizens. Indeed, war constitutes almost the only remedy to chastise atrocious breaches of moral obligations, and social justice in respect to debts and other contracts."1

§ 488. So, that we see completely demonstrated by our own history the importance of a more effectual establishment of justice under the auspices of a national government.2

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1 The Federalist, No. 7.

2 The remarks of Mr. Chief Justice Jay in Chisholm v. Georgia,(2 Dall. R. 419, 474; S. C. 2 Peters's Cond. R. 635, 670,) illustrate the truth of these reasonings in an interesting manner. " Prior to the date," says he. " of the constitution, the people had not any national tribunal, to

which they could resort for justice; the distribution of justice was then confined to state judicatories, in whose institution and organization the people of the other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice, which another state might yield to her, or to her citizens; and that, even in cases where state considerations were not always favourable to the most exact measure. There was danger, that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

"Prior also to that period, the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed. In their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to state courts, and particularly to the courts of delinquent states became apparent. While all the states were bound to protect each, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done to

§ 489. The next clause in the preamble is "to ensure domestic tranquillity." The illustrations appropriate to this head have been in a great measure anticipated in our previous observations. The security of the states against foreign influence, domestic dissensions, commercial rivalries, legislative retaliations, territorial disputes, and the petty irritations of a border warfare for privileges, exemptions, and smuggling, have been already noticed.1 The very habits of intercourse, to which the states were accustomed with each other during their colonial state, would, as has been justly remarked, give a keener edge to every discontent excited by any inequalities, preferences, or exclusions, growing out of the public policy of any of them.2 These, however, are not the only evils. In small communities domestic factions may well be expected to arise, which, when honest, may lead to the most pernicious public measures; and when corrupt, to domestic insurrections, and even to an overthrow of the government. The dangers to a republican government from this source have been dwelt upon by the advocates of arbitrary government with much exultation; and it must be confessed, that the history of free governments has furnished but too many examples to apologize for, though not to justify their arguments, drawn not only against the forms of republican government, but against the principles of civil liberty. They have pointed out the brief duration of republics, the factions, by which they have been rent, and the miseries, which they have suffered from distracted councils, and time-serving policy,

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each, and the citizens of each; but also to cause justice to be done by each, and the citizens of each; and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure."

1 The Federalist, No. 6, 7,12.

2 Id. No. 7.

and popular fury, and corruption, in a manner calculated to increase the solicitude of every well-wisher to the cause of rational liberty. And even those, who are most favourable in their views, seem to have thought, that the experience of the world had never yet furnished any conclusive proofs in its support.1 We know but too well, that factions have been the special growth of republics. By a faction, we are to understand a number of citizens, whether amounting to a minority or majority of the whole, who are united by some common impulse of passion, or interest, or party, adverse to the rights of the other citizens, or to the permanent and aggregate interests of the community.2

§ 490. The latent causes of faction seem sown in the nature of man. A zeal for different opinions concerning religion, and government, and many other points, both of speculation and practice; an attachment to different leaders; mutual rivalries and animosities; the restlessness of ambition; the pride of opinion; the desire for popular favour; commonly supply a ready origin to factions. And where deeper

causes are not at work, the most trivial differences, and the most accidental circumstances, occasionally excite the most severe conflicts. But the most durable, as well as the most alarming form, in which faction has displayed itself, has grown out of the unequal distribution of property. Those, who have, and those, who have not property, have, and must for ever have, distinct interests in society. The relation of debtor and creditor, at all times delicate, sometimes assumes a shape, which threatens the overthrow of the government itself.3

§ 491. There are but two methods of curing the mischiefs of faction; the one, by removing its causes,

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1 The Federalist, No. 9.

2 Id. No. 10.

3 Id. No. 10.

which, in a free government, is impracticable without the destruction of liberty; the other, by controlling its effects. If a faction be a minority, the majority may apply the proper corrective, by defeating or checking the violence of the minority in the regular course of legislation. In small states, however, this is not always easily attainable, from the difficulty of combining in a permanent form sufficient influence for this purpose. A feeble domestic faction will naturally avail itself, not only of all accidental causes of dissatisfaction at home, but also of all foreign aid and influence to carry its projects. And, indeed, in the gradual operations of factions, so many combinations are formed and dissolved, so many private resentments become embodied in public measures, and success and triumph so often follow after defeat, that the remnants of different factions, which have had a brief sway, however hostile to each other, have an interest to unite in order to put down their rivals. But if the faction be a majority, and stand unchecked, except by its own sense of duty, or its own fears, the dangers are imminent to all those, whose principles, or interests, or characters stand in the way of their supreme dominion.1

§ 492. These evils are felt in great states; but it has been justly observed, that in small states they are far more aggravated, bitter, cruel, and permanent. The most effectual means to control such effects seem to be in the formation of a confederate republic, consisting of several states.2 It will be rare, under such circumstances, if proper powers are confided to the general government, that the state line does not form the natural, as it will the jurisdictional boundary of the opera-

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1 The Federalist, No. 10.

2 Id. No. 9.

tions of factions. The authority of the general government will have a natural tendency to suppress the violence of faction, by diminishing the chances of ultimate success; and the example of the neighbouring states, who will rarely, at the same time, partake of the same feelings, or have the same causes to excite them into action, will mitigate, if it does not wholly disarm, the violence of the predominant faction.1

§ 493. One of the ordinary results of disunion among neighbouring states is the necessity of creating and keeping up standing armies, and other institutions unfavourable to liberty. The immediate dangers from sudden inroads and invasions, and the perpetual jealousies and discords incident to their local position, compel them to resort to the establishment of armed forces, either disproportionate to their means, or inadequate for their defence. Either alternative is fraught with public mischiefs. If they do not possess an adequate military force to repel invasion, they have no security against aggression and insult. If they possess an adequate military force, there is much reason to dread, that it may, in the hands of aspiring or corrupt men, become the means of their subjugation.2 There is no other refuge in such cases, but to seek an alliance always unequal, and to be obtained only by important concessions to some powerful nation, or to form a confederacy with other states, and thus to secure the co-operation and the terror of numbers. Nothing has so strong a tendency to suppress hostile enterprises, as the consciousness, that they will not be easily successful. Nothing is so sure to produce moderation, as the consciousness, that resistance will steadily maintain the

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1 The Federalist, No. 9, 10.

2 Id. No. 41.

dictates of justice. Summary, nay, even arbitrary authority, must be granted, where the safety of a state cannot await the slow measures of ordinary legislation to protect it. That government is, therefore, most safe in its liberties, as well as in its domestic peace, whose numbers constitute a preventive guard against all internal, as well as external attacks.

§ 494. We now proceed to the next clause in the preamble, to "provide for the common defence." And many of the considerations already stated apply with still greater force under this head. One of the surest means of preserving peace is said to be, by being always prepared for war. But a still more sure means is the power to repel, with effect, every aggression. That power can scarcely be attained without a wide extent of population, and at least a moderate extent of territory. A country, which is large in its limits, even if thinly peopled, is not easily subdued. Its variety of soil and climate, its natural and artificial defences, nay, its very poverty and scantiness of supplies, make it difficult to gain, or to secure a permanent conquest. It is far easier to overrun, than to subdue it. Armies must be divided, distant posts must be maintained, and channels of supplies kept constantly open. But where the territory is not only large, but populous, permanent conquest can rarely occur, unless (which is not our case) there are very powerful neighbours on every side, having a common interest to assist each other, and to subjugate their enemy. It is far otherwise, where there are many rival and independent states, having no common union of government or interests. They are half subdued by their own dissensions, jealousies, and resentments before the conflict is begun. They are easily made to act a part in the destruction of each other, or

easily fall a prey for want of proper concert and energy of operations.

§ 495. Besides; -- The resources of a confederacy must be far greater than those of any single state belonging to it, both for peace and war. It can command a wider range of revenue, of military power, of naval armaments, and of productive industry. It is more independent in its employments, in its capacities, and in its influences. In the present state of the world, a few great powers possess the command of commerce, both on land and at sea. In war, they trample upon the rights of neutrals who are feeble; for their weakness furnishes an excuse both for servility and disdain. In peace, they control the pursuits of the rest of the world, and force their trade into every channel by the activity of their enterprise, their extensive navigation, and their flourishing manufactures. They little regard the complaints of those, who are subvided into petty states with varying interests; and use them only as instruments to annoy or check the enterprise of each other. Such states are not formidable in peace or in war. To secure their rights and maintain their independence they must become a confederated nation, and speak with the force of numbers, as well as the eloquence of truth.1 The navy or army, which could be maintained by any single state in the Union, would be scarcely formidable to any second rate power in Europe. It would be a grievous public burthen, and exhaust the whole resources of the state. But a navy or army for all the purposes of home defence, or protection upon the ocean, is within the compass of the resources of the general government, without any severe exaction. And

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1 The Federalist, No. 11.

with the growing strength of the Union must be at once more safe for us, and more formidable to foreign nations. The means, therefore, to provide for the common defence are ample; and they can only be rendered inert and inadequate by a division among the states, and a want of unity of operations.1

§ 496. We pass, in the next place, to the clause to "promote the general welfare." And it may be asked, as the state governments are formed for the same purpose by the people, why should this be set forth, as a peculiar or prominent object of the constitution of the United States? To such an inquiry two general answers may be given. The states, separately, would not possess the means. If they did possess the means, they would not possess the power to carry the appropriate measures into operation.

§ 497. First, in respect to means. It is obvious, that from the local position and size of several of the states, they must for ever possess but a moderate revenue, not more than what is indispensable for their own wants, and, in the strictest sense, for domestic improvements. In relation to others more favourably situated for commerce and navigation, the revenues from taxation may be larger; but the main reliance must be placed upon the taxation by way of imposts upon importations. Now, it is obvious, from the remarks already made, that no permanent revenue can be raised from this source, when the states are separated. The evasions of the laws, which will constantly take place from the rivalries, and various interests of the

neighbouring states; the facilities afforded by the numerous harbours, rivers, and bays, which indent and intersect our coasts; the strong

1 The Federalist, No. 24, 25.

interest of foreigners to promote smuggling; the want of uniformity in the duties laid by the different states; the means of intercourse along the internal territorial boundaries of the commercial states; these, and many other causes, would inevitably lead to a very feeble administration of any local revenue system, and would make its returns moderate and unsatisfactory. What could New-York do with a single sea-port, surrounded on each side by jealous maritime neighbours with numerous ports? What could Massachusetts, or Connecticut do with the intermediate territory of RhodeIsland, running into the heart of the states by water communications admirably adapted for the security of illicit trade? What could Maryland or Virginia do with the broad Chesapeake between them with its thousand landing places? What could Pennsylvania oppose to the keen resentments, or the facile policy of her weaker neighbour, Delaware? What could any single state on the Mississippi do to force a steady trade for itself with adequate protecting duties? In short, turn to whichever part of the continent we may, the difficulties of maintaining an adequate system of revenue would be insurmountable, and the expenses of collecting it enormous. After some few struggles for uniformity, and co-operation for mutual support, each state would sink back into listless indifference or gloomy despondency; and rely, principally, upon direct taxation for its ordinary supplies.1 The experience of the few years succeeding the peace of 1783 fully justifies the worst apprehensions on this head.

§ 498 On the other hand, a general government, clothed with suitable authority over all the states, could

1 The Federalist, No. 12.

easily guard the whole Atlantic coast, and make it the interest of all honourable merchants to assist in a regular and punctilious payment of duties. Vessels arriving at different ports of the Union would rarely choose to expose themselves to the perils of seizure, not in a single state only, but in every state, into which the goods might be successively imported. The dangers upon the coast, from the vigilant operations of the revenue officers and revenue vessels, would be great; and they would be much enhanced by the expenses of concealment after the goods were landed.1 And the fact has corresponded with the theory. Since the establishment of the national government, there has been comparatively little smuggling on our coasts; and the revenue from the duties upon importations has steadily increased with the development of the other resources of the country.

§ 499. And this leads us to remark, in the next place, that the establishment of a general government is not only beneficial, as a source of revenue, but as a means of economy in its collection, distribution, and expenditure. Instead of a large civil list for each state, which shall be competent of itself to discharge all the functions applicable to a sovereign nation, a comparatively small one for the whole nation will suffice to carry into effect its powers, and to receive and disburse its revenues. Besides the economy in the civil department, we have already seen, how much less actual expenditures will be necessary for the military and naval departments, for the security of all the states, than would be, if each were compelled to maintain at all points its independent sovereignty. No fortifications,

1 The Federalist, No. 12.

no commanding posts, no naval flotilla will be necessary to guard the states against each other; nor any corps of officers to protect the frontiers of each against invasion, or smuggling. The exterior boundary of the whole Union will be that alone, which will require to be protected at the national expense.1 Besides; there will be a uniformity of operations and arrangements upon all subjects of the common welfare under the guidance of a single head; instead of multifarious, and often conflicting systems by distinct states.

§ 500. But if the means were completely within the power of the several states, it is obvious, that the jurisdiction would be wanting to carry into effect any great or comprehensive plan for the welfare of the whole. The idea of a permanent and zealous co-operation of thirteen (and now of twenty-four) distinct governments in any scheme for the common welfare, is of itself a visionary notion. In the first place, laying aside all local jealousies and accidental jars, there is no plan for the benefit of the whole, which would not bear unequally upon some particular parts. Is it a regulation of commerce or mutual intercourse, which is

proposed? Who does not see, that the agricultural, the manufacturing, and the navigating states, may have a real or supposed difference of interest in its adoption. If a system of regulations, on the other hand, is prepared by a general government, the inequalities of one part may, and ordinarily will, under the guidance of wise councils, correct and meliorate those of another. The necessity of a sacrifice of one for the benefit of all may not, and probably will not, be felt at the moment by the state called upon to make it. But in a general govern-

1 The Federalist, No. 13,14.

ment, representing the interests of all, the sacrifice, though first opposed, will, in the end, be found adequately recompensed by other substantial good. Agriculture, commerce, manufactures, may, each in turn, be compelled to yield something of their peculiar benefits, and yet, on the whole, be still each a gainer by the general system. The very power of thus redressing the evils, felt by each in its intercourse with foreign nations, by prohibitory regulations, or countervailing duties, may secure permanent privileges of an incalculable value.1 And the fact has been, as theoretical reasoning would lead us to suppose. The navigation and commerce, the agriculture and manufactures of all the states, have received an advancement in every direction by the union, which has far exceeded the most sanguine expectation of its warmest friends.

§ 501. But the fact alone of an unlimited intercourse, without duty or restriction, between all the states, is of itself a blessing of almost inconceivable value. It makes it an object with each permanently to look to the interests of all, and to withdraw its operations from the narrow sphere of its own exclusive territory. Without entering here into the inquiry, how far the general government possesses the power to make, or aid the making of roads, canals, and other general improvements, which will properly arise in our future discussions, it is clear, that if there were no general government, the interest of each state to undertake, or to promote in its own legislation any such project, would be far less strong, than it now is; since there would be no certainty, as to the value or duration of such improvements, looking beyond the boundaries of the state.

1 The Federalist, No. 11.

The consciousness, that the union of the states is permanent, and will not be broken up by rivalries, or conflicts of policy, that caprice, or resentment, will not divert any state from its proper duties, as a member of the Union, will give a solid character to all improvements. Independent of the exercise of any authority by the general government for this purpose, it was justly foreseen, that roads would be every where shortened and kept in better order; accommodations for travellers would be multiplied and meliorated; an interior navigation on our eastern side would be opened throughout the whole extent of our coast; and, by canals and improvements in river navigation, a boundless field opened to enterprise and emigration, to commerce and products, through the interior states, to the farthest limits of our western territories.1

§ 502. Passing from these general considerations to those of a direct practical nature, let us see, how far certain measures, confessedly promotive of the general welfare, have been, or would be, affected by a disunion of the states. Take, for example, the post-office establishment, the benefits of which can scarcely be too strongly stated in respect to the public interests, or to private convenience. With what a wonderful facility it now communicates intelligence, and transmits orders and directions, and money and negotiable paper to every extremity of the Union. The government is enabled to give the most prompt notice of approaching dangers, of its commands, its wishes, its duties, its interests, its laws, and its policy, to the most distant functionaries with incredible speed. Compare this with the old course of private posts, and special expresses. Look

1 The Federalist, No. 14.

to the extensive advantages to trade, navigation, and commerce, to agriculture and manufactures, in the ready distribution of news, of knowledge of markets, and of transfers of funds, independent of the inestimable blessings of communication between distant friends, to relieve the heart from its oppressive anxieties. In our colonial state it took almost as long a period of time to convey a letter (independent of the insecurity and uncertainty of its transmission) from Philadelphia to Boston, as it now takes to pass from the

seat of government to the farthest limits of any of the states. Even under the confederation, from the want of efficient funds and an efficient government, the post moved on with a tardy indifference and delay, which made it almost useless. We now communicate with England, and the continents of Europe, within periods not essentially different from those, which were then consumed in passing from the centre to the eastern and southern limits of the Union. Suppose the national government were now dissolved, how difficult would it be to get the twenty-four states to agree upon any uniform system of operations, or proper apportionment of the postage to be paid on the transmission of the mail. Each state must act continually by a separate legislation; and the least change by any one would disturb the harmony of the whole system. It is not at all improbable, that before a single letter could reach NewOrleans from Eastport, it would have to pay a distinct postage in sixteen independent states, subject to no common control or appointment of officers. The very statement of such a case amounts to a positive prohibition upon any extensive internal intercourse by the mail, as the burthens and the insecurity of the establishment would render it intolerable. With what admi-

rable ease, and expedition, and noiseless uniformity of movement, is the whole now accomplished through the instrumentality of the national government!

§ 503. Let us take another example, drawn from the perils of navigation; and ask ourselves, how it would be possible, without an efficient national government, to provide adequately for the erection and support of light-houses, monuments, buoys, and other guards against shipwreck. Many of these are maintained at an expense wholly disproportionate to their advantage to the state, in which they are situate. Many of them never would be maintained, except for the provident forecast of a national government, intent on the good of the whole, and possessing powers adequate to secure it. The same considerations apply to all measures of internal improvement, either to navigation by removing obstructions in rivers and inlets, or by erecting fortifications for purposes of defence, and to guard our harbours against the inroads of enemies.

§ 504. Independent of these means of promoting the general welfare, we shall at once see, in our negotiations with foreign powers, the vast superiority of a nation combining numbers and resources over states of small extent, and divided by different interests. If we are to negotiate for commercial or other advantages, the national government has more authority to speak, as well as more power to influence, than can belong to a single state. It has more valuable privileges to give in exchange, and more means of making those privileges felt by prohibitions, or relaxations of its commercial legislation. Is money wanted; how much more easy and cheap to borrow-upon the faith of a nation competent to pay, than of a single state of fluctuating policy. Is confidence asked for the faithful fulfilment

of treaty stipulations; how much more strong the guaranty of the Union with suitable authorities, than any pledge of an individual state. Is a currency wanted at once fixed on a solid basis, and sustained by adequate sanctions to enlarge public or private credit; how much more decisive is the legislation of the Union, than of a single state with a view to extent, or uniformity of operations.

§ 505. Thus we see, that the national government, suitably organized, has more efficient means, and more extensive jurisdiction to promote the general welfare, than can belong to any single state of the confederacy. And there is much truth in the suggestion, that it will generally be directed by a more enlightened policy, a more liberal justice, and more comprehensive wisdom, in the application of its means and its powers to their appropriate end. Generally speaking, it will be better administered; because it will command higher talents, more extensive experience, more practical knowledge, and more various information of the wants of the whole community, than can belong to smaller societies.1 The wider the sphere of action, the less reason there is to presume, that narrow views, or local prejudices will prevail in the public councils. The very diversities of opinion in the different representatives of distant regions will have a tendency, not only to introduce mutual concession and conciliation, but to elevate the policy, and instruct the judgment of those, who are to direct the public measures.

§ 506. The last clause in the preamble is to "secure the blessings of liberty to ourselves and our posterity." And surely no object could be more worthy of the wisdom and ambition of the best men in any age. If there

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1 The Federalist, No. 27.

be any thing, which may justly challenge the admiration of all mankind, it is that sublime patriotism, which, looking beyond its own times? and its own fleeting pursuits, aims to secure the permanent

happiness of posterity by laying the broad foundations of government upon immovable principles of justice. Our affections, indeed, may naturally be presumed to outlive the brief limits of our own lives, and to repose with deep sensibility upon our own immediate descendants. But there is a noble disinterestedness in that forecast, which disregards present objects for the sake of all mankind, and erects structures to protect, support, and bless the most distant generations. He, who founds a hospital, a college, or even a more private and limited charity, is justly esteemed a benefactor of the human race. How much more do they deserve our reverence and praise, whose lives are devoted to the formation of institutions, which, when they and their children are mingled in the common dust, may continue to cherish the principles and the practice of liberty in perpetual freshness and vigour.

§ 507. The grand design of the state governments is, doubtless, to accomplish this important purpose; and there can be no doubt, that they are, when well administered, well adapted to the end. But the question is not so much, whether they conduce to the preservation of the blessings of liberty, as whether they of themselves furnish a complete and satisfactory security. If the remarks, which have been already offered, are founded in sound reasoning and human experience, they establish the position, that the state governments, per se, are incompetent and inadequate to furnish such guards and guaranties, as a free people have a right to require for the maintenance of their vital interests, and especially

of their liberty. The inquiry then naturally presents itself, whether the establishment of a national government will afford more effectual and adequate securities.

§ 508. The fact has been already adverted to, that when the constitution was before the people for adoption, it was generally represented by its opponents, that its obvious tendency to a consolidation of the powers of government would subvert the state sovereignties, and thus prove dangerous to the liberties of the people.1 This indeed was a topic dwelt on with peculiar emphasis; and it produced so general an alarm and terror, that it came very nigh accomplishing the rejection of the constitution.2 And yet the reasoning, by which it was supported, was so vague and unsatisfactory; and the reasoning, on the other side, was so cogent and just, that it seems difficult to conceive, how, at that time, or at any later time, (for it has often been resorted to for the same purpose,) the suggestion could have had any substantial influence upon the public opinion.

§ 509. Let us glance at a few considerations, (some of which have been already hinted at,) which are calculated to suppress all alarm upon this subject. In the first place, the government of the United States is one of limited powers, leaving all residuary general powers in the state governments, or in the people thereof. The jurisdiction of the general government is confined to a few enumerated objects, which concern the common welfare of all the states. The state governments have a full superintendence and control over the immense mass of local interests of their respective states, which con-

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1 Elliot's Debates, 278, 296, 297, 332, 333; 2 Elliot's Debates, 47, 96, 136; 3 Elliot's Debates, 243, 257, 291; The Federalist, No. 39, 45, 17, 31.

2 The Federalist, No. 17.

nect themselves with the feelings, the affections, the municipal institutions, and the internal arrangements of the whole population.1 They possess, too, the immediate administration of justice in all cases, civil and criminal, which concern the property, personal rights, and peaceful pursuits of their own citizens. They must of course possess a large share of influence; and being independent of each other, will have many opportunities to interpose checks, as well as to combine a common resistance, to any undue exercise of power by the general government, independent of direct force.2

§ 510. In the next place, the state governments are, by the very theory of the constitution, essential constituent parts of the general government. They can exist without the latter, but the latter cannot exist without them. Without the intervention of the state legislatures, the president of the United States cannot be elected at all; and the senate is exclusively and absolutely under the choice of the state legislatures. The representatives are chosen by the people of the states. So that the executive and legislative branches of the national government depend upon, and emanate from the states. Every where the state sovereignties are represented; and the national sovereignty, as such, has no representation.3 How is it possible, under such circumstances, that the national government can be dangerous to the liberties of the people, unless the states, and the people of the states, conspire together for their overthrow? If there should be such a conspiracy, is not this more justly to be deemed an act of the states through their own agents, and by their own choice, rather than a corrupt usurpation by the general government?

1 The Federalist, No. 14, 45.

2 Id. No. 45.

3 Id. No. 45.

§ 511. Besides; the perpetual organization of the state governments, in all their departments, executive, legislative, and judicial; their natural tendency to cooperation in cases of threatened danger to their common liberties; the perpetually recurring right of the elective franchise, at short intervals, must prevent the most formidable barriers against any deliberate usurpation, which does not arise from the hearty co-operation of the people of the states. And when such a general co-operation for usurpation shall exist, it is obvious, that neither the general, nor the state governments, can interpose any permanent protection. Each must submit to that public will, which created, and may destroy them.

§ 512. Another not unimportant consideration is, that the powers of the general government will be, and indeed must be, principally employed upon external objects, such as war, peace, negotiations with foreign powers, and foreign commerce. In its internal operations it can touch but few objects, except to introduce regulations beneficial to the commerce, intercourse, and other relations, between the states, and to lay taxes for the common good. The powers of the states, on the other hand, extend to all objects, which, in the ordinary course of affairs, concern the lives, and liberties, and property of the people, and the internal order, improvement, and prosperity of the state. The operations of the general government will be most extensive and important in times of war and danger; those of the state governments, in times of peace and security.1 Independent of all other considerations, the fact, that the states possess a concurrent power of taxation, and an

1 The Federalist, No. 45.

exclusive power to regulate the descents, devise, and distribution of estates, (a power the most formidable to despotism, and the most indispensable in its night exercise to republicanism,) will for ever give them an influence, which will be as commanding, as, with reference to the safety of the Un on, they could deliberately desire.1

§ 513. Indeed, the constant apprehension of some of the most sincere patriots, who by their wisdom have graced our country, has been of an opposite character. They have believed, that the states would, in the event, prove too formidable for the Union. That the tendency would be to anarchy in the members, and not to tyranny in the head.2 Whether their fears, in this respect, were not those of men, whose judgments were misled by extreme solicitude for the welfare of their country, or whether they but too well read the fate of our own in the history of other republics, time, the great expounder of such problems, can alone determine.3

1 The Federalist, No. 31.

2 Id. 17, 45, 46, 31.

3 Mr. Turgot appears to have been strongly impressed with the difficulty of maintaining a national government, under such circumstances. In his letter to Dr. Price, he says: "In the general union of the states, I do not observe a coalition, a fusion of all the parts to form one homogeneous body. It is only a jumble of communities too discordant, and which contain a constant tendency to separation, owing to the diversity in their laws, customs, and opinions, to the inequality of their present strength, but still more to the inequality of their advances to greater strength. It is only a copy of the Dutch republic, with this difference, that the Dutch republic had nothing to fear, as the American republic has, from the future possible increase of any one of the provinces. All this edifice has been hitherto supported upon the erroneous foundation of the most ancient and vulgar policy; upon the prejudice, that nations and states, as such, may have an interest distinct from the interest, which individuals have to be free, and defend their property against the attacks of robber and conquerors," &c. &c. Similar views seem to have

The reasoning on this subject, which has been with so much profoundness and ability advanced by the Federalist, will, in the mean time, deserve the attention of every considerate man in America.1

§ 514. Hitherto our experience has demonstrated the entire safety of the states, under the benign operations of the constitution. Each of the states has grown in power, in vigour of operation, in commanding influence, in wealth, revenue, population, commerce, agriculture, and general efficiency. No man will venture to affirm, that their power, relative to that of the Union, has been diminished, although our population has, in the intermediate period, passed from three to more than twelve millions. No man will pretend to say, that the affection for the state governments has been sensibly diminished by the operations of the general government. If the latter has become more deeply an object of regard and reverence, of attachment and pride, it is, because it is felt to be the parental guardian of our public and private rights, and the natural ally of all the state governments, in the administration of justice, and the promotion of the general prosperity. It is beloved, not for its power, but for its beneficence; not because it commands, but because it protects; not because it controls, but because it sustains the common interests, and the common liberties, and the common lights of the people.

§ 515. That there have been measures adopted by the general government, which have not met with universal approbation, must be admitted. But was not this

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occupied the mind of a distinguished American gentleman, who published a pamphlet in 1788, (edit. Worcester,) entitled, " Thoughs upon the Political Situation of the United States of America," &c. p. 37, &c. 1 The Federalist, No. 45, 46, 31.

difference of opinion to be expected? Does it not exist in relation to the acts of the state governments? Must it not exist in every government, formed and directed by human beings of different talents, characters, passions, virtues, motives, and intelligence? That some of the measures of the general government have been deemed usurpations by some of the states is also true. But it is equally true, that those measures were deemed constitutional by a majority of the states, and as such, received the most hearty concurrence of the state authorities. It is also true, that some measures, whose constitutionality has been doubted or denied by some states, have, at other times, upon re-examination, been approved of by the same states. Not a single measure has ever induced three quarters of the states to adopt any amendment to the constitution founded upon the notion of usurpation.1 Wherever an amendment has taken place, it has been to clear a real doubt, or obviate an inconvenience established by our experience. And this very power of amendment, at the command of the states themselves, forms the great balance-wheel of our system; and enables us silently and quietly to redress all irregularities, and to put down all practical oppressions. And what is not a little remarkable in the history of the government, is, that two measures, which stand confessedly upon the extreme limits of constitutional authority, and carry the doctrine of constructive power to the last verge, have been brought forward by those, who were the opponents of the constitution, or the known advocates for its most restricted construc-

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1 If there be any exception, it is the decision, as to the suability of the states. But even this deserves not the name of usurpation, for the case falls clearly within the words of the constitution.

tion. In each case, however, they received the decided support of a great majority of all the states of the Union; and the constitutionality of them is now universally acquiesced in, if not universally affirmed. We allude to the unlimited embargo, passed in 1807, and the purchase and admission of Louisiana into the Union, under the treaty with France in 1803.1 That any act has ever been done by the general government, which even a majority of the states in the Union have deemed a clear and gross usurpation, may be safely denied. On the other hand, it is certain, that many powers positively belonging to the general government, have never yet been put into full operation. So that the influence of state opinions, and state jealousies, and state policy, may be clearly traced throughout the operations of the general government, and especially in the exercise of the legislative powers. This furnishes no just ground of complaint or accusation. It is right, that it should be so. But it demonstrates, that the general government has many salutary checks, silently at work to control its movements; and, that experience coincides with theory in establishing, that it is calculated to secure " the blessings of liberty to ourselves and our posterity."

§ 516. If, upon a closer survey of all the powers given by the constitution, and all the guards upon their exercise, we shall perceive still stronger inducements

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1 4 Elliot's Debates, 257. -- President Jefferson himself, under whose administration both these measures were passed, which were, in the highest sense, his own measures, was deliberately of opinion, that an amendment of the constitution was necessary, to authorize the general government to admit Louisiana into the Union. Yet he ratified the very treaty, which secured this right; and confirmed the laws, which gave it effect. 4 Jefferson's Corresp. 1, 2, 3. -- A more particular consideration of these subjects will naturally arise in some future discussions.

to fortify this conclusion, and to increase our confidence in the constitution, may we not justly hope, that every honest American will concur in the dying expression of Father Paul, " Esto perpetua," may it be perpetual.

END OF VOL. I.

COMMENTARIES.
CHAPTER VII.
DISTRIBUTION OF POWERS.

§ 517. IN surveying the general structure of the constitution of the United States, we are naturally led to an examination of the fundamental principles, on which it is organized, for the purpose of carrying into effect the objects disclosed in the preamble. Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all governments are supposed to rest, viz. the executive, the legislative, and the judicial powers. The manner and extent, in which these powers are to be exercised, and the functionaries, in whom they are to be vested, constitute the great distinctions, which are known in the forms of government. In absolute governments the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confided to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic Aristocracy. If

they are exercised by the people at large in their original sovereign assemblies, the government is a pure and absolute Democracy. But it is more common to find these powers divided, and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third; and in these cases the government is properly deemed a mixed one; a mixed monarchy, if the executive power is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or republic, if it is delegated by election, and is not hereditary. In mixed monarchies and aristocracies some of the functionaries of the legislative and judicial powers are, or at least may be, hereditary. But in a representative republic all power emanates from the people, and is exercised by their choice, and never extends beyond the lives of the individuals, to whom it is entrusted. It may be entrusted for any shorter period; and then it returns to them again, to be again delegated by a new choice.

§ 518. In the convention, which framed the constitution of the United States, the first resolution adopted by that body was, that "a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."1 And from this fundamental proposition sprung the subsequent organization of the whole government of the United States. It is, then, our duty to examine and consider the grounds, on which this proposition rests, since it lies at the bottom of all our institutions, state, as well as national.

§ 519. In the establishment of a free government, the division of the three great powers of government,

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1 Journals of Convent, 82, 83, 129, 207, 215.

the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should for ever be kept separate and distinct. And accordingly we find it laid down with emphatic care in the bill of rights of several of the state constitutions. In the constitution of Massachusetts, for example, it is declared, that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and judicial powers, or either of them; to the end it may be a government of laws and not of men"1 Other declarations of a similar character are to be found in other state constitutions.2

§ 520. Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object,

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1 Bill of Rights, article 30.

2 The Federalist. No. 47. -- It has been remarked by Mr. J. Adams, that the practicability of the duration of a republic, in which there is a governor, a senate, and a house of representatives doubted by Tacitus, though he admits the theory to be laudable. Cunotas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his et constituta reipublicrae forma laudari facilius quam inveniri, vel si evenit, haud diuturna esse potest. Tacit. Ann. Iib. 14. Cicero asserts, "Statuo esse optime constitutam rempubicam, quae ex tribus generibus illis, regali, optimo, et populari, modice confusa" Cic. Frag. de Repub.* The British government perhaps answers more nearly to the form of government proposed by these writers, than what we in modern times should esteem strictly a republic.

*** 1 Adams's Amer. Constitutions, Preface, 19.**

and extent of the maxim, and of the reasoning, by which it is supported. The remarks of Montesquieu on this subject will be found in a professed commentary upon the constitution of England.1 " When," says he, " the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again; there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of every thing, were the same man, or the same body, whether of the nobles, or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."2 **§ 521.** The same reasoning is adopted by Mr. Justice Blackstone, in his Commentaries.3 "In all tyrannical governments," says he, "the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together,

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1 Montesquieu, B. 11, ch. 6.

2 Mr. Turgot uses the following strong language: "The tyranny of the people is the most cruel and intolerable, because it leaves the fewest resources to the oppressed. A despot is restrained by a sense of his own interest. He is checked by remorse or public opinion. But the multitude never calculate; the multitude are never checked by remorse, and will even ascribe to themselves the highest honour, when they deserve only disgrace." Letter to Dr. Price.

3 1 Black. Comm. 146.

there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power, which he, as legislator, thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject." Again; "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, by, but not removable at, the pleasure of the crown, consists one main preservative of the public liberty; which cannot long subsist in any state, unless the administration of commonjustice be in some degree separated from the legislative, and also the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."1

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1 1 Black. Comm. 269. See l Wilson's Law Lectures, 394, 399, 400, 407, 408, 409; Woodeson's Elem. of Jurisp. 53, 56. -- The remarks of Dr. Paley, on the same subject, are full of his usual practical sense. "The first maxim," says he, "of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices

are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends. Whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, they must be applied by the other, let them affect whom they will.

"For the sake of illustration let it be supposed, in this country, either

§ 522. And the Federalist has, with equal point and brevity, remarked, that " the accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny."1

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that, parliaments being laid aside, the courts of Westminster Hall made their own laws; or, that the two hoses of parliament, with the king at their head, tried and decided causes at their bar. It is evident, in the first place, that the decisions of such a judicature would be so many laws; and, in the second place, that, when the parties and the interests to be affected by the laws were known, the inclinations of the law-makers would inevitably attach on one side or the other; and that where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without any constant laws, that is, without any known pre-established rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and iniquity of the motives, to which they owed their origin. These dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals, upon whom its acts will operate; it has no cases or parties before it; no private designs to serve: consequently, its resolutions will be suggested by the consideration of universal effects and tendencies, which always produce impartial, and commonly advantageous regulations. When laws are made, courts or justice, whatever be the disposition of the judges, must abide by them; for the legislative being necessarily the supreme power of the state, the judicial and every other power is accountable to that: and it cannot be doubted, that the persons, who possess the sovereign authority of government, will be tenacious of the laws, which they themselves prescribe, and sufficiently jealous of the assumption of dispensing and legislative power by any others." Paley's Moral Philosophy, B. 6, ch. 8.

1 The Federalist, No. 47; Id. No. 22. See also Gov. Randolph's Letter, 4 Elliot's Deb. 133; Woodeson's Elem. of Jurisp. 53, 56. -- Mr. Jefferson, in his Notes on Virginia,* has expressed the same truth with peculiar fervour and force. Speaking of the constitution of government of his own state, he Says, " all the powers of government, legislative executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of a despotic

*** Jefferson's Notes, p. 195.**

§ 523. The general reasoning, by which the maxim is supported, independently of the just weight of the authority in its support, seems entirely satisfactory. What is of far more value than any mere reasoning, experience has demonstrated it to be founded in a just view of the nature of government, and the safety and liberty of the people. And it is no small commendation of the constitution of the United States, that instead of adopting a new theory, it has placed this practical truth, as the basis of its organization. It has placed the legislative, executive, and judicial powers in different hands. It has, as we shall presently see, made their term of office and their organization different; and, for objects of permanent and paramount importance, has given to the judicial department a tenure of office during good be

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government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those, who doubt it, turn their eyes on the republic of Venice. An elective despotism is not the government we fought for; but one, which should not only be founded on free principles, but in which the powers of, government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others " Yet Virginia lived voluntarily under this constitution more than fifty years;* and, not withstanding this solemn warning, by her own favourite statesman, in the recent revision of her old constitution and the formation

of a new one, she has not in this respect changed the powers of the government. The legislature still remains with all its great powers.

No person, however, has examined this whole subject more profoundly, and with more illustrations from history and political philosophy, than Mr. John Adams, in his celebrated Defence of the American Constitutions. It deserves a thorough perusal by every statesman.

Milton was an open advocate for concentrating all powers, legislative and executive, in one body; and his opinions, as well as those of some other men of a philosophical cast, are sufficiently wild and extravagant to put us upon our guard against too much reliance on mere authority.#

*** See 2 Pitkin's Hist. 293, 299, 300.**

 # See 1 Adams's Def. of Amer. Const. 365 to 371.

haviour; while it has limited each of the others to a term of years.

§ 524. But when we speak of a separation of the three great departments of government, and maintain, that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist.1 It was obviously the view taken of the subject by Montesquieu and Blackstone in their Commentaries; for they were each speaking with approbation of a constitution of government, which embraced this division of powers in a general view; but which, at the same time, established an occasional mixture of each with the others, and a mutual dependency of each upon the others. The slightest examination of the British constitution will at once convince us, that the legislative, executive, and judiciary departments are by no means totally distinct, and separate from each other. The executive magistrate forms an integral part of the legislative department; for parliament consists of the king, lords, and commons; and no law can be passed except by the assent of the king. Indeed, he possesses certain prerogatives, such as, for instance, that of making foreign treaties, by which he can, to a limited extent,

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1 The Federalist, No. 42.

impart to them a legislative force and operation. He also possesses the sole appointing power to the judicial department, though the judges, when once appointed, are not subject to his will, or power of removal. The house of lords also constitutes, not only a vital and independent branch of the legislature, but is also a great constitutional council of the executive magistrate, and is, in the last resort, the highest appellate judicial tribunal. Again; the other branch of the legislature, the commons, possess, in some sort, a portion of the executive and judicial power, in exercising the power of accusation by impeachment; and in this case, as also in the trial of peers, the house of lords sits as a grand court of trials for public offences. The powers of the judiciary department are, indeed, more narrowly confined to their own proper sphere. Yet still the judges occasionally assist in the deliberations of the house of lords by giving their opinions upon matters of law referred to them for advice; and thus they may, in some sort, be deemed assessors to the lords in their legislative, as well as judicial capacity.1

§ 525. Mr. Justice Blackstone has illustrated the advantages of an occasional mixture of the legislative and executive functions in the English constitution in a striking manner. "It is highly necessary," says he, " for preserving the balance of the constitution, that the executive power should be a branch, though not the whole of 'the legislative. The total union of them, we have seen, would be productive of tyranny. The total disjunction of them, for the present, would, in the end, produce the same effects by causing that union, against which it seems to provide. The legislative would soon

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1 The Federalist, No. 47; De Lolme on the English Constitution, B. 2, ch. 3.

become tyrannical by making continual encroachments, and gradually assuming to itself the rights of the executive power, &c. To hinder, therefore, any such encroachments, the king is, himself a part of the parliament; and, as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of rejecting, rather than resolving; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong; but merely of preventing wrong from being done. The

crown cannot begin of itself any alterations in the present established law; but it may approve, or disapprove of the alterations suggested, and consented to by the two houses."1

§ 526. Notwithstanding the memorable terms, in which this maxim of a division of powers is incorporated into the bill of rights of many of our state constitutions, the same mixture will be found provided for, and indeed required in the same solemn instruments of government. Thus, the governor of Massachusetts exercises a part of the legislative power, possessing a qualified negative upon all laws. The house of representatives is a grand inquest for accusation; and the senate is a high court for the trial of impeachments. The governor, with the advice of the executive council, possesses the power of appointment in general; but the appointment of certain officers still belongs to the senate and house of representatives. On the other hand, although the judicial department is distinct from the

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1 1 Black. Comm. 154.

executive and legislative in many respects, either branch may require the advice of the judges, upon solemn questions of law referred to them. The same general division, with the same occasional mixture, may be found in the constitutions of other states. And in some of them the deviations from the strict theory are quite remarkable. Thus, until the late revision, the constitution of New-York constituted the governor, the chancellor, and the judges of the Supreme Court, or any two of them with the governor, a council of revision, which possessed a qualified negative upon all laws passed by the senate and house of representatives. And, now, the chancellor and the judges of the Supreme Court of that state constitute, with the senate, a court of impeachment, and for the correction of errors. In New-Jersey the governor is appointed by the legislature, and is the chancellor and ordinary, or surrogate, a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the branches of the legislature. In Virginia the great mass of the appointing power is vested in the legislature. Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.1

§ 627. It would not, perhaps, be thought important to have dwelt on this subject, if originally it had not been made a special objection to the constitution of the United States, that though it professed to be founded upon a division of the legislative, executive, and judicial departments, yet it was really chargeable with a departure from the doctrine by accumulating in some

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1 The Federalist. No. 47, 48.

instances the different powers in the same hands, and by a mixture of them in others; so, that it, in effect, subverted the maxim, and could not but be dangerous to the public liberty.1 The fact must be admitted, that such an occasional accumulation and mixture exists; but the conclusion, that the system is therefore dangerous to the public liberty, is wholly inadmissible. If the objection were well founded, it would apply with equal, and in some cases with far greater force to most of our state constitutions; and thus the people would be proved their own worst enemies, by embodying in their own constitutions the means of overthrowing their liberties.

§ 528. The authors of the Federalist thought this subject a matter of vast importance, and accordingly bestowed upon it a most elaborate commentary. At the present time the objection may not be felt, as possessing much practical force, since experience has demonstrated the fallacy of the suggestions, on which it was founded. But, as the objection may be revived; and as a perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government, it may not be without use to recur to some of the reasoning, by which those illustrious statesmen, who formed the constitution, while they admitted the general truth of the maxim, endeavoured to prove, that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties. The proposition, which they undertook to maintain, was this, that "unless these departments be so far connected and blended, as to give to each a constitutional control over

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1 1 Amer. Museum, 536, 549, 550; Id. 553; 3 Amer. Museum, 78, 79.

the others, the degree of separation, which the maxim requires, as essential to a free government, can never in practice be duly maintained."1

§ 529. It is proper to premise, that it is agreed on all sides, that the powers belonging to one department ought not to be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of

their respective powers.2 Power, however, is of an encroaching nature, and it ought to be effectually restrained from passing the limits assigned to it. Having separated the three great departments by a broad line from each other, the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others. Is it sufficient to declare on parchment in the constitution, that each shall remain, and neither shall usurp the functions of the other? No one, well read in history in general, or even in our own history during the period of the existence of our state constitutions, will place much reliance on such declarations. In the first place, men may and will differ, as to the nature and extent of the prohibition. Their wishes and their interests, the prevalence of faction, an apparent necessity, or a predominant popularity, will give a strong bias to their judgments, and easily satisfy them with reasoning, which has but a plausible colouring. And it has been accordingly round, that the theory has bent under the occasional pressure, as well as under the occasional elasticity of public opinion, and as well in the states, as in the general government under the confed-

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1 The Federalist, No. 48.

2 The Federalist, No. 48

eration. Usurpations of power have been notoriously assumed by particular departments in each; and it has often happened, that these very usurpations have received popular favour and indulgence.1

§ 530. In the next place, in order to preserve in full vigour the constitutional barrier between each department, when they are entirely separated, it is obviously indispensable, that each should possess equally, and in the same degree, the means of self-protection. Now, in point of theory, this would be almost impracticable, if not impossible; and in point of fact, it is well known, that the means of self-protection in the different departments are immeasurably disproportionate. The judiciary is incomparably the weakest of either; and must for ever, in a considerable measure, be subjected to the legislative power. And the latter has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources, by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation, and the property of the people. It can grant, or withhold supplies; it can levy, or withdraw taxes; it can unnerve the power of the sword by striking down the arm, which wields it.

§ 531. De Lolme has said, with great emphasis, "It is, without doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can duly do by successive steps, (I mean subvert the laws,) and through a longer, or a shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws, so its bare

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1 The Federalist, No. 48. See also The Federalist, No. 38, 42.

will can also annihilate them; and if I may be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But, here, we must observe a difference between the legislative and executive powers. The latter may be confined, and even is more easily so, when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be divided."1

§ 532. The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked with equal force and sagacity, that the legislative power is every where extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and the dread of the royal prerogative, which was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined, as it was, with an hereditary authority, and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny, as is threatened by executive usurpations. The representatives of the people will watch with jealousy every encroachment of the executive magistrate, for it trenches upon their own authority. But, who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves, as by

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1 De Lolme, B. 2, ch. 3.

others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed

influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions, which actuate the multitude; yet not go numerous, as to be incapable of pursuing the objects of its passions by means, which reason prescribes; it is easy to see, that the tendency to the usurpation of power is, if not constant, at least probable; and that it is against the enterprising ambition of this department, that the people may well indulge all their jealousy, and exhaust all their precautions.1

§ 533. There are many reasons, which may be assigned for the engrossing influence of the legislative department. In the first place, its constitutional powers are more extensive, and less capable of being brought within precise limits, than those of either of the other departments. The bounds of the executive authority are easily marked out, and defined. It reaches few objects, and those are known; It cannot transcend them, without being brought in contact with the other departments. Laws may check and restrain, and bound its exercise. The same remarks apply with still greater force to the judiciary; The jurisdiction is, or may be, bounded to a few objects or persons; or, however general and unlimited, its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act upon. It can decide only

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1 The Federalist, No. 48, 49.

upon rights and cases, as they are brought by others before it. It can do nothing for itself. It must do every thing, for others. It must obey the laws; and if it corruptly administers them, it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is unlimited. It is for ever varying its means and its ends. It governs the institutions, and laws, and public policy of the country. It regulates all its vast interests. It disposes of all its property. Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devises of all property held by individuals. It controls the sources and the resources of wealth. It changes at its will the whole fabric of the laws. It moulds at its pleasure almost all the institutions, which give strength, and comfort, and dignity to society.

§ 534. In the next place, it is the direct, visible representative of the will of the people in all the changes of times and circumstances. It has the pride, as well as the power of numbers.1 It is easily moved and steadily moved by the strong impulses of popular reeling, and popular odium. It obeys, without reluctance, the wishes and the will of the majority for the time being. The path to public favour lies open by such obedience; and it finds not only support, but impunity, in whatever measures the majority advises, even though they transcend the constitutional limits. It has no motive, therefore, to be jealous, or scrupulous in its own use of power; and it finds its ambition stimulated,

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1 "Numerous assemblies," says Mr. Turgot, "are swayed in their debates by the smallest motives."

and its arm strengthened by the countenance, and the courage of numbers. These views are not alone those of men, who look with apprehension upon the fate of republics; but they are also freely admitted by some of the strongest advocates for popular rights, and the permanency of republican institutions.1 Our domestic history furnishes abundant examples to verify these suggestions.2

§ 535. If, then, the legislative power possesses a decided preponderance of influence over either or both of the others; and if, in its own separate structure, it furnishes no effectual security for the others, or for its own abstinence from usurpations, it will not be sufficient to rely upon a mere constitutional division of the powers to insure our liberties.3

§ 536. What remedy, then, can be proposed, adequate for the exigency? It has been suggested, that an appeal to the people, at stated times, might redress any inconveniences of this sort. But, if these be frequent, it will have a tendency to lessen that respect for, and confidence in the stability of our constitutions, which is so essential to their salutary influence. If it be true, that all governments rest on opinion, it is no less true, that the strength of opinion in each individual, and its practical influence on his conduct, depend much upon the number, which he supposes to have entertained the same opinion.4 There is, too, no small danger in disturbing the public tranquillity by a fre-

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1 See Mr. Jefferson's very striking remarks in his Notes on Virginia, p. 195, 196, 197, 248. In December, 1776, and again, June, 1781, the legislature of Virginia, under a great pressure, were near passing an act appointing a dictator. Ib. p. 207.

2 The Federalist, No. 48, 49.

3 See Jefferson's Notes on Virginia, 195, 196, 197.

4 The Federalist, No. 48.

quent recurrence to questions respecting the fundamental principles of government.1 Whoever has been present in any assembly, convened for such a purpose, must have perceived the great diversities of opinion upon the most vital questions; and the extreme difficulty in bringing a majority to concur in the longsighted wisdom of the soundest provisions. Temporary feelings and excitements, popular prejudices, an ardent love of theory, an enthusiastic temperament, inexperience, and ignorance, as well as preconceived opinions, operate wonderfully to blind the judgment, and seduce the understanding. It will probably be found, in the history of most conventions of this sort, that the best and soundest parts of the constitution, those, which give it permanent value, as well as safe and steady operation, are precisely those, which have enjoyed the least of the public favour at the moment, or were least estimated by the framers. A lucky hit, or a strong figure, has not unfrequently overturned the best reasoned plan. Thus, Dr. Franklin's remark, that a legislature, with two branches, was a wagon, drawn by a horse before, and a horse behind, in opposite directions, is understood to have been decisive in inducing Pennsylvania, in her original constitution, to invest all the legislative power in a single body.2 In her present constitution, that error has been fortunately corrected. It is not believed, that the clause in the constitution of Vermont providing for a septennial council of censors to inquire into the infractions of her constitution during the last septenary, and to recommend suitable measures to the legislature, and to call,

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1 The Federalist, No. 48, 50.

2 1 Adams's American Constitutions, 105, 106.

if they see fit, a convention to amend the constitution, has been of any practical advantage in that state in securing it against legislative or other usurpations, beyond the security possessed by other states, having no such provision.1

§ 537. On the other hand, if an appeal to the people, or a convention, is to be called only at great distances of time, it will afford no redress for the most pressing mischiefs. And if the measures, which are supposed to be infractions of the constitution, enjoy popular favour, or combine extensive private interests, or hare taken root in the habits of the government, it is obvious, that the chances of any effectual redress will be essentially diminished.2

§ 538. But a more conclusive objection is, that the decisions upon all such appeals would not answer the purpose of maintaining, or restoring the constitutional equilibrium of the government. The remarks of the Federalist, on this subject, are so striking, that they scarcely admit of abridgment without impairing their force: "We have seen, that the tendency of republican governments is to aggrandizement of the legislature at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part

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1 The history of the former constitution of Pennsylvania, and the report of its council of censors, shows the little value of provisions of this sort in a strong light. The Federalist, No. 48, 50.

2 The Federalist, No. 50.

only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their professions. The former are generally objects of jealousy; and their administration is always liable to be discoloured and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connexions of blood, of friendship, and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal weight with the people, and that they are more immediately the confidential guardians of their rights and liberties. With these advantages it can hardly be supposed, that the adverse party would have an equal chance of a favourable issue. But the legislative party would not only be able to plead their case most successfully with the people; they would probably be constituted themselves the judges. The same influence, which had gained them an election into the legislature, would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention, in short, would be composed chiefly of men, who had been, or who actually were, or who expected to be, members of the department, whose conduct was arraigned. They would consequently be parties to the very question to be decided by them."1

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1 The Federalist, No. 48. -- The truth of this reasoning, as well as

§ 539. If, then, occasional or periodical appeals to the people would not afford an effectual barrier against the inroads of the legislature upon the other departments of the government, it is manifest, that resort must be had to some contrivances in the interior structure of the government itself, which shall exert a constant check, and preserve the mutual relations of each with the other. Upon a thorough examination of the subject, it will be found, that this can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for. Each department should have a will of its own, and the members of each should have but a limited agency in the acts and appointments of the members of the others. Each should have its own independence secured beyond the power of being taken away by either, or both of the others. But at the same time the relations of each to the other should be so strong, that there should be a mutual interest to sustain. and protect each other. There should not only be constitutional means, but personal motives, to resist encroachments of one, or either of the others. Thus, ambition would be made to counteract ambition; the desire of power to check power; and the pressure of interest to balance an opposing interest.1

§ 540. There seems no adequate method of producing this result but by a partial participation of each

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the utter inefficacy of any such periodical conventions, is abundantly established by the history of Pennsylvania under her former constitution.*

1 The Federalist, No. 48, 50, 51.

*** The Federalist, No. 50. See 2 Pitkin;s Hist. 305, 306.**

in the powers of the other; and by introducing into every operation of the government in all its branches, a system of checks and balances, on which the safety of free institutions has ever been found essentially to depend. Thus, for instance, a guard against rashness and violence in legislation has often been found, by distributing the power among different branches, each having a negative check upon the other. A guard against the inroads of the legislative power upon the executive has been in like manner applied, by giving the latter a qualified negative upon the former; and a guard against executive influence and patronage, or unlawful exercise of authority, by requiring the concurrence of a select council, or a branch of the legislature in appointments to office, and in the discharge of other high functions, as well as by placing the command of the revenue in other hands.

§ 541. The usual guard, applied for the security of the judicial department, has been in the tenure of office of the judges, who commonly are to hold office during good behaviour. But this is obviously an inadequate provision, while the legislature is entrusted with a complete power over the salaries of the judges, and over the jurisdiction of the courts, so that they can alter, or diminish them at pleasure. Indeed, the judiciary is naturally, and almost necessarily (as has been already said) the weakest department.1 It can have no means of influence by patronage. Its powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither lay taxes, nor appropriate money, nor command armies, or appoint to offices. It is never brought into contact

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1 Montesq. Spirit of Laws, B. 11, Ch. 6.

with the people by the constant appeals and solicitations, and private intercourse, which belong to all the other departments of government. It is seen only in controversies, or in trials and punishments. Its rigid justice and impartiality give it no claims to favour, however they may to respect. It stands solitary and unsupported, except by that portion of public opinion, which is interested only in the strict administration of justice. It can rarely secure the sympathy, or zealous support, either of the executive, or the legislature. If they are not (as is not unfrequently the case) jealous of its prerogatives, the constant necessity of scrutinizing the acts of each, upon the application of any private person, and the painful duty of pronouncing judgment, that these acts are a departure from the law or constitution, can hare no tendency to conciliate kindness, or nourish influence. It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied; and every attempt to introduce them has been resisted with a pertinacity, which demonstrates, how slow popular leaders are to introduce checks upon their own power; and how slow the people are to believe, that the judiciary is the real bulwark of their liberties. In some of the states the judicial department is partially combined with some branches of the executive and legislative departments; and it is believed, that in those cases, it has been found no unimportant auxiliary in preserving a wholesome vigour in the laws, as well as a wholesome administration of public justice.

§ 542. How far the constitution of the United States, in the actual separation of these departments, and the

occasional mixtures of some of the powers of each, has accomplished the objects of the great maxim, which we have been considering, will appear more fully, when a survey is taken of the particular powers confided to each department. But the true and only test must, after all, be experience, which corrects at once the errors of theory, and fortifies and illustrates the eternal judgments of nature.

§ 543. It is not a little singular, however, (as has been already stated,) that one of the principal objections urged against the constitution at the time of its adoption was this occasional mixture of powers,1 upon which, if the preceding reasoning (drawn, as must be seen, from the ablest commentators) be well founded, it must depend for life and practical influence. It was said, that the several departments of power were distributed, and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of the other parts. The objection, as it presents itself in details, will be more accurately examined hereafter. But it may here be said, that the experience of more than forty years has demonstrated the entire safety of this distribution, at least in the quarter, where the objection was supposed to apply with most force. If any department of the government has an undue influence, or absorbing power, it certainly has not been either the executive or judiciary.

1 The Federalist, No. 47; Id. 38.

CHAPTER VIII.
THE LEGISLATURE.

§ 544. THE first article of the constitution contains the structure, organization, and powers, of the legislature of the Union. Each section of that article, and indeed, of every other article, will require a careful analysis, and distinct examination. It is proposed, therefore, to bring each separately under review, in the present commentaries, and to unfold the reasons, on which each is founded, the objections, which have been urged against it, and the interpretation, so far as it can satisfactorily be ascertained, of the terms, in which each is expressed.

§ 545. The first section, of the first article is in the following words: "All legislative powers herein granted "shall be vested in a congress of the United States, which "shall consist of a senate and house of representatives."

§ 546. This section involves, as a fundamental rule, the exercise of the legislative power by two distinct and independent branches. Under the confederation, the whole legislative power of the Union was vested in a single branch. Limited as was that power, the concentration of it in a single body was deemed a prominent defect of the confederation. But if a single assembly could properly be deemeda fit receptacle of the slender and fettered authorities, confided to the federal government by that instrument, it could scarcely be consistent with the principles of a good government to entrust it with the more enlarged and vigorous powers delegated in the constitution.1

1 The Federalist, No. 22.

§ 547. The utility of a subdivision of the legislative power into different branches, having a negative upon each other, is, perhaps, at the present time admitted by most persons of sound reflection.1 But it has not always found general approbation; and is, even now, sometimes disputed by men of speculative ingenuity, and recluse habits. It has been justly observed, that there is scarcely in the whole science of politics a more important maxim, and one, which bears with greater influence upon the practical operations of government. It has been already stated, that Pennsylvania, in her first constitution, adopted the scheme of a single body, as the depositary of the legislative power, under the influence, as is understood, of a mind of a very high philosophical character.2 Georgia, also, is said in her first constitution, (since changed,) to have confided the whole legislative power to a single body.3 Vermont adopted the same course, giving, however, to the executive council a power of revision; and of proposing amendments, to which she yet adheres.4 We are also told by a distinguished statesman of great accuracy and learning, that at the first formation of our state constitutions, it was made a question of transcendant importance, and divided the opinions of our most eminent men. Legislation, being merely the expression of the will of the community, was thought to be an operation so simple in its nature, that inexperienced reason could not readily perceive the necessity of committing it to

1 Jefferson's Notes on Virginia, 194; 1 Kent's Comm. 208; DeLolme on the Constitution of England, B. 2, ch. 3; 3 Amer. Museum, 62, 66, Gov. Randolph's Letter.

2 1 Adams's Defence of American Constitution, 105, 106; 2 Pitk. Hist. 294, 305, 316.

3 Kent's Comm. 208; 2 Pitk. Hist. 315.

4 2 Pitk. Hist. 314, 316; Const. of Vermont, 1793, ch. 2, § 2, 16.

two bodies of men, each having a decisive check upon the action of the other. All the arguments derived from the analogy between the movements of political bodies, and the operations of physical nature; all the impulses of political parsimony; all the prejudices against a second co-ordinate legislative assembly stimulated by the exemplification of it in the British parliament, were against a division of the legislative power.1

§ 548. It is also certain, that the notion, that the legislative power ought to be confided to a single body, has been, at various times, adopted by men eminent for their talents and virtues. Milton, Turgot, Franklin, are but a few among, those, who have professedly entertained, and discussed the question.2 Sir James Mackintosh, in a work of a controversial character, written with the zeal and eloquence of youth, advocated the doctrine of a single legislative body.3 Perhaps his maturer life may have changed this early opinion. At all events, he can, in our day, count few followers. Against his opinion, thus uttered, there is the sad example of France itself, whose first constitution, in 1791, was formed on this basis, and whose proceedings the genius of this great man was employed to vindicate. She stands a monument of the folly and mischiefs of the scheme; and by her subsequent adoption of a division of the legislative power, she has secured to herself (as it is hoped) the permanent blessings of liberty.4 Against all visionary reasoning of this sort, Mr. Chancellor Kent

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1 President J. Q Adams's Oration, 4th July, 1831. See also Adams's Defence of American Constitution, per tot; 1 Kent's Comm. 208, 209, 210; 2 Pitk. Hist. 233, 305; Paley's Moral Phil. B. 6, ch. 7.

2 1 Adams's Defence American Constitution, 3; Id. 105; Id. 366; 2 Pitk. Hist. 233.

3 Mackintosh on the French Revolution, (1792) 4 edit. p. 266 to 273.

4 1 Kent's Comm. 209, 210.

has, in a few pages of pregnant sense and brevity, condensed a decisive argument.1 There is danger, however, that it may hereafter be revived; and indeed it is occasionally hinted by gifted minds, as a problem yet worthy of a fuller trial.2

§ 549. It may not, therefore, be uninstructive to review some of the principal arguments, by which this division is vindicated. The first and most important ground is, that it forms a great check upon undue, hasty, and oppressive legislation. Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous. The habit of acting together produces a strong tendency to what, for want of a better word, may be called the corporation spirit, or what is so happily expressed in a foreign phrase, I'esprit du corps. Certain popular leaders often acquire an extraordinary ascendency over the body, by their talents, their eloquence, their intrigues, or their cunning. Measures are often introduced in a hurry, and debated with little care, and examined with less caution. The very restlessness of many minds produces an utter impossibility of debating with much deliberation, when a measure has a plausible aspect, and enjoys a momentary favour. Nor is it infrequent, especially in cases of this sort, to overlook well-founded objections to a measure, not only because the advocates of it have little desire to bring them in review, but because the opponents are often seduced into a credulous silence. A legislative body is not ordinarily apt to mistrust its own powers, and far

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1 1 Kent's Comm. 208 to 210.

2 Mr. Tucker, the learned author of the Commentaries on Blackstone, seems to hold the doctrine, that a division of the legislative power is not useful or important. See Tuck. Black. Comm. App. 226, 227.

less the temperate exercise of those powers. As it prescribes its own rules for its own deliberations, it easily relaxes them, whenever any pressure is made for an immediate decision. If it feels no check 'out its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society.1

§ 550. But it is not merely inconsiderate and rash legislation, which is to be guarded against, in the ordinary course of things. There is a strong, propensity in public bodies to accumulate power in their own hands, to widen the extent of their own influence, and to absorb within their own circle the means, and the motives of patronage. If the whole legislative power is vested in a single body, there can be, practically, no restraint upon the fullest exercise of that power; and of any usurpation, which it may seek to excuse or justify, either from necessity or a superior regard to the public good. It has been often said, that necessity is the plea of tyrants; but it is equally true, that it is the plea of all public bodies invested with power, where no check exists upon its exercise.2 Mr. Hume has remarked with

1 1 Kent's Comm. 208, 209; 3 Amer. Museum, 66.

2 The facility, with which even great men satisfy themselves with exceeding their constitutional powers, was never better exemplified, than by Mr. Jefferson's own practice and example, as stated in his own correspondence. In 1802, he entered into a treaty, by which Louisiana was to become a part of the Union, although (as we have seen) in his own opinion, it was unconstitutional.* And, in 1810, he contended for the right of the executive to purchase Florida, if, in his own opinion, the opportunity would otherwise be lost, notwithstanding it might involve a transgression of the law.# Such are the examples given of a state necessity, which is to supersede the constitution and laws. Such are the principles, which he contended, justified him in an arrest of persons not sanctioned by law.+

*** 4 Jefferson's Corresp. 1, 2, 3, 4 .Id. 149, 150 .Id. 151.**

great sagacity, that men are generally more honest in their private, than in their public capacity; and will go greater lengths to serve a party, than when their own private interest is alone concerned. Honour is a great check upon mankind. But where a considerable body of men act together, this check is in a great measure removed, since a man is sure to be approved of by his own party, for what promotes the common interest; and he soon learns to despise the clamours of adversaries.1 This is by no means an opinion peculiar to Mr. Hume. It will be found lying at the foundation of the political reasonings of many of the greatest men in all ages, as the result of a close survey of the passions, and infirmaties, of the history, and experience of mankind.2 With a, view, therefore, to preserve the rights and liberties of the people against unjust encroachments, and to secure the equal benefits of a free constitution, it is of vital importance to interpose some check against the undue exercise of the legislative power, which in every government is the predominating, and almost irresistible power?3

§ 551. This subject is put in a very strong light by an eminent writer,4 whose mode of reasoning can be

1 1 Hume's Essays, Essay 6; Id. Essay 16. -- Mr. Jefferson has said, that " the functionaries of public power rarely strengthen in their dispositions to abridge it." 4 Jefferson's Corresp. 277.

2 See 1 Adams's Defence of American Constitution, p. 121, Letter 26, &c.; Id. Letter, 24; Id. Letter 55; 1 Hume's Essays, Essay 16; 1 Wilson's Law Lect. 394 to 397; 3 Adams's Defence of American Constitution, Letter 6, p. 209, &c.

3 Mr. Hume's thoughts are often striking and convincing; but his mode of a perfect commonwealth * contains some of the most extravagant vagaries of the human mind, equalled only by Locke's Constitution for Carolina. These examples show the danger of relying implicitly upon the mere speculative opinions of the wisest men.

4 Mr. John Adams.

*** 1 Hume's Essays, Essay 16.**

best conveyed in his own words. "If," says he, "we should extend our candour so far, as to own, that the majority of mankind are generally under the dominion of benevolence and good intentions; yet it must be confessed, that a vast majority frequently transgress; and what is more decidedly in point, not only a majority, but almost all, confine their benevolence to their families, relations, personal friends, parish, village, city, county, province; and that very few indeed extend it impartially to the whole community. Now, grant but this truth, and the question is decided. If a majority are capable of preferring their own private interests, or that of their families, counties, and party, to that of the nation collectively, some provision must be made in the constitution in favour of justice, to compel all to respect the common right, the public good, the universal law in preference to all private and partial considerations."1 Again: "Of all possible forms of government, a sovereignty in one assembly, successively chosen by the people, is, perhaps, the best calculated to facilitate the gratification of self-love, and the pursuit of the private interests of a few individuals. A few eminent, conspicuous characters will be continued in their seats in the sovereign assembly from one election to another, whatever changes are made in the seats around them. By superior art, address, and opulence, by more splendid birth, reputations, and connexions, they will be able to intrigue with the people, and their leaders out of doors, until they worm out most of their opposers, and introduce their friends. To this end they will bestow all offices, contracts, privileges in commerce, and other emoluments on the latter, and their connexions, and

1 3 Adams's Defence of American Constitution, Letter 6, p. 215, 216. See North American Review, Oct 1827, p. 263.

throw every vexation and disappointment in the way of the former, until they establish such a system of hopes and fears throughout the whole state, as shall enable them to carry a majority in every fresh election of the house. The judges will be appointed by them and their party, and of consequence will be obsequious enough to their inclinations. The whole judicial authority, as well as the executive, will be employed, perverted, and prostituted, to the purposes of electioneering. No justice will be attainable; nor will innocence or virtue be safe in the judicial courts, but for the friends of the prevailing leaders. Legal prosecutions will be instituted, and carried on against opposers to their vexation and ruin. And as they have the public purse at command, as well as the executive and judicial power, the public money will be expended in the same way. No favours will be attainable, but by those, who will court the ruling demagogues of the house, by voting for their friends, and instruments; and pensions, and pecuniary rewards and gratifications, as well as honours, and offices of every kind, voted to friends and partisans, &c. &c. The press, that great barrier and bulwark of the rights of mankind, when it is protected by law, can no longer be free. If the authors, writers, and printers, will not accept of the hire, that will be offered them, they must submit to the ruin, that will be denounced against them. The presses, with much secrecy and concealment, will be made the vehicles of calumny against the minority, and of panegyric, and empirical applauses of the leaders of the majority, and no remedy can possibly be obtained. In one word, the whole system of affairs, and every conceivable motive of hope or fear, will be employed to promote the private interests of a few, and their obsequious majority; and

there is no remedy but in arms. Accordingly we find in all the Italian republics, the minority always were driven to arms in despair.1

§ 552. Another learned writer has ventured on the bold declaration, that "a single legislature is calculated to unite in it all the pernicious qualities of the different extremes of bad government. It produces general weakness, inactivity, and confusion; and these are intermixed with sudden and violent fits of despotism, injustice and cruelty."2

§ 553. Without conceding, that this language exhibits an unexaggerated picture of the results of the legislative power being vested in a single assembly, there is enough in it to satisfy the minds of considerate men, that there is great danger in such an exclusive deposit of it.3 Some check ought to be provided, to maintain the real balance intended by the constitution; and this check will be most effectually obtained by a co-ordinate branch of equal authority, and different organization, which shall have the same legislative power, and possess an independent negative upon the doings of the other branch. The value of the check will, indeed, in a great measure depend upon this difference of organization. If the term of office, the qualifications, the mode of election, the persons and interests represented by each branch, are exactly the same, the check will be less powerful, and the guard less perfect, than if some, or all of these ingredients differ, so as to bring into play all the various interests and influences, which belong to a free, honest, and enlightened society.

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1 3 Adams's Defence of American Constitution, 284 to 286.

2 1 Wilson's Law Lect. 393 to 405; The Federalist, No. 22.

3 See Sidney on Government, ch. 3, § 45.

§ 554. The value, then, of a distribution of the legislative power, between two branches, each possessing a negative upon the other, may be summed up under the following, heads. First: It operates directly as a security against hasty, rash, and dangerous legislation; and allows errors and mistakes to be corrected, before they have produced any public mischiefs. It interposes delay between the introduction, and final adoption of a measure; and thus furnishes time for reflection; and for the successive deliberations of different bodies, actuated by different motives, and organized upon different principles.

§ 555. In the next place, it operates indirectly as a preventive to attempts to carry private, personal, or party objects, not connected with the common good. The very circumstance, that there exists another body clothed with equal power, and jealous or its own rights, and independent of the influence of the leaders, who favour a particular measure, by whom it must be scanned, and to whom it must be recommended upon its own merits, will have a silent tendency to discourage the efforts to carry it by surprise, or by intrigue, or by corrupt party combinations. It is far less easy to deceive, or corrupt, or persuade two bodies into a course, subversive of the general good, than it is one; especially if the elements, of which they are composed, are essentially different.

§ 556. In the next place, as legislation necessarily acts, or may act, upon the whole community, and involves interests of vast difficulty and complexity, and requires nice adjustments, and comprehensive enactments, it is of the

greatest consequence to secure an independent review of it by different minds, acting under different, and sometimes opposite opinions and

feelings; so, that it may be as perfect, as human wisdom can devise. An appellate jurisdiction, therefore, that acts, and is acted upon alternatively, in the exercise of an independent revisory authority, must have the means, and can scarcely fail to possess, the will, to give it a full and satisfactory review. Every one knows, notwithstanding all the guards interposed to secure due deliberation, how imperfect all human legislation is; how much it embraces of doubtful principle, and of still more doubtful utility; how various, and yet how defective, are its provisions to protect rights, and to redress wrongs. Whatever, therefore, naturally and necessarily awakens doubt, solicits caution, attracts inquiry, or stimulates vigilance and industry, is of value to aid us against precipitancy in framing, or altering laws, as well as against yielding to the suggestions of indolence, the selfish projects of ambition, or the cunning devices of corrupt and hollow demagogues.1 For this purpose, no better expedient has, as yet, been found, than the creation of an independent branch of censors to revise the legislative enactments of others, and to alter, amend, or reject them at its pleasure, which, in return, its own are to pass through a like ordeal.

§ 557. In the nest place, there can scarcely be any other adequate security against encroachments upon the constitutional rights and liberties of the people. Algernon Sidney has said with great force, that the legislative power is always arbitrary, and not to be trusted in the hands of any, who are not bound to obey the

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1 "Look," says an intelligent writer, "into every society, analyze public measures, and get at the real conducters of them, and it will be found, that few, very few, men in any government, and in the most democratical perhaps the fewest, are, in fact, the persons, who give the lead and direction to all, which is brought to pass." Thoughts upon the Political Situation of the United States of America, printed at Worcester, 1788.

laws they make.1 But it is not less true, that it has a constant tendency to overleap its proper boundaries, from passion, from ambition, from inadvertence, from the prevalence of faction, or from the overwhelming influence of private interests.2 Under such circumstances, the only effectual barrier against oppression, accidental or intentional, is to separate its operations, to balance interest against interest, ambition against ambition, the combinations and spirit of dominion of one body against the like combinations and spirit of another. And it is obvious, that the more various the elements, which enter into the actual composition of each body, the greater the security will be.3 Mr. Justice Wilson has truly remarked, that, "when a single legislature is determined to depart from the principles of the constitution, and its uncontrollable power may prompt the determination, there is no constitutional authority to check its progress. It may proceed by long and hasty strides in violating the constitution, till nothing but a revolution can check its career. Far different will the case be, when the legislature consists of two branches. If one of them should depart, or attempt to depart, from the principles of the constitution, it will be drawn back by the other. The very apprehension of the event will prevent the departure, or the attempt.4

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1 Sidney's Disc. on Government, ch. 3, § 45.

2 The Federalist, No. 15.

3 Id. No. 62, 15.

4 1 Wilson's Law Lect. 396; The Federalist, No. 62, 63. -- Mr. Jefferson was decidedly in favour of a division of the legislative power into two branches, as will be evident from an examination of his Notes on Virginia, (p. 194,) and his Correspondence at the period, when this subject was much discussed.* De Lolme, in his work on the constitution of England, has (ch. 3, p. 214, &c.) some very striking remarks on the same subject, in the passage already cited. He has added: "The result of a division of the executive power is either a more or less speedy

*** 2 Pitk. Hist. 283.**

§ 558. Such is an outline of the general reasoning, by which the system of a separation of the legislative power into two branches has been maintained experience has shown, that if in all cases it has not been found a complete check to inconsiderate or unconstitutional legislation; yet, that it has, upon many occasions, been round sufficient for the purpose. There is not probably at this moment a single state in the Union, which would consent to unite the two branches into one assembly; though there have not been wanting at all times minds of a high order, which have been led by enthusiasm, or a love of simplicity, or a devotion to theory, to vindicate such a union with arguments, striking and plausible, if not convincing.

§ 559. In the convention, which formed the constitution, upon the resolution moved, "that the national legislature ought to consist of two branches," all the states present, except. Pennsylvania, voted in the affirmative.1 At a subsequent period, however, seven only, of eleven states present, voted in the affirmative; three in the negative, and one was divided.2 But, although in the convention this diversity of opinion appears,3 it seems probable, that ultimately, when a national government was decided on, which should exert great controlling authority over the states, all opposition was withdrawn, as the existence of two branches furnished a greater security to the lesser states. It does not appear; that this division Or the legislative

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establishment of the right of the strongest, or a continued state of war; that of a division of the legislative power is either truth, or general tranquillity." See also Paley's Moral and Political Philosophy, B. 6, ch. 6, 7.

1 Journal of the Convention, 85; 2 Pitk. Hist. 233.

2 Journal of the Convention, 140.

3 Yates's Minutes, 4 Elliot's Debates, 59, 75, 76; Id. 87, 88, 89; Id. 124, 125.

power became with the people any subject of ardent discussion, or of real controversy. If it had been so, deep traces of it would have been found in the public debates, instead of a general silence. The Federalist touches the subject in but few places, and then principally with reference to the articles of confederation, and the structure of the senate.1 In fact, the opponents of the constitution felt, that there was additional security given to the states, as such, by their representation in the senate; and as the large states must have a commanding influence upon the actual basis in the house, the lesser states could not but unite in a desire to maintain their own equality in a co-ordinate branch.2

§ 560. Having considered the general reasoning, by which the division of the legislative power has been justified, it may be proper, in conclusion, to give a summary of those grounds, which were deemed most important, and which had most influence in settling the actual structure of the constitution of the United States. The question of course had reference altogether to the establishment of the senate; for no one doubted the propriety of establishing a house of representatives, as a depositary of the legislative power, however much any might differ, as to the nature of its composition.

§ 561. In order to justify the existence of a senate with co-ordinate powers, it was said, first, that it was a misfortune incident to republican governments, though in a less degree than to other governments, that those, who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and

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1 The Federalist, No. 22, 62, 63.

2 The Federalist, No. 22; Id. No. 37, 38; Id. No. 39; Id. No. 62.

dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies, in schemes of usurpation or perfidy, whereas the ambition or corruption of one would otherwise be sufficient. This precaution, it was added, was founded on such clear principles, and so well understood in the United States, that it was superfluous to enlarge on it. As the improbability of sinister combinations would be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance, which would consist with a due harmony in all proper measures, and with the genuine principles of republican government.1

§ 562. Secondly. The necessity of a senate was not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples of this sort might be cited without number, and from proceedings in the United States, as well as from the history of other nations. A body, which is to correct this infirmity, ought to be free from it, and consequently ought to be less numerous, and to possess a due degree of firmness, and a proper tenure of office.2

§ 563. Thirdly. Another. defect to be supplied by a senate lay in the want of a due acquaintance with the objects and principles of legislation. A good government implies two things; fidelity to the objects of the

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1 The Federalist, No. 62.

2 The Federalist, No. 62; Paley's Moral and Political Philosophy, B. 6, ch. 7, 7; 2 Wilson's Law Lect. 144 to 148.

government; secondly, a knowledge of the means, by which those objects can be best attained. It was suggested, that in the American governments too little attention had been paid to the last; and that the establishment of a senate upon a proper basis would greatly increase the chances of fidelity, and of wise and safe legislation. What (it was asked) are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding, against each preceding session; so many admonitions to the people of the value of those aids, which may be expected from a well-constituted senate?1

§ 564. Fourthly. Such a body would prevent too great a mutability in the public councils, arising from a rapid succession of new members; for from a change of men there must proceed a change of opinions, and from a change of opinions, a change of measures. Such instability in legislation has a tendency to diminish respect and confidence abroad, as well as safety and prosperity at home. It has a tendency to damp the ardour of industry and enterprise; to diminish the security of property; and to impair the reverence and attachment, which are indispensable to the permanence of every political institution.2

§ 565. Fifthly. Another ground, illustrating the utility of a senate, was suggested to be the keeping alive of a due sense of national character. In respect to foreign nations, this was of vital importance; for in our intercourse with them, if a scrupulous and uniform adherence to just principles was not observed, it must sub-

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1 The Federalist, No. 62.Id. No. 62.

2 Id. No. 62.

ject us to many embarrassments and collisions. It is difficult to impress upon a single body, which is numerous and changeable, a deep sense of the value of national character. A small portion of the praise, or blame of any particular measure can fall to the lot of any particular person; and the period of office is so short, that little responsibility is felt, and little pride is indulged, as to the course of the government.1

§ 566. Sixthly. It was urged, that paradoxical as it might seem, the want in some important cases of a due responsibility in the government arises from that very frequency of elections, which in other cases produces such responsibility. In order to he reasonable, responsibility must be limited to objects within the power of the responsible party; and in order to be effectual, it must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents. Some measures have singly an immediate and sensible operation; others again depend on a succession of well connected schemes, and have a gradual, and perhaps unobserved operation. If, therefore, there be but one assembly, chosen for a short period, it will be difficult to keep up the train of proper measures, or to preserve the proper connexion between the past and the future. And the more numerous the body, and the more changeable its component parts, the more difficult it will be to preserve the personal responsibility, as well as the uniform action, of the successive members to the great objects of the public welfare.2

§ 567. Lastly. A senate duly constituted would not only operate, as a salutary check upon the representa-

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1 The Federalist, No. 63.

2 Id. No. 63.

tives, but occasionally upon the people themselves, against their own temporary delusions and errors. The cool, deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of their rulers. But there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures, which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of a body of respectable citizens, chosen without reference to the exciting, cause, to check the misguided career of public opinion, and to suspend the blow, until reason, justice, and truth can regain their authority over the public mind.1 It was thought to add great weight to all these considerations, that history has informed us of no longlived republic, which had not a senate. Sparta, Rome, Carthage were, in fact, the only states, to whom that character can be applied.2

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1 The Federalist, No. 63.

2 The Federalist, No. 63. -- There are some very striking remarks on this subject in the reasoning of the convention, in the county of Essex, called to consider the constitution proposed for Massachusetts, in 1778,* and which was finally rejected. The legislative power," said that body, " mast not be trusted with

one assembly. A single assembly is frequently influenced by the vices, follies, passions, and prejudices of an individual. It is liable to be avaricious, and to exempt itself from the burthens it lays on its constituents. It is subject to ambition; and after a series of rears sill be prompted to vote itself perpetual. The long parliament in England voted itself perpetual, and thereby a for a time destroyed the political liberty of the subject. Holland was governed by

*** It is contained in pamphlet, entitled "The Essex Result," and was printed (in 1778, I quote the passage from Mr. Savage's valuable Exposition of the Constitution of Massachusetts, printed in the New-England Magazine for March, 1832, p. 9. See also on this subject Paley's Moral Philosophy, B. 6, ch. 7, p. 383; The federalist, No 63, 63.**

§ 568. It will be observed, that some parts of the foregoing, reasoning apply to the fundamental importance or an actual division or the legislative power; and other parts to the true principle, upon which that division should be subsequently organized, in order to give full effect to the constitutional check. Some parts go to show the value of a senate; and others, what should be its structure, in order to ensure wisdom, experience, fidelity, and dignity in its members. All of it, however, instructs us, that, in order to give it fair play and influence, as a co-ordinate branch of government, it ought to be less numerous, more select, and more durable, than the other branch; and be chosen in a manner, which should combine, and represent different interests with a varied force.1 How far these objects are attained by the constitution will be better seen, when the details belonging to each department are successively examined.

§ 569. This discussion may be closed by the remark, that in the Roman republic the legislative authority, in the last resort, resided for ages in two distinct political bodies, not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed. In one, the patrician;

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one representative assembly, annually elected. They afterwards voted themselves from annual to septennial; then for life; and finally exerted the power of filling up all vacancies, without application to their constituents. The government of Holland is now a tyranny, though a republic. The result of a single assembly will be hasty and indigested; and their judgments frequently absurd and inconsistent. There must be a second body to revise with coolness, and wisdom, and to control with firmness, independent upon the first, either for their creation, or existence. Yet the first must retain a right to a similar revision and control over the second."

1 The Federalist, No. 62, 63.

in the other, the plebeian predominated. And yet, during the co-existence of these two legislatures, the Roman republic attained to the supposed pinnacle of human greatness.1

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1 The Federalist, No. 34.

CHAPTER IX.

HOUSE OF REPRESENTATIVES.

§ 570. THE second section of the first article contains the structure and organization of the house of representatives. The first clause is as follows:

"The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

§ 571. As soon as it was settled, that the legislative power should be divided into two separate and distinct branches, a very important consideration arose in regard to the organization of those branches respectively. It is obvious, that the organization of each is susceptible of very great diversities and modifications, in respect to the principles of representation; the qualification of the electors, and the elected; the term of service of the members; the ratio of representation; and the number, of which the body should be composed.

§ 572. First; the principle of representation. The American people had long been in the enjoyment of the privilege of electing, at least, one branch of the legislature; and, in some of the colonies, of electing all the branches composing the legislature. A house of representatives, under various denominations, such as a house of delegates, a house of commons, or, simply, a house of representatives, emanating directly from, and responsible to, the people, and

possessing a distinct and independent legislative authority, was familiar to all the colonies, and was held by them in the highest rever-

ence and respect. They justly thought, that as the government in general should always have a common interest with the people, and be administered for their good; so it was essential to their rights and liberties, that the most numerous branch should have an immediate dependence upon, and sympathy with the people.1 There was no novelty in this view. It was not the mere result of a state of colonial dependence in which their jealousy was awake to all the natural encroachments of power in a foreign realm. They had drawn their opinions and principles from the practice of the parent country. They knew the inestimable value of the house of commons, as a component branch of the British parliament; and they believed, that it had at all times furnished the best security against the oppressions of the crown, and the aristocracy. While the power of taxation, of revenue, and of supplies, remained in the hands of a popular branch, it was difficult for usurpation to exist for any length of time without check; and prerogative must yield to that necessity which controlled at once the sword and the purse. No reasoning, therefore, was necessary to satisfy the American people of the advantages of a house of representatives, which should emanate directly from themselves; which should guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government. Experience, as well as theory, had settled it in their minds, as a fundamental principle of a free government, and especially of a republican government, that no laws

1 The Federalist, No. 52; 1 Black. Comm. 158, 159; Paley's Moral Philosophy, B. 6, ch. 7; I Wilson's Law Lect. 429 to 433; 2 Wilson's Law Lect. 122 to 133.

ought to be passed without the co-operation and consent of the representatives of the people; and that these representatives should be chosen by themselves without the intervention of any other functionaries to intercept, or vary their responsibility.1

§ 473. The principle, however, had been hitherto applied to the political organization of the state legislatures only; and its application to that of the federal government was not without some diversity of opinion. This diversity had not its origin in any doubt of the correctness of the principle itself, when applied to simple republics; but, the propriety of applying it to cases of confederated republics was affected by other independent considerations. Those, who might wish to retain a very large portion of state sovereignty, in its representative character, in the councils of the Union, would naturally desire to have the house of representatives elected by the state in its political character, as under the old confederation. Those, on the other hand, who wished to impart to the government a national character, would as naturally desire an independent election by the people themselves in their primary meetings. Probably these circumstances had some operation upon the votes given on the question in the convention itself. For it appears, that upon the original proposition in the convention, "That the members of the first branch of the national legislature ought to be elected by the people of the several states, six states voted for it, two against it, and two were divided.2 And upon a subsequent motion to strike out the word "people," and insert in its place the word "legislatures,"

1 1 Tucker's Black. Comm. App. 28.

2 Journal of Convention, May 31, 1787, p. 85, 86, 135; 4 Elliot's Debates, (Yates's Minutes,) 58.

three states voted in the affirmative and eight in the negative.1 At a subsequent period a motion, that the representatives should be appointed in such manner as the legislature of each state should direct, was negatived, six states voting in the affirmative, three in the negative, and one being divided; and the final vote in favour of an election by the people was decided by the vote of nine states in the affirmative, one voting in the negative, and one being divided.2 The result was not therefore obtained without much discussion and argument; though at last an entire unanimity prevailed.3 It is satisfactory to know, that a fundamental principle of public liberty has been thus secured to ourselves and our posterity, which will for ever indissolubly connect the interests of the people with the interests of the Union.4 Under the confederation, though the delegates to congress might have been elected by the people, they were, in fact, in all the states except two, elected by the state legislature.5

1 Journal of Convention, May 31,1 787, p. 103, 104; 4 Elliot's Debates, (1 Yates's Minutes,) 62, 63, 90, 91.

2 Journal of Convention, June 21, 1787, p. 140, 141, 215; 4 Elliot's Debates, 90, 91, (Yates's Minutes.)

3 Journal of Convention, p. 216, 233.

4 Mr. Burke, in his Reflections on the French Revolution, has treated the subject of the mischiefs of an indirect choice only by the people of their representative in a masterly manner. He has demonstrated, that such a system must remove all real responsibility to the people from the representative. Mr. Jefferson has expressed his approbation of the principle of a direct choice in a very qualified manner. He says, "I approve of the greater house being chosen by the people directly. For, though I think a house so chosen will be very inferior to the present congress, will be very ill qualified to legislate for the Union, for foreign nations, &c.; yet this evil does not weigh against the good of preserving inviolate the fundamental principle, that the people ought not to be taxed but by representatives chosen immediately by themselves." 2 Jefferson's Corresp. p. 273.

5 The Federalist, No. 40.

§574. We accordingly find, that in the section under consideration, the house of representatives is required to be composed of representatives chosen by the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; the influence direct; and the responsibility direct. If any intermediate agency had been adopted, such as a choice through an electoral college, or by official personages, or by select and specially qualified functionaries pro hac vice, it is obvious, that the dependence of the representative upon the people, and the responsibility to them, would have been far less felt, and far more obstructed. Influence would have naturally grown up with patronage; and here, as in many other cases, the legal maxim would have applied, causa proxima, non remota, spectalur. The select body would have been at once the patrons and the guides of the representative; and the people themselves have become the instruments of subverting their own rights and power.

§ 575. The indirect advantages from this immediate agency of the people in the choice of their representatives are of incalculable benefit, and deserve a brief mention in this place, because they furnish us with matter for most serious reflection, in regard to the actual operations and influences of republican governments. In the first place, the right confers an additional sense of personal dignity and duty upon the mass of the people. It gives a strong direction to the education, studies, and pursuits of the whole community. It enlarges the sphere of action, and contributes, in a high degree, to the formation of the public manners, and national character. It procures to the common people courtesy and sympathy from their superiors, and diffuses a common confidence, as well as a

common interest, through all the ranks of society. It awakens a desire to examine, and sift, and debate all public proceedings, and thus nourishes a lively curiosity to acquire knowledge, and, at the same time, furnishes the means of gratifying it. The proceedings and debates of the legislature; the conduct of public officers from the highest to the lowest; the character and conduct of the executive and his ministers; the struggles, intrigues, and conduct of different parties; and the discussion of the great public measures and questions, which agitate and divide the community, are not only freely canvassed, and thus improve and elevate conversation; but they gradually furnish the mind with safe and solid materials for judgment upon all public affairs; and check that impetuosity and rashness, to which sudden impulses might otherwise lead the people, when they are artfully misguided by selfish demagogues, and plausible schemes of change.1

§ 576. But this fundamental principle of an immediate choice by the people, however important, would alone be insufficient for the public security, if the right of choice had not many auxiliary guards and accompaniments. It was indispensable, secondly, to provide for the qualifications of the electors. It is obvious, that even when the principle is established, that the popular branch of the legislature shall emanate directly from the people, there still remains a very serious question, by whom and in what manner the choice shall be made. It is a question vital to the system, and in a practical sense decisive, as to the durability and efficiency of the powers of government. Here, there is much room for doubt, and ingenious speculation, and theoretical inqui-

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1 I have borrowed these views from Dr. Paley, and fear only, that by abridging them I have lessened their force. Paley's Moral Philosophy, B. 6, ch. 6. See also 2 Wilson's Law Lect. 124 to 128.

ry; upon which different minds may arrive, and indeed have arrived, at very different results. To whom ought the right of suffrage, in a free government, to be confided? Or, in other words, who ought to be permitted to vote in the choice of the representatives of the people? Ought the right of suffrage to be absolutely universal? Ought it to be qualified and restrained? Ought it to belong to many, or few? If there ought to be restraints and qualifications, what are the true boundaries and limits of such restraints and qualifications?

§ 577. These questions are sufficiently perplexing and disquieting in theory; and in the practice of different states, and even of free states, ancient as well as modern, they have assumed almost infinite varieties of form and

illustration. Perhaps they do not admit of any general, much less of any universal answer, so as to furnish an unexceptionable and certain rule for all ages and all nations. The manners, habits, institutions, characters, and pursuits of different nations; the local position of the territory, in regard to a nations; the actual organizations and classes of society; the influences of peculiar religious, civil, or political institutions; the dangers, as well as the difficulties, of the times; the degrees of knowledge or ignorance pervading the mass of society; the national temperament, and even the climate and products of the soil; the cold and thoughtful gravity of the north; and the warm and mercurial excitability of tropical or southern regions; all these may, and probably will, introduce modifications of principle, as well as of opinion, in regard to the right of suffrage, which it is not easy either to justify or to overthrow.1

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1 1 Black.Comm. 171, 172. -- Mr.Justice Blackstone * has remarked,

*** 1 1 Black. Comm. 171.**

§ 578. The most strenuous advocate for universal suffrage has never yet contended, that the right should be absolutely universal. No one has ever been sufficiently visionary to hold, that all persons, of every age, degree, and character, should be entitled to vote in all elections of all public officers. Idiots, infants, minors, and persons insane or utterly imbecile, have been, without scruple, denied the right, as not having the sound judgment and discretion fit for its exercise. In many countries, persons guilty of crimes have also been denied the right, as a personal punishment, or as a security to society. In most countries, females, whether married or single, have been purposely excluded from voting, as interfering with sound policy, and the harmony of social life. In the few cases in which they have been permitted to vote, experience has not justified the conclusion, that it has been attended with any correspondent advantages, either to the public, or to themselves. And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle,

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"That the true reason of requiring any qualification with regard to property in voters is to exclude such persons, as are in so mean a situation, that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man a larger share in elections, than is consistent with general liberty. If it were probable, that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in election those delegates, to whose charge is committed the disposal of his property, his liberty, and his live. But since that can hardly be expected in persons of indigent fortunes, or such as the under the immediate dominion of others, all popular states have been obliged to establish certain qualifications, thereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose will bay be supposed independent, more thoroughly upon a level with each other." Similar reasoning might be employed to justify other exclusions, besides those founded upon a want of property.

upon which the one half of every society has thus been systematically excluded by the other half from all right of participating in government, which would not, at the same time, apply to and justify many other exclusions. If it be said, that all men have a natural, equal, and unalienable right to vote, because they are all born free and equal; that they all have common rights and interests entitled to protection, and therefore have an equal right to decide, either personally or by their chosen representatives, upon the laws and regulations, which shall control, measure, and sustain those rights and interests; that they cannot be compelled to surrender, except by their free consent, what, by the bounty and order of Providence, belongs to them in common with all their race; -- what is there in these considerations, which is not equally applicable to females, as free, intelligent, moral, responsible beings, entitled to equal rights, and interests, and protection, and having a vital stake in all the regulations and laws of society? And if an exception, from the nature of the case, could be felt in regard to persons, who are idiots, infants, and insane; how can this apply to persons, who are of more mature growth, and are yet deemed minors by the municipal law? Who has an original right to fix the time and period of pupilage, or minority? Whence was derived the right of the ancient Greeks and Romans to declare, that women should be deemed never to be of age, but should be subject to perpetual guardianship? Upon what principle of natural law did the Romans, in after times, fix the majority of females, as well as of males, at twentyfive years?1 Who has a right to say that in England it shall, for some purposes, be at fourteen, for others, at seventeen, and for all, at twenty-one years; while, in

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1 1 Black. Comm. 463, 464.

France, a person arrives, for all purposes, at majority, only at thirty years, in Naples at eighteen, and in Holland at twenty-five?1 Who shall say, that one man is not as well qualified, as a voter, at eighteen years of age, as another is at twenty-five, or third at forty; and far better, than most men are at eighty? And if any society is invested with authority to settle the matter of the age and sex of voters, according to its own view of its policy, or convenience, or justice, who shall say, that it has not equal authority, for like reasons, to settle any other matter regarding the rights, qualifications, and duties of voters?2

§ 579. The truth seems to be, that the right of voting, like many other rights, is one which, whether it has a fixed foundation in natural law or not, has always been treated in the practice of nations, as a strictly civil right, derived from, and regulated by each society, according to its own circumstances and interests.3 It is difficult, even in the abstract, to conceive how it could have otherwise been treated. The terms and conditions, upon which any society is formed and organized, must essentially depend upon the will of those, who are associated; or at least of those, who constitute a majority, actually controlling the rest. Originally, no man could have any right but to act for himself; and the power to choose a chief magistrate or other officer to exercise dominion or authority over others, as well as himself, could arise only upon a joint consent of the others to such appointment; and their consent might be qualified exactly according, to their

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1 1 Black. Comm. 463, 464;

2 Id. 171.

3 1 Black. Comm. 171; 2 Wilson's Law Lect. 130; Montesquieu's Spirit of Laws, B. 11. ch. 6; 1 Tucker's Black. Comm. App. 52, 53.

own interests, or power, or policy. The choice of representatives to act in a legislative capacity is not only a refinement of much later stages of actual association and civilization, but could scarcely occur, until the society had assumed to itself the right to introduce such institutions, and to confer such privileges, as it deemed conducive to the public good, and to prohibit the existence of any other. In point of fact, it is well known, that representative legislative bodies, at least in the form now used, are the peculiar invention of modern times, and were unknown to antiquity. If, then, every well organized society has the right to consult for the common good of the whole, and if, upon the principles of natural law, this right is conceded by the very union of society, it seems difficult to assign any limit to this right, which is compatible with the due attainment of the end proposed. If, therefore, any society shall deem the common good and interests of the whole society best promoted under the particular circumstances, in which it is placed, by a restriction of the right of suffrage, it is not easy to state any solid ground of objection to its exercise of such an authority. At least, if any society has a clear right to deprive females, constituting one half of the whole population, from the right of suffrage, (which, with scarcely an exception, has been uniformly maintained,) it will require some astuteness to find upon what ground this exclusion can bevindicated, which does justify, or at least excuse, many other exclusions.1 Government (to use the pithy language of Mr. Burke) has been deemed a practical thing, made for the, happiness of mankind,

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1 See Paley's Moral Philosophy, B. 6, ch. 7, p. 392; 1 Black. Comm. 171; Montesquieu's Spirit of Laws, B. 11. ch. 6.

and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians.1

§ 580. Without laying any stress upon this theoretical reasoning, which is brought before the reader, not so much because it solves all doubts and objections, as because it presents a view of the serious difficulties attendant upon the assumption of an original and unalienable right of suffrage, as originating in natural law, and independent of civil law, it may be proper to state, that every civilized society has uniformly fixed, modified, and regulated the right of suffrage for itself, according to its own free will and pleasure. Every constitution of government in these United States has assumed, as a fundamental principle, the right of the people of the state to alter, abolish, and modify the form of its own government, according, to the sovereign pleasure of the people.2 In fact, the people of each state have gone much farther, and settled a far more critical question, by deciding, who shall be the voters, entitled to approve and reject the constitution framed by a delegated body under their direction. In the adoption of no state constitution has the assent been asked of any but the qualified voters; and women, and minors, and other persons, not recognized as voters by existing laws, have been studiously excluded. And yet the constitution has been deemed entirely obligatory upon them, as well as upon the minority, who voted against it. From this it will be seen, how

little, even in the most free of republican governments, any abstract right of suffrage, or any original and indefeasible privilege, has been recognized in practice. If this consideration

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1 Burke's Letter to the Sheriffs of Bristol in 1777.

2 See Locke on Government, p. 2, § 149, 227.

does not satisfy our minds, it at least will prepare us to presume, that there may be an almost infinite diversity in the established right of voting, without any state being able to assert, that its own mode is exclusively founded in natural justice, or is most conformable to sound policy, or is best adapted to the public security. It will teach us, that the question is necessarily complex and intricate in its own nature, and is scarcely susceptible of any simple solution, which shall rigidly apply to the circumstances and conditions, the interests and the feelings, the institutions and the manners of all nations.1 What may best promote the public weal, and secure the public liberty, and advance the public prosperity in one age or nation, may totally fail of similar results under local, physical, or moral predicaments essentially different.

§ 581. It would carry us too far from the immediate object of these Commentaries to take a general survey Or the various modifications, under which the right of suffrage, either in relation to laws, or magistracy, or even judicial controversies, has appeared in different nations in ancient and modern times. The examples of Greece and Rome, in ancient times, and of England in modern times, will be found most instructive.2 In England, the qualifications of voters, as also the modes of representation, are various, and framed upon no common principle. The counties are represented by knights, elected by the proprietors of lands, who are freeholders;3 the boroughs and cities are represented

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1 Dr. Lieber's Encyclopedia Americana, art. Constitution.

2 See 3 Adams's Amer. Constitut. Letter 6, p. 263, &c. p. 440, &c. 1 Black. Comm. 171, 172, 173; Montesquieu's Spirit of Laws, Book 11, ch. 13; Id. B. 2, ch. 2.

3 1 Black. Comm. 172, 173; Paley's Moral Philosophy, B. 6, ch. 7; The Federalist, No. 57.

by citizens and burgesses, or others chosen by the citizens or burgesses, according to the qualifications prescribed by custom, or by the respective charters and by-laws of each borough, or city.1 In these, the right of voting is almost infinitely varied and modified.2 In the American colonies, under their charters and laws, no uniform rules in regard to the right of suffrage existed. In some of the colonies the course of the parent country was closely followed, so that freeholders alone were voters;3 in others a very near approach was made to universal suffrage among the males of competent age; and in others, again, a middle principle was adopted, which made taxation and voting dependent upon each other, or annexed to it the qualification of holding some personal estate, or the privilege of being a freeman, or the eldest son of a freeholder of the town or corporation.4 When the revolution brought about the separation of the colonies, and they formed themselves into independent states, a very striking diversity was observable in the original constitutions adopted by them;5 and a like diversity has pervaded all the constitutions of the new states, which have since grown up, and all the revised constitutions of the old states, which have received the final ratification of the people. In some of the states the right of suffrage

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1 1 Black. Comm. 172 to 175; 1 Tuck. Black. Comm. App. 209 to 212. See also Burke's Reflections on the French Revolution.

2 See Dr. Lieber's Encyclopedia Americana, art. Election; Great Britain, Constitution of.

3 See Jefferson's Notes on Virginia, 191; 1 Tucker's Black. Comm. App. 96 to 100.

4 See Charter of Rhode-Island, 1663; and Rhode-Island Laws, (edit 1789,) p. 114. See also Connecticut Charter, 1662, and Massachusetts Charters. 1628 and 1692.

5 2 Wilson's Law Lect. 132 to 138; 2 Pitkin's Hist. ch. 19, p. 294 to 316.

depends upon a certain length of residence, and payment of taxes; in others, upon mere citizenship and residence; in others, upon the possession of a freehold, or some estate of a particular value, or upon the payment of taxes, or performance of some public duty, such as service in the militia, or on the highways.1 In no two of these state constitutions will it be found, that the qualifications of the voters are settled upon the same uniform basis.2 So that we have the most abundant proofs, that among a free and enlightened people, convened for the purpose of establishing their own forms of government, and the rights of their own voters, the question, as to the due regulation of the qualifications, has been deemed a matter of mere state policy, and varied to meet the wants, to suit the

prejudices, and to roster the interests of the majority. An absolute, indefeasible right to elect or be elected, seems never to have been asserted on one side, or denied on the other; but the subject has been freely canvassed, as one of mere civil polity, to be arranged upon such a basis, as the majority may deem expedient with reference to the moral, physical, and intellectual condition of the particular state.3

§ 582. It was under this known diversity of constitutional provisions in regard to state elections, that the convention, which framed the constitution of the Union, _____

1 2 Wilson's Law Lect. 132 to 138. -- Mr. Hume, in his Idea of a Perfect Commonwealth, proposes, that the representatives should be freeholders of

20l a year, and householders worth 500l. 1 Hume's Essays, Essay 16, p. 526. 2 See The Federalist, No. 54; 2 Wilson's Law Lectures, 132 to 138; 2 Pitkin's Hist. 294 to 316.

3 Dr. Lieber's Encyclopedia Americana, art. Constitution of the United States. The Federalist, No. 52 to 54.

was assembled. The definition of the right of suffrage is very justly regarded, as a fundamental article of a republican government. It was incumbent on the convention, therefore, to define and establish this right in the constitution. To have left it open for the occasional regulation of congress would have been improper, for the reason just mentioned. To have submitted it to the legislative discretion of the states, would have been improper, for the same reason; and for the additional reason, that it would have rendered too dependent on the state governments, that branch of the federal government, which ought to be dependent on the people alone.1 Two modes of providing for the right of suffrage in the choice of representatives were presented to the consideration of that body. One was to devise some plan, which should operate uniformly in all the states, on a common principle; the other was to conform to the existing diversities in the states, thus creating a mixed mode of representation. In favour of the former course, it might be urged, that all the states ought, upon the floor of the house of representatives, to be represented equally; that this could be accomplished only by the adoption of a uniform qualification of the voters, who would thus express the same public opinion of the same body of citizens throughout the Union; that if freeholders alone in one state chose the representatives; and in another all male citizens of competent age; and in another all freemen of particular towns or corporations; and in another all taxed inhabitants; it would be obvious, that different interests and classes would obtain exclusive representations in different states; and thus the great objects of the

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1 The Federalist, No. 52.

constitution, the promotion of the general welfare and common defence, might be unduly checked and obstructed; that a uniform principle would at least have this recommendation, that it could create no wellfounded jealousies among the different states, and would be most likely to satisfy the body of the people by its perfect fairness, its permanent equality of operation, and its entire independence of all local legislation, whether in the shape of state laws; or of amendments to state constitutions.

§ 583. On the other hand, it might be urged in favour of the latter course, that the reducing of the different qualifications, already existing in the different states, to one uniform rule, would have been a very difficult task, even to the convention itself, and would be dissatisfactory to the people of different states.1 It would not be very easy for the convention to frame any rule, which would satisfy the scruples, the prejudices, or the judgments of a majority of its own members. It would not be easy to induce Virginia to give up the exclusive right of freeholders to vote; or Rhode-Island, or Connecticut, the exclusive right of freemen to vote; or Massachusetts, the right of persons possessing a given value of personal property to vote; or other states, the right of persons paying taxes, or having a fixed residence, to vote. The subject itself was not susceptible of any very exact limitations upon any general reasoning. The circumstances of different states might create great diversities in the practical operation of any uniform system. And the natural attachments, which long habit and usage had sanctioned, in regard to the exercise of the

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1 The Federalist, No. 52.

right, would enlist all the feelings, and interests, and opinions of every state against any substantial change in its own institutions. A great embarrassment would be thus thrown in the way of the adoption of the constitution itself, which perhaps would be thus put at hazard, upon the mere ground of theoretical propriety.1

§584. Besides; it might be urged, that it is far from being clear, upon reasoning or experience, that uniformity in the composition of a representative body is either more promotive of the general good, than a mixed system, embracing, and representing, and combining distinct interests, classes, and opinions.2 In England the house of commons, as a representative body, is founded upon no uniform principle, either of numbers, or classes, or

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1 Rawle on the constitution, ch. 4, p. 40.

2 Mr. Burke manifestly thought, that no system of representative government could be safe without a large admixture of different persons and interests. "Nothing," say he, "is a due and adequate representation of a state, that does not represent its ability, as well as is property. But as ability is a vigorous and active principle, and as property is sluggish, inert, and timid, it can never be safe from the invasion of ability, unless it be, out of all proportion, predominant in the representation."* In a subsequent page of his Reflections on the French Revolution, be discussed the then favorite theory of representation proposed for the constitution of France, upon the triple basis of territory, population, and taxation, and demonstrates, with great clearness, its inconvenience, inequality, and inconsistency. The representatives, too, were to be chosen indirectly, by electors appointed by electors, who were again chosen by other electors. " The member," says Mr. Burke, "who goes to the National Assembly, is not chosen by the people, nor accountable to them. There are three elections before he is chosen; two sets of magistrates intervene between him and the primary assembly, so as to render him, as I have said, an ambassador of a state, and not the representative of the people within a state." So much for mere theory in the hands of visionary end speculative statesmen.

*** Burke's Reelections on the French Revolution. See also Paley's Philosophy, B. 6, ch. 7.**

places.1 The representation is made up of persons chosen by electors having, very different, and sometimes very discordant qualifications; in some cases, property is exclusively represented; in others, particular trades and pursuits; in others, inhabitancy and corporate privileges; in others, the reverse. In some cases, the representatives are chosen by very numerous voters; in others, by very few; in some cases, a single patron possesses the exclusive power of choosing representatives, as in nomination boroughs; in others, very populous cities have no right to choose any representatives at all; in some cases, a select body, forming a very small part of the inhabitants, has the exclusive right of choice; in others, non-residents can control the whole election; in some places a half million of inhabitants possess the right to choose no more representatives, than are assigned to the most insignificant borough, with scarcely an inhabitant to point out its local limits.2 Yet this inequality has never, of itself, been deemed an exclusive evil in Great Britain.3 And in every system of reform, which has found public favour in that country, many of these diversities have been embodied from choice, as important checks upon undue legislation, as facilitating the representation of different interests, and

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1 Paley's Moral Philosophy, B. 6, ch. 7, p. 380, 381 to 394; DeLolme, Const. of England, B. 1, ch. 4, p. 61, 62; 1 Kent's Comm. 219; 1 Tuck. Black. App. 209, 210, 211; 1 Wilson's Law Lect. 431.

2 Mr. Jefferson, in his Notes on Virginia, insists with great earnestness upon the impropriety of allowing to different counties in that state, the same number of representatives, without any regard to their relative population.* And yet in the new constitution adopted in 1830-1831, Virginia has adhered to the save system in principle, and her present representation is apportioned upon an arbitrary and unequal basis.

3 Burke's Reflections on the French Revolution.

*** Jefferson's Notes, 192.**

different opinions; and as thus securing, by a well-balanced and intelligent representation of all the various classes of society, a permanent protection of the public liberties of the people, and a firm security of the private rights of persons and property.1 Without, therefore, asserting, that such a mixed representation is absolutely, and under all circumstances, the best, it might be safely affirmed, that the existence of various elements in the composition of the representative body is not necessarily inexpedient, unjust, or insecure; and, in many cases, may promote a wholesome restraint upon partial plans of legislation, and ensure a vigorous growth to the general interests of the Union. The planter, the farmer, the mechanic, the merchant, and the manufacturer might thus be brought to act together, in a body representing each; and thus superior intelligence, as well as mutual good-will and respect, be diffused through the whole of the collective body.2

§ 585. In the judgment of the convention, this latter reasoning seems to have obtained a decisive influence,

1 Mr. Wilson in his Lectures, considers the inequality of representation in the house of commons, as a prominent defect in the British government. But his objections are mainly urged against the mode of apportioning the representation, and not against the qualifications of the voters.* In the reform now under the consideration of parliament, there is a very great diversity of electoral qualifications allowed, and apparently supported by all parties. Mr. Burke in his Reflections on the French Revolution, holds doctrine essentially different in many points from Mr. Wilson. See also in Winne's Eunomus, Dialogue 3, § 18, 19, 20, an ingenious defence of the existing system in Great-Britain.

2 See Paley's Moral Philosophy, B. 6, ch. 7, p. 380; Id. 394. See also Franklin's Remarks; 2 Pitk. Hist. 242.--Dr. Paley has placed the inequalities of representation in the house of commons in a strong light; and he has attempted a vindication of it, which, whether satisfactory or not, is at least urged with great skill and ingenuity of reasoning. Paley's Moral Philosophy, B. 6, ch, 7, p. 391 to 400. See also 2 Pitk. Hist. 242.

*** 1 Wilson's Lect. 430 to 433.**

and to have established the final result; and it was accordingly declared, in the clause under consideration, that " the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."1 Upon this clause (which was finally adopted by a unanimous vote) the Federalist has remarked, "the provision made by the convention appears to be the best, that lay within their option. It must be satisfactory to every state, because it is conformable to the standard already established by the state itself. It will be safe to the United States, because, being fixed by the state constitutions, it is not alterable by the state governments; and it cannot be feared, that the people of the states will alter this part of their constitutions in such a manner, as to abridge the rights secured to them by the federal constitution."2 The remark, in a general sense, is true; but the provision has not, in fact, and may not have, all the security against alteration by the state governments, which is so confidently affirmed. At the time, when it was made, Connecticut and Rhode-Island were acting under the royal charters of 1662 and 1663; and their legislatures possessed the power of modifying, from time to time, the right of suffrage. Rhode-Island yet continues without any written constitution, unless the charter of 1663 is to be deemed such. In Maryland successive legislatures may change the form of government; and in other states amendments may be, and indeed have been adopted,

1 Journal of Convention, 216, 233. -- The clause, however, did not pass without opposition; a motion to strike out was made and negatived, seven states voting in the negative, one in the affirmative, and one being divided. Journ. of Convention, 7 Aug. p. 233.

2 The Federalist, No. 52. See also 2 Elliot's Debates, 38; 2 Wilson's Law Lect. 123, 130, 131.

materially varying the rights of suffrage.1 So that absolute stability is not to be predicated of the existing modes of suffrage; though there is little practical danger of any changes, which would work unfavourably to popular rights.

§ 586. In the third place, the term of service of representatives. In order to ensure permanent safety to the liberties of the people, other guards are indispensable, besides those, which are derived from the exercise of the right of suffrage and representation. If, when the legislature is once chosen, it is perpetual, or may last during the life of the representatives; and in case of death, or resignation only, the vacancy is to be supplied by the election of new representatives; it is easy to perceive, that in such cases there will be but a very slight check upon their acts, on the part of the people. In such cases, if the legislative body should be once corrupted, the evil would be past all remedy, at least without some violent revolution, or extraordinary calamity.2 But, when different legislative bodies are to succeed each other at short intervals, if the people disapprove of the present, they may rectify its faults, by the silent exercise of their power in the succeeding election. Besides, a legislative assembly, which is sure to be separated again, and its members soon return to private life, will feel its own interests, as well as duties, bound up with those of the community at large.3 It may, therefore, be safely laid down, as a fundamental axiom of republican governments, that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon

1 See 2 Wilson's Law Lect. note (d,) 136, 137.

2 1 Black. Comm. 189; Montesquieu's Spirit of Laws, B. 11, ch. 6.

3 1 Black. Comm. 189.

his acts and opinions, and produce a sympathy between him and his constituents.1 If, when he is once elected, he holds his place for life, or during good behaviour, or for a long period of years, it is obvious, that there will be little effective control exercised upon him; and he will soon learn to disregard the wishes, the interests, and even the rights of his constituents, whenever they interfere with his own selfish pursuits and objects. When appointed, he may not, indeed, consider himself, as exclusively their representative, bound by their opinions, and devoted to their peculiar local interests, although they may be wholly inconsistent with the good of the Union. He ought rather to deem himself a representative of the nation, and bound to provide for the general welfare, and to consult for the general safety.2 But still; in a just sense, he ought to feel his responsibility to them, and to act for them in common wish the rest of the people; and to deem himself, in an emphatic manner, their defender, and their friend.3

§ 587. Frequent elections are unquestionably the soundest, if not the sole policy, by which this depend-

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1 The Federalist, No. 52, 57.

2 1 Black. Comm. 159. See also Dr. Franklin's Remarks; 2 Pitk. Hist. 242; Rawle on Const. 38, 39. But see 1 Tucker's Black. Comm. App. 193; 4 Elliot's Debates, 209 -- Mr. Burke in his, Speech to the Electors of Bristol, in 1774, has treated this subject with great candour, and dignity, and ability. "Parliament," said he, "is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates. But parliament is a deliberative assembly of one nation with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide; but the general good, resulting from the general reason of the whole. You choose a member indeed; but then you have chosen him, he is not a member of Bristol, but he is a member of parliament." See, on this subject, 1 Tuck. Black. Comm. App. 193; 2 Lloyd's Deb. in 1789, p. 199 to 217.

3 See Burke's Speech to the Electors of Bristol in 1774.

ence and sympathy and responsibility can he effectually secured.1 But the question, what degree of frequency is best calculated to accomplish that object is not susceptible of any precise and universal answer, and must essentially depend upon very different considerations in different nations, and vary with their size, their age, their conditions, their institutions, and their local peculiarities.2

§ 588. It has been a current observation, that " where annual elections end, tyranny begins."3 But this remark, like many others of a general nature, is open to much question. There is no pretence, that there is any natural connexion between the period of a year, or any other exact revolution of time, and the political changes fit for governments or magistrates. Why is the election of a magistrate or representative more safe for one year, than for two years? For one year, more than for six months? For six months, more than for three months? It is certainly competent for a state to elect its own rulers, daily, or weekly, or monthly, or annual-

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1 The Federalist, No. 52, 57.

2 Dr. Paley, with his usual practical sense, has remarked, in regard to the composition, and tenure of office, of the British house of commons, that, "the number, the fortune, and quality of the members; the variety of interests and characters among them; above all, the temporary duration of their power, and the change of men, which every new election produces, are so many securities to the public, as well against the subjection of their judgments to any external dictation, as against the formation of a junto in their won body, sufficiently powerful to govern their decisions. The representatives are so intermixed with the constituents, and the constituents with the rest of the people, that they cannot, without a partiality too flagrant to be endured, impose any burthen upon the subject, in which they do not share themselves. Nor scarcely can they adopt an advantageous regulation, in which their own interests will not participate of the advantage." Paley's Moral Philosophy, B. 6, ch. 7.

3 The Federalist, No. 53. See Montesquieu's Spirit of Laws, B. 2, ch. 3.

ly, or for a longer period, if it is deemed expedient. In this respect, it must be, or ought to be, governed by its own convenience, interests, and safety. It is, therefore, a question of sound policy, dependent upon circumstances, and not resolvable into any absolute elements dependent upon the revolution or return of natural seasons.1 The aim of every political constitution is, or ought to be, first to obtain for rulers men, who possess most wisdom to discern, and most virtue to pursue the common good of the society; and, in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue their public trust.2 Various means may be resorted to for this purpose; and doubtless one of the most efficient is the frequency of elections. But who is there, that will not

perceive, upon the slightest examination of the subject, what a wide space there is for the exercise of discretion, and for diversity of judgment.

§ 589. Without pretending to go into a complete survey of the subject, in all its bearings, the frequency of elections may be materially affected, as matter of policy, by the extent of the population and territory of a country, the concentration or sparseness of the population, the nature of the pursuits, and employments, and engagements of the people; and by the local and political situation of the nation in regard to contiguous nations. If the government be of small extent, or be concentrated in a single city, it will be far more easy for the citizens to choose their rulers frequently, and to change them without mischief, than it would be, if the territory were large, the population sparse, and the means

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1 The Federalist, No. 52, 53; Montesquieu's Spirit of Laws, B. 2, ch. 3; 1 Elliot's Debates, 30, 31, 39.

2 The Federalist, No. 57; 2 Elliot's Debates, 42.

of intercourse few and liable to interruption. If all the inhabitants, who are to vote, reside in towns and villages there will be little inconvenience in assembling together at a short notice to make a choice. It will be far otherwise, if the inhabitants are scattered over a large territory, and are engaged in agricultural pursuits, like the planters and farmers of the southern and western states, who must meet at a distance from their respective homes, and at some common place of assembling. In cases of this sort, the sacrifice of time necessary to accomplish the object, the expenses of the journey, the imperfect means of communication, the slow progress of interchanges of opinion, would naturally diminish the exercise of the right of suffrage. There would be great danger, under such circumstances, that there would grow up a general indifference or inattention to elections, it they were frequent, since they would create little interest, and would involve heavy charges and burthens. The nature of the pursuits and employments of the people must also have great influence in settling the question. If the mass of the citizens are engaged in employments, which take them away for a long period from home, such as employments in the whale and cod fisheries, in the fur-trade, in foreign and distant commerce, in periodical caravans, or in other pursuits, which require constant attention, or long continued labours at particular seasons; it is obvious, that frequent elections, which should interfere with their primary interests and objects, would be at once inconvenient, oppressive, and unequal. They would enable the few to obtain a complete triumph and ascendency in the affairs of the state over the many. Besides, the frequency of elections must be subject to other considerations, affecting the general comfort and convenience, as well

of rulers, as of electors. In the bleak regions of Lapland, and the farther north, and in the sultry and protracted heats of the south, a due regard must be had to the health of the inhabitants, and to the ordinary means of travelling. If the territory be large, the representatives must come from great distances, and are liable to be retarded by all the varieties of climate, and geological features of the country; by drifts of impassable snows; by sudden inundations; by chains of mountains; by extensive prairies; by numerous streams; by sandy deserts.1

§ 590. The task of legislation, too, is exceedingly different in a small state, from what it is in a large one; in a state engaged in a single pursuit, or living in pastoral simplicity, from what it is in a state engaged in the infinitely varied employments of agriculture, manufacture, and commerce, where enterprise and capital rapidly circulate; and new legislation is constantly required by the new fortunes of society. A single week might suffice for the ordinary legislation of a state of the territorial extent of Rhode-Island; while several months would scarcely suffice for that of New-York. In Great-Britain a half year is consumed in legislation for its diversified interests and occupations; while a week would accomplish all, that belongs to that of Lapland or Greenland, of the narrow republic of Geneva, or of the subordinate principalities of Germany. Athens might legislate, without obstructing the daily course of common business, for her own meagre territory; but when Rome had become the mistress of the world, the year seemed too short for all the exigencies of her sovereignty. When she deliberated for a world, she

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1 1 Elliot's Debates, 33, Ames's Speech.

felt, that legislation, to be wise or safe, must be slow and cautious; that knowledge, as well as power, was indispensable for the true government of her provinces.

§ 591. Again; the local position of a nation in regard to other nations may require very different courses of legislation, and very different intervals of elections, from what would be dictated by a sense of its own interest and convenience under other circumstances. If it is surrounded by powerful and warlike neighbours, its own government must be invested with proportionately prompt means to act, and to legislate, in order to repel aggressions, and secure its own rights. Frequent changes in the public councils might not only leave it exposed to the hazard of

having no efficient body in existence to act upon any sudden emergency, but also, by the fluctuations of opinion, necessarily growing out of these changes, introduce imbecility, irresolution, and the want of due information into those councils. Men, to act with vigour and effect, must have time to mature measures, and judgment and experience, as to the best method of applying them. They must not be hurried on to their conclusions by the passions, or the fears of the multitude. They must deliberate, as well as resolve. If the power drops from their hands before they have an opportunity to carry any system into full effect, or even to put it on its trial, it is impossible, that foreign nations should not be able, by intrigues, by false alarms, and by corrupt influences, to defeat the wisest measures of the best patriots.

§ 592. One other consideration of a general nature deserves attention. It is, that while, on the one hand, constantly recurring elections afford a great security to public liberty, they are not, on the other hand, without some dangers and inconveniences of a formidable

nature. The very frequency of elections has a tendency to create agitations and dissensions in the public mind; to nourish factions, and encourage restlessness, to favour rash innovations in domestic legislation and public policy; and to produce violent and sudden changes in the administration of public affairs, founded upon temporary excitements and prejudices.1

§ 593. It is plain, that some of the considerations, which have been stated, must apply with very different force to the condition and interests of different states; and they demonstrate, if not the absurdity, at least the impolicy of laying down any general maxim, as to the frequency of elections to legislative, or other offices.2 There is quite as much absurdity in laying down, as a general rule, that where annual elections end, tyranny begins, as there is in saying, that the people are free only while they are choosing their representatives, and slaves during the whole period of their service.

§ 594. If we examine this matter by the light of history, or at least of that portion of it, which is best entitled to instruct us on the point, it will be found, that there is no uniformity of practice, or principle, among free nations in regard to elections. In England it is not easy to trace out any very decided course. The history of parliament, after magna charta, proves, that that body had been accustomed usually to assemble once a year; but, as these sessions were dependent upon the good pleasure and discretion of the crown, very long and inconvenient intermissions occasionally

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1 See Mr. Ames's Speech, 1 Elliot's Debates, 31, 33; Ames's Works, 20, 24.

2 Montesquieu's Spirit of Laws, B. 2, ch. 3; l Elliot's Debates, 30 to 42.

occurred, from royal contrivance, ambition, or policy.1 But, even when parliament was accustomed to sit every year, the members were not chosen every year. On the contrary, as the dissolution of parliament was solely dependent on the will of the crown, it might, and formerly it sometimes did happen, that a single parliament lasted through the whole life of the king, who convened it.2 To remedy these grievances, it was provided by a statute, passed in the reign of Charles the Second, that the intermissions should not be protracted beyond the period of three years; and by a subsequent statute of William and Mary, that the same parliament should not sit longer than three years, but be, at the end of that period, dissolved, and a new one elected. This period was, by a statute of George the First, prolonged to seven years, after an animated debate; and thus septennial became a substitute for triennial parliaments.3 Notwithstanding the constantly increasing influence of the house of commons, and its popular cast of opinion and action, more than a century has elapsed without any successful effort, or even any general desire, to change the duration of parliament. So that, as the English constitution now stands, the parliament must expire, or die a natural death, at the end of the seventh year, and not sooner, unless dissolved by the royal prerogative.4 Yet no man, tolerably well acquainted with the history of Great Britain for the last century, would venture to affirm, that the people had not enjoyed a higher degree of liberty and

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1 The Federalist, No. 52.

2 1 Black. Comm. 189, and note.

3 1 Black. Comm. 189; The Federalist, No. 52, 53; 1 Elliot's Debates, 37, 39; 2 Elliot's Debates, 42.

4 1 Black. Comm. 189; The Federalist, No. 52.

influence in all the proceedings of the government, than ever existed in any antecedent period.

§ 595. If we bring, our inquiries nearer home, it will be found, that the history of the American colonies before the revolution affords an equally striking proof of the diversity of opinion and usage. It is very well known, that the

principle of representation in one branch of the legislature was (as has been already stated) established in all the colonies. But the periods of election of the representatives were very different. They varied from a half-year to seven years. In Virginia the elections were septennial; in North and SouthCarolina, biennial; in Massachusetts, annual; in Connecticut and Rhode-Island, semi-annual.1 It has been very justly remarked by the Federalist, that there is not any reason to infer, from the spirit and conduct of the representatives of the people prior to the revolution, that biennial elections would have been dangerous to the public liberties. The spirit, which every where displayed itself at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proofs, that a sufficient portion of liberty had been every where enjoyed to inspire both a sense of its worth, and a zeal for its proper enlargement. This remark holds good, as well with regard to the then colonies, whose elections were least frequent, as to those, whose elections were most frequent. Virginia was the colony, which stood first in resisting the parliamentary encroachments of Great Britain; it was the first also in espousing, by a public act, the resolution of independence. Yet her house of representatives

1 The Federalist, No. 52; 1 Elliot's Debates, 41, 42; 2 Elliot's Debates, 42; 3 Elliot's Debates, 40.

was septennial.1 When, after the revolution, the states freely framed and adopted their own constitutions of government, a similar, though not so marked a diversity of opinion, was exhibited. In Connecticut, until her recent constitution, the representatives were chosen semi-annually; in Rhode-Island they are still chosen semi-annually; in South-Carolina, Tennessee, Missouri, Illinois, and Louisiana they are chosen biennially; and in the rest of the states annually.2 And it has been justly observed in the Federalist,3 that it would not be easy to show, that Connecticut or Rhode-Island is better governed, or enjoys a greater share of rational liberty, than South-Carolina, (or any of the other states having biennial elections;) or, that either the one or the other of these states is distinguished, in these respects, and by those causes, from the states, whose elections are different from both.

§ 596. These remarks are sufficient to establish the futility of the maxim alluded to, respecting the value of annual elections. The question, how frequent elections should be, and what should be the term of service of representatives, cannot be answered in any universal form, applicable to all times, and all nations.4 It is very complex in its nature, and must ultimately resolve itself into a question of policy and sound, discretion, with reference to the particular condition and circumstances of each nation, to which it is sought to be applied. The same fundamental principles of government may require very different, if not entirely opposite practices in different states. There is great wis-

1 The Federalist, No. 52.

2 Dr. Lieber's Encycl. Americana, art. Constitutions of the United States; 3 Elliot's Debates, 260; l Kent. Comm. 215.

3 The Federalist, No. 53; 3 Elliot's Debates, 260.

4 1 Elliot's Debates, 40, 41, 42.

dom in the observations of one of our eminent statesmen on this subject. "It is apparent," said he, "that a delegation for a very short period, as for a single day, would defeat the design of representation. The election in that case would not seem to the people to be of any importance, and the person elected would think as lightly of his appointment. The other extreme is equally to be avoided. An election for a long term of years, or for life, would remove the member too far from the control of the people, would be dangerous to liberty, and in fact repugnant to the purposes of the delegation. The truth, as usual, is placed somewhere between the extremes, and, I believe, is included in this proposition; the term of election must be so long, that the representative may understand the interests of the people; and yet so limited, that his fidelity may be secured by a dependence upon their approbation."1

§ 597. The question, then, which was presented to the consideration of the convention, was, what duration of office, on the part of the members of the house of representative, was, with reference to the structure of the other branches of the legislative department of the general government, best adapted to preserve the public liberty and to promote the general welfare. I say, with reference to the structure of the other branches of the legislative department of the general government, because it is obvious, that the duration of office of the president and senate, and the nature and extent of the powers to be confided to congress, must most materially affect the decision upon this point. Absolute unanimity upon such a subject could hardly be expected; and accordingly it will be found, that no

1 Mr. Ames's Speech, 1 Elliot's Debates, 30, 31; Ames's Works, 21; 2 Elliot's Debates, 44, 46

inconsiderable diversity of opinion was exhibited in the discussions in the convention. It was, in the first instance, decided in a committee of the whole, that the period should be three years, seven states voting in the affirmative, and four in the negative.1 That period was afterwards struck out by a vote of the convention, seven states voting in the affirmative, three in the negative, and one being divided, and the word " two" was unanimously inserted in its stead.2 In the subsequent revision the clause took the shape, in which it now stands in the constitution.

§ 598. The reasons, which finally prevailed in the convention and elsewhere in favour of biennial elections in preference to any other period, may be arranged under the following heads:

§ 599. In the first place, an argument might properly be drawn from the extent of the country to be governed. The territorial extent of the United States would require the representatives to travel from great distances, and the arrangements, rendered necessary by that circumstance, would furnish much more serious objections with men fit for this service, if limited to a single year, than if extended to two years.3 Annual elections might be very well adapted to the state legislatures from the facility of convening the members, and from the familiarity of the people with all the general objects of local legislation, when they would be highly inconvenient for the legislature of the Union. If, when convened, the term of congress was of short duration, there would scarcely be time properly to examine and mature

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1 Journal of the Convention, p. 67, 115, 116, 135; 4 Elliot's Debates, (Yate's Minutes,) 70, 71.

2 Journal of the Convention, p. 141, 207, 216; 1 Elliot's Debates, 30; 4 Elliot's Debates, (Yate's Minutes,) 91, 92.

3 The Federalist, No. 53; 1 Elliot's Debates, 30, 40, 41, 42.

measures. A new election might intervene before there had been an opportunity to interchange opinions and acquire the information indispensable for wise and salutary action.1 Much of the business of the national legislature must necessarily be postponed beyond a single session; and if new men are to come every year, a great part of the information already accumulated will be lost, or be unavoidably open for re-examination before any vote can be properly had.

§ 600. In the next place, however well founded the maxim might be, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and conversely, the smaller the power, the more safely its duration may be protracted;2 that maxim, if it applied at all to the government of the Union, was favourable to the extension of the period of service beyond that of the state legislatures. The powers of congress are few and limited, and of a national character; those of the state legislatures are general, and have few positive limitations. If annual elections are safe for a state; biennial elections would not be less safe for the United States. No just objection, then, could arise from this source, upon any notion, that there would be a more perfect security for public liberty in annual than in biennial elections.

§ 601. But a far more important consideration grows out of the nature and objects of the powers of congress. The aim of every political constitution is, or ought to be, first, to obtain for rulers men, who possess most wisdom to discern, and most virtue to pursue, the common good of society; and, in the next place, to take the most effectual precautions for keeping, them virtu-

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1 The Federalist, No. 53; 1 Elliot's Debates, 40, 41, 42.

2 The Federalist, No. 52; Montesquieu's Spirit of Laws, B. 2, ch. 3.

ous, whilst they continue to hold their public trust. Frequent elections have, without question, a tendency to accomplish the latter object. But too great a frequency will, almost invariably, defeat the former object, and, in most cases, put at hazard the latter. As has been already intimated, it has a tendency to introduce faction, and rash counsels, and passionate appeals to the prejudices, rather than to the sober judgment of the people. And we need not to be reminded, that faction and enthusiasm are the instruments, by which popular governments are destroyed.2 It operates also, as a great discouragement upon suitable candidates offering themselves for the public service. They can have little opportunity to establish a solid reputation, as statesmen or patriot, when their schemes are liable to be suddenly broken in upon by demagogues, who may create injurious suspicions, and even displace them from office, before their measures are fairly tried.3 And they are apt to grow weary of continued appeals to vindicate their character and conduct at the polls, since success, however triumphant, is of such short duration, and confidence is so easily loosened. These considerations, which are always of some weight, are especially applicable to services in a

national legislature, at a distance from the constituents, and in cases, where a great variety of information, not easily accessible, is indispensable to a right understanding of the conduct and votes of representatives.

§ 602. But the very nature and objects of the national government require far more experience and knowledge, than what may be thought requisite in the

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1 The Federalist, No. 57; 1 Kent's Comm. 215.

2 Ames's Speech; 1 Elliot's Debates, 33.

3 1 Kent's Comm. 215.

members of a state legislature. For the latter a knowledge of local interests and opinions may ordinarily suffice. But it is far different with a member of congress. He is to legislate for the interest and welfare, not of one state only, but of all the states. It is not enough, that he comes to the task with an upright intention and sound judgment, but he must have a competent degree of knowledge of all the subjects, on which he is called to legislate; and he must have skill, as to the best mode of applying it. The latter can scarcely be acquired, but by long experience and training in the national councils. The period of service ought, therefore, to bear some proportion to the variety of knowledge and practical skill, which the duties of the station demand.1

§ 603. The most superficial glance at the relative duties of a member of a state legislature and of those of a member of congress, will put this matter in a striking light. In a single state, the habits, manners, institutions, and laws, are uniform, and all the citizens are more or less conversant with them. The relative bearings of the various pursuits and occupations of the people are well understood, or easily ascertained. The general affairs of the state lie in a comparatively narrow compass, and are daily discussed and examined by those, who have an immediate interest in them, and by frequent communication with each other can interchange opinions.2 It is very different with the general government. There, every measure is to be discussed with reference to the rights, interests, and pursuits of all the states. When the constitution was adopted, there were thirteen, and there are now twenty-four

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1 The Federalist, No. 53; 1 Elliot's Debates, 30, 37, 39, 40, 41; Id. 220; 2 Elliot's Debates, 42; I Kent's Comm. 215.

2 The Federalist, No. 53, 56.

states, having different laws, institutions, employments, products, and climates, and many artificial, as well as natural differences in the structure of society, growing out of these circumstances. Some of them are almost wholly agricultural; some commercial; some manufacturing; some have a mixture of all; and in no two of them are there precisely the same relative adjustments of all these interests. No legislation for the Union can be safe or wise, which is not founded upon an accurate knowledge of these diversities, and their practical influence upon public measures. What may be beneficial and politic, with reference to the interests of a single state, may be subversive of those of other states. A regulation of commerce, wise and just for the commercial states, may strike at the foundation of the prosperity of the agricultural or manufacturing states. And, on the other hand, a measure beneficial to agriculture or manufactures, may disturb, and even overwhelm the shipping interest. Large and enlightened views, comprehensive information, and a just attention to the local peculiarities, and products, and employments of different states, are absolutely indispensable qualifications for a member of congress. Yet it is obvious, that if very short periods of service are to be allowed to members of congress, the continual fluctuations in the public councils, and the perpetual changes of members will be very unfavourable to the acquirement of the proper knowledge, and the due application of it for the public welfare. One set of men will just have mastered the necessary information, when they will be succeeded by a second set, who are to go over the same grounds, and then are to be succeeded by a third. So, that inexperience, instead of practical wisdom, hasty legislation, instead of sober deliberation, and imperfect projects,

instead of well constructed systems, would characterize the national government.1

§ 604. Congress has power to regulate commerce with foreign nations and among, the several states. How can foreign trade be properly regulated by uniform laws without (I do not say some acquaintance, but) a large acquaintance with the commerce, ports, usages, and regulations of foreign states, and with the pursuits and products of the United States? How can trade between the different states be duly regulated, without an accurate knowledge of their relative situation, and climate, and productions, and facilities of intercourse.2 Congress has power to lay taxes and imposts; but how can taxes be judiciously imposed, and effectively collected, unless they are accommodated to the local circumstances of the several states? The power of taxation, even with the purest and best intentions, might, without a thorough knowledge of the diversified interests of the states, become a most oppressive

and ruinous engine of power.3 It is true, that difficulties of this sort, will occur more frequently in the first operations of the government, than afterwards.4 But in a growing community, like that of the United States, whose population has already increased from three to thirteen millions within forty years, there must be a perpetual change of measures to suit the new exigencies of agriculture, commerce, and manufactures, and to ensure the vital objects of the constitution. And, so far is it from being true, that the national government has by its familiarity become more simple and facile in its machinery and operations, that it may be affirmed, that a

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1 The Federalist, No. 53, 56.
2 Id.
3 Id.
4 Id.

far more exact and comprehensive knowledge is now necessary to preserve its adjustments, and to carry on its daily operations, than was required, or even dreamed of, at its first institution. Its very success, as a plan of government, has contributed, in no small degree, to give complexity to its legislation. And the important changes in the world during its existence has required very many developments of its powers and duties, which could hardly have occurred, as practical truths to its enlightened founders.

§ 605. There are other powers belonging to the national government, which require qualifications of a high character. They regard our foreign intercourse and diplomatic policy. Although the house of representatives does not directly participate in foreign negotiations and arrangements; yet, from the necessary connexion between the several branches of public affairs, its cooperation with the other departments of the government will be often indispensable to carry them into full effect. Treaties with foreign nations will often require the sanction of laws, not merely by way of appropriations of money to comply with their stipulations; but also to provide suitable regulations to give them a practical operation. Thus, a purchase of territory, like that of Louisiana, would not only require the house of representatives to vote an appropriation of money; and a treaty, containing clauses of indemnity, like the British treaty of 1794, in like manner require an appropriation to give it effect; but commercial treaties, in an especial manner would require many variations and additions to the existing laws in order to adjust them to the general system, and produce, where it is intended, a just reciprocity.1 It is hardly necessary to say, that a com-

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1 The Federalist, No. 53.

petent knowledge of the law of nations is indispensable to every statesman; and, that ignorance may not only involve the nation in embarrassing controversies with other nations; but may also involve it in humiliating sacrifices. Congress alone is entrusted with the power to declare war. What would be said of representatives called upon to exercise this ultimate appeal of sovereignty, who were ignorant of the just rights and duties of belligerent and neutral nations?1

§ 606. Besides; the whole diplomacy of the executive department, and all those relations with independent powers, which connect themselves with foreign intercourse, are so intimately blended with the proper discharge of legislative duties, that it is impossible, that they should not be constantly brought under review in the public debates. They must frequently furnish matter for censure or praise; for accusation or vindication; for legislative checks, or legislative aids; for powerful appeals to popular favour, or popular resentment; for the ardent contests of party; and even for the graver exercise of the power of impeachment.

§ 607. And this leads us naturally to another remark; and that is, that a due exercise of some of the powers confided to the house of representatives, even in its most narrow functions, require, that the members should at least be elected for a period of two years. The power of impeachment could scarcely be exerted with effect by any body, which had not a legislative life of such a period. It would scarcely be possible, in ordinary cases, to begin and end an impeachment at a single annual session. And the effect of change of members during its prosecution would be attended with no inconsiderable embarrassment and inconvenience. If the power

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1 The Federalist, No. 53.

is ever to be exerted, so as to bring great offenders to justice, there must be a prolonged legislative term of office, so as to meet the exigency. One year will not suffice to detect guilt, and to pursue it to conviction.1

§ 608. Again; the house of representatives is to be the sole judge of the elections of its own members. Now, if but one legislative session is to be held in a year, and more than one cannot ordinarily be presumed convenient or

proper, spurious elections cannot be investigated and annulled in time to have a due effect The sitting member must either hold his seat during the whole period of the investigation, or he must be suspended during the same period. In either case the public mischief will be very great. The uniform practice has been to allow the member, who is returned, to hold his seat and vote, until he is displaced by the order of the house, after full investigation. If, then, a return can be obtained, no matter by what means, the irregular member is sure of holding his seat, until a long period has elapsed, (for that is indispensable to any thorough investigation of facts arising at great distances;) and thus a very pernicious encouragement is given to the use of unlawful means for obtaining irregular returns, and fraudulent elections.2

§ 609. There is one other consideration, not without its weight in all questions of this nature. Where elections are very frequent, a few of the members, as happens in all such assembles, will possess superior talents; will, by frequent re-elections, become members of long standing; will become thoroughly masters of the public business; and thus will acquire a preponderating and undue influence, of which they will naturally be dis-

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1 1 Elliot's Debates, 34; Mr. Ames's Speech.

2 The Federalist, No. 53.

posed to avail themselves. The great bulk of the house will be composed of new members, who will necessarily be inexperienced, diffident, and undisciplined, and thus be subjected to the superior ability and information of the veteran legislators. If biennial elections would have no more cogent effect, than to diminish the amount of this inequality; to guard unsuspecting confidence against the snares, which may be set for it; and to stimulate a watchful and ambitious responsibility, it would have a decisive advantage over mere annual elections.1

§ 610. Such were some of the reasons, which produced, on the part of the framers of the constitution, and ultimately of the people themselves, an approbation of biennial elections. Experiencehas demonstrated the sound policy and wisdom of the provision. But looking back to the period, when the constitution was upon its passage, one cannot but be struck with the alarms, with which the public mind was on this subject attempted to be disturbed. It was repeatedly urged in and out of the state conventions, that biennial elections were dangerous to the public liberty; and that congress might perpetuate itself, and reign with absolute power over the nation.2

§ 611. In the next place, as to the qualifications of the elected. The constitution on this subject is as follows:3 "No person shall be a representative, who "shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States;

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1 The Federalist, No. 53. See also 1 Tucker's Black. Comm. App. 229; 2 Wilson's Law Lectures, 151.

2 1 Elliot's Debates, 28, 37, 38, 43; Id. 217.

3 Art. J, §2, paragraph 3.

"and who shall not, when elected, be an inhabitant of that state, in which he shall be chosen."

§ 612. It is obvious, that the inquiry, as to the due qualifications of representatives, like that, as to the due qualifications of electors in a government, is susceptible, in its own nature, of very different answers, according to the habits, institutions, interests, and local peculiarities of different nations. It is a point, upon which we can arrive at no universal rule, which will accommodate itself to the welfare and wants of every people, with the same proportionate advantages. The great objects are, or ought to be, to secure, on the part of the representatives, fidelity, sound judgment, competent information, and incorruptible independence. The best modes, by which these objects can be attained, are matters of discussion and reasoning, and essentially dependent upon a large and enlightened survey of the human character and passions, as developed in the different stages of civilized society. There is great room, therefore, for diversities of judgment and opinion upon a subject so comprehensive and variable in its elements. It would be matter of surprise, if doctrines essentially different, nay, even opposite to each other, should not, under such circumstances, be maintained by political writers, equally eminent and able. Upon questions of civil policy, and the fundamental structure of governments, there has hitherto been too little harmony of opinion among the greatest men to encourage any hope, that the future will be less fruitful in dissonances, than the past. In the practice of governments, a very great diversity of qualifications has been insisted on, as prerequisites of office; and this alone would demonstrate, that there was not admitted to exist any common stan-

dard of superior excellence, adapted to all ages, and all nations.

§ 613. In Great-Britain, besides those negative qualifications, which are founded in usage, or positive law, such as the exclusion of persons holding certain offices and pensions, it is required, that every member for a county, or

knight of a shire, (as he is technically called,) shall have a clear estate of freehold, or copyhold, to the value of 600 sterling per annum; and every member for a city or borough, to the value of 300, except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members of the two universities.1

§ 614. Among the American colonies antecedent to the revolution, a great diversity of qualifications existed; and the state constitutions, subsequently formed, by no means lessen that diversity. Some insist upon a freehold, or other property, of a certain value; others require a certain period of residence, and citizenship only; others require a freehold only; others a payment of taxes, or an equivalent; others, again, mix up all the various qualifications of property, residence, citizenship, and taxation, or substitute some of these, as equivalents for others.2

§ 615. The existing qualifications in the states being then so various, it may be thought, that the best course would have been, to adopt the rules of the states respectively, in regard to the most numerous branch of their own legislatures. And this course might not have been open to serious objections. But, as the qualifications of members were thought to be less carefully defined in the state constitutions, and more susceptible of

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1 1 Black. Comm. 176. See 4 Instit. 46 to 48.

2 Dr. Lieber's Encycl. Americana, art. Constitutions of the United States.

uniformity, than those of the electors, the subject was thought proper for regulation by the convention.1 And it is observable, that the positive qualifications are few and simple. They respect only age, citizenship, and inhabitancy.2

§ 616. First, in regard to age. The representative must have attained twenty-five years. And certainly to this no reasonable objection can be made.3 If experience, or wisdom, or knowledge be of value in the national councils, it can scarcely be pretended, that an earlier age could afford a certain guaranty for either. That some qualification of age is proper, no one will dispute. No one will contend, that persons, who are minors, ought to be eligible; or, that those, who have not attained manhood, so as to be entitled by the common law to dispose of their persons, or estates, at their own will, would be fit depositaries of the authority to dispose of the rights, persons, and property of others. Would the mere attainment of twenty-one years of age be a more proper qualification? All just reasoning would be against it. The characters and passions of young men can scarcely be understood at the moment of their majority. They are then new to the rights of self-government; warm in their passions; ardent in their expectations; and, just escaping from pupilage, are strongly tempted to discard the lessons of caution, which riper years inculcate. What they will become, remains to be seen; and four years beyond that period is but a very short space, in which to try their virtues, develope their talents, enlarge their resources, and give them a practical insight into the business of life ade-

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1 The Federalist, No. 295.

2 1 Tucker's Black. Comm. App. 197.

3 1 Tucker's Black. Comm. App. 213, 214; 2 Wilson's Law Lect. 139, 140.

quate to their own immediate wants and duties. Can the interests of others be safely confided to those, who have yet to learn how to take care of their own? The British constitution has, indeed, provided only for the members of the house of commons not being minors;1 and illustrious instances have occurred to show, that great statesmen may be formed even during their minority. But such instances are rare, they are to be looked at as prodigies, rather than as examples; as the extraordinary growth of a peculiar education and character, and a hot-bed precocity in a monarchy, rather than as the sound and thrifty growth of the open air, and the bracing hardihood of a republic. In the convention this qualification, as to age, did not pass without a struggle. It was originally carried by a vote of seven states against three, one being divided; though it was ultimately adopted without a division.2 In the state conventions it does not seem to have formed any important topic of debate.3

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1 Black. Comm. 162, 173, 175; 4 Instit. 46, 47.

2 Journal of Convention, June 22, p. 143; Id. Aug. 8, p 235; 4 Elliot's Debates, (Yates's Minutes,) 94.

3 Lork Coke has with much gravity enumerated the proper qualifications of a parliament-man, drawing the resemblances from the properties of the elephant. First, that he should be without gall; that is, without malice, rancour, heat, and envy. Secondly, that he should be constant, inflexible, and not to be bowed, or turned from the right, either for fear, reward, or favour, nor in judgment respect persons. Thirdly, that he should be of a rip e memory, that remembering perils past, he might remember dangers to come. Fourthly, that though he be of the greatest strength and understanding, yet he be sociable, and go in companies; and fifthly, that he philanthropic, showing the way to every man.* Whatever one may

now think of this quaint analogy, these qualities would not, in our day, be thought a bad enumeration of the proper qualities of a good modern member of parliament, or congress. * 4 Instit. 3.

§ 617. Secondly, in regard to citizenship. It is required, that the representative shall have been a citizen of the United States seven years. Upon the propriety of excluding aliens from eligibility, there could scarcely be any room for debate; for there could be no security for a due administration of any government by persons, whose interests and connexions were foreign, and who owed no permanent allegiance to it, and had no permanent stake in its measures or operations. Foreign influence, of the most corrupt and mischievous nature, could not fail to make its way into the public councils, if there was no guard against the introduction of alien representatives.1 It has accordingly been a fundamental policy of most, if not of all free states, to exclude all foreigners from holding offices in the state. The only practical question would seem to be, whether foreigners, even after naturalization, should be eligible as representatives; and if so, what was a suitable period of citizenship for the allowance of the privilege. In England, all aliens born, unless naturalized, were originally excluded from a seat in parliament; and now, by positive legislation, no alien, though naturalized, is capable of being a member of either house of parliament.2 A different course, naturally arising from the circumstances of the country, was adopted in the American colonies antecedent to the revolution, with a view to invite emigrations, and settlements, and thus to facilitate the cultivation of their wild and waste lands. A similar policy had since pervaded the state governments, and had been attended with so many advantages, that it would hare been

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1 The Federalist, No. 62.

2 1 Black. Comm. 162, 175; 4 Inst. 46.

impracticable to enforce any total exclusion of naturalized citizens from office. In the convention it was originally proposed, that three years' citizenship should constitute a qualification; but that was exchanged for seven years by a vote of ten states to one.1 No objection seems even to have been suggested against this qualification; and hitherto it has obtained a general acquiescence or approbation. It certainly subserves two important purposes. 1. That the constituents have a full opportunity of knowing the character and merits of their representative. 2. That the representative has a like opportunity of learning the character, and wants, and opinions of his constituents.2

§ 618. Thirdly, in regard to inhabitancy. It is required, that the representative shall, when elected, be an inhabitant of the state, in which he shall be chosen. The object of this clause, doubtless, was to secure an attachment to, and a just representation of, the interests of the state in the national councils. It was supposed, that an inhabitant would feel a deeper concern, and possess a more enlightened view of the various interests of his constituents, than a mere stranger. And, at all events, he would generally possess more entirely their sympathy and confidence. It is observable, that the inhabitancy required is within the state, and not within any particular district of the state, in which the member is chosen. In England, in former times, it was required, that all the members of the house of commons should be inhabitants of the places, for which they were chosen. But this was for a long time wholly disregarded in practice, and was at length repealed by

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1 Journal of the Convention, 8 August, 233, 234.

2 2 Wilson's Law Lectures, 141.

statute of 14 Geo. 3, ch. 58.1 This circumstance is not a little remarkable in parliamentary history; and it establishes, in a very striking manner, how little mere theory can be regarded in matters of government. It was found by experience, that boroughs and cities were often better represented by men of eminence, and known patriotism, who were strangers to them, than by those chosen from their own vicinage. And to this very hour some of the proudest names in English History, as patriots and statesmen, have been the representatives of obscure, and, if one may so say, of ignoble boroughs.

§ 619. An attempt was made in the convention to introduce a qualification of one year's residence before the election; but it failed, four states voting in favour of it, six against it, and one being divided.2 The omission to provide, that a subsequent non-residence shall be a vacation of the seat, may in some measure defeat the policy of the original limitation. For it has happened, in more than one instance, that a member, after his election, has removed to another state, and thus ceased to have that intimate intercourse with, and dependence upon his constituents, upon which so much value has been placed in all his discussions on this subject.

§ 620. It is observable, that no qualification, in point of estate, has been required on the part of members of the house of representatives.3 Yet such a qualification is insisted on, by a considerable number of the states, as a qualification for the popular branch of the

1 1 Black. Comm. 175; 2 Wilson's Law Lect. 142.

2 Journal of Convention, 8 August, p. 224, 225.

3 Journal of Convention, 26 July, p. 204, 205; Id. 212; Id. 241, 242.

state legislature.1 The probability is, that it was not incorporated into the constitution of the Union from the difficulty of framing a provision, that would be generally acceptable. Two reasons have, however, been assigned by a learned commentator for the omission, which deserve notice. First, that in a representative government the people have an undoubted right to judge for themselves of the qualification of their representative, and of their opinion if his integrity and ability will supply the want of estate, there is better reason for contending, that it ought not prevail. Secondly, that by requiring a property qualification, it may happen, that men, the best qualified in other respects, might be incapacitated from serving their country.2 There is, doubtless, weight in each of these considerations. The first, however, is equally applicable to all sorts of qualifications whatsoever; and proceeds upon art inadmissible foundation; and that is, that the society has no just right to regulate for the common good, what a portion of the community may deem for their special good. The other reason has a better foundation in theory; though, generally speaking, it will rarely occur in practice. But it goes very far towards overturning another fundamental guard, which is deemed essential to public liberty; and that is, that the representative should have a common interest in measures with his constituents. Now, the power of taxation, one of the most delicate and important in human society, will rarely be exerted oppressively by those, who are to share the common burthens. The possession of property has in this respect a great value

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1 Dr. Lieber's Encyclopedia Americana, art. Constitutions of the United States.

2 1 Tucker's Black. Comm. App. 212, 213; 1 Elliot's Debates, 55, 56.

among the proper qualifications of a representative; since it will have a tendency to check any undue impositions, or sacrifices, which may equally injure his own, as well as theirs.1

§ 621. In like manner there is a total absence of any qualification founded on religious opinions. However desirable it may be, that every government should be administered by those, who have a fixed religious belief, and feel a deep responsibility to an infinitely wise and eternal Being; and however strong may be our persuasion of the everlasting value of a belief in Christianity for our present, as well as our immortal welfare; the history of the world has shown the extreme dangers, as well as difficulties, of connecting the civil power with religious opinions. Half the calamities, with which the human race have been scourged, have arisen from the union of church and state; and the people of America, above all others, have too largely partaken of the terrors and the sufferings of persecution for conscience' sake, not to feel an excessive repugnance to the introduction of religious tests. Experience has demonstrated the folly, as well as the injustice, of exclusions from office, founded upon religious opinions. They have aggravated all other evils in the political organization of societies. They carry in their train discord, oppression, and bloodshed.2 They perpetuate a savage ferocity, and insensibility to human rights and sufferings. Wherever they have been abolished, they have introduced peace and moderation, and enlightened legislation. Wherever they have been perpetuated, they have always checked, and in many

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1 1 Tucker's Black. Comm. App. 212, 213.

2 See 4 Black. Comm. 44, 45, 46, 47.

cases have overturned all the securities of public liberty. The right to burn heretics survived in England almost to the close of the reign of Charles the Second;1 and it has been asserted, (but I have not been able to ascertain the fact by examination of the printed journals,) that on that occasion the whole bench of bishops voted against the repeal. We all know how slowly the Roman Catholics have recovered their just rights in England and Ireland. The triumph has been but just achieved, after a most painful contest for a half century. In the catholic countries, to this very hour, protestants are, for the most part, treated with a cold and reluctant jealousy, tolerated perhaps, but never cherished. In the actual situation of the United States a union of the states would have been impractible from the known diversity of religious sects, if any thing more, than a simple belief in Christianity in the most general form of expression, had been required. And even to this some of the states would have objected, as inconsistent with the fundamental policy of their own charters, constitutions, and laws. Whatever, indeed, may have been the desire of

many persons, of a deep religious reeling, to have embodied some provision on this subject in the constitution, it may be safely affirmed, that hitherto the absence has not been felt, as an evil; and that while Christianity continues to be the belief of the enlightened, and wise, and pure, among the electors, it is impossible, that infidelity can find an easy home in the house of representatives.

§ 622. It has been justly observed, that under the reasonable qualifications established by the constitution, the door of this part of the federal government is open

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1 4 Black. Comm. 49.

to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or any particular profession of religious faith.1

§ 623. A question, however, has been suggested upon this subject, which ought not to be passed over without notice. And that is, whether the states can superadd any qualifications to those prescribed by the constitution of the United States. The laws of some of the states have already required, that the representative should be a freeholder, and be resident within the district, for which he is chosen.2 If a state legislature has authority to pass laws to this effect, they may impose any other qualifications beyond those provided by the constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the Union. The legislature of one state may require, that none but a Deist, a Catholic, a Protestant, a Calvinist, or a Universalist, shall be a representative. The legislature of another state may require, that none shall be a representative but a planter, a farmer, a mechanic, or a manufacturer. It may exclude merchants, and divines, and physicians, and lawyers. Another legislature may require a high monied qualification, a freehold of great value, or personal estate of great amount. Another legislature may require, that the party shall have been born, and always lived in the state, or district; or that he shall be an inhabitant of a particular town or city, free of a corporation, or eldest son. In short, there is no end to the varieties of qualifications, which, without insisting upon extravagant cases, may be imagined. A state may, with the

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2 1 Tucker's Black. Comm. App. 213.

sole object of dissolving the Union, create qualifications so high, and so singular, that it shall become impracticable to elect any representative.

§ 624. It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others. And a doubt of this sort seems to have pervaded the mind of a learned commentator.1 A power to add new qualifications is certainly equivalent to a power to very them. It adds to the aggregate, what changes the nature of the former requisites. The house of representatives seems to have acted upon this interpretation, and to have held, that the state legislatures have no power to prescribe new qualifications, unknown to the constitution of the United States.2 A celebrated American statesman,3 however, with his avowed devotion to state power, has intimated a contrary doctrine. "If," says he, "whenever the constitution assumes a single power out of many, which belong to the same subject, we should consider it as assuming the whole, it would vest the general government with a mass of powers never contemplated. On the contrary, the assumption of particular powers seems an exclusion of all not assumed. This reasoning appears to me to be sound, but on so recent a change of view, caution requires us not to be over confident."4 He intimates, however, that unless the case be either

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1 1 Tucker's Black. Comm. App. 213.

2 4 Jefferson's Correspondence, 238.

3 Mr. Jefferson.

4 Jefferson's Correspondence, 239.

clear or urgent, it would be better to let it lie undisturbed.1

§ 625. It does not seem to have occurred to this celebrated statesman, that the whole of this reasoning, which is avowedly founded upon that amendment to the constitution, which provides, that "the powers not delegated nor prohibited to the states, are reserved to the states respectively, or to the people," proceeds upon a basis, which is inapplicable to the case. In the first place, no powers could be reserved to the states, except those, which existed in the states before the constitution was adopted. The amendment does not profess, and, indeed, did not intend to confer on the states any new powers; but merely to reserve to them, what were not conceded to the government of

the Union. Now, it may properly be asked, where did the states get the power to appoint representatives in the national government? Was it a power, that existed at all before the constitution was adopted? If derived from the constitution, must it not be derived exactly under the qualifications established by the constitution, and none others? If the constitution has delegated no power to the states to add new qualifications, how can they claim any such power by the mere adoption of that instrument, which they did not before possess?

§ 626. The truth is, that the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the Union, deriving his

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1 4 Jefferson's Correspondence, p. 239.

powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. It is no original prerogative of state power to appoint a representative, a senator, or president for the Union. Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people. Before a state can assert the right, it must show, that the constitution has delegated and recognised it. No state can say, that it has reserved, what it never possessed.

§ 627. Besides; independent of this, there is another fundamental objection to the reasoning. The whole scope of the argument is, to show, that the legislature of the state has a right to prescribe new qualifications. Now, if the state in its political capacity had it, it would not follow, that the legislature possessed it. That must depend upon the powers confided to the state legislature by its own constitution. A state, and the legislature of a state, are quite different political beings. Now it would be very desirable to know, in which part of any state constitution this authority, exclusively of a national character, is found delegated to any state legislature. But this is not all. The amendment does not reserve the powers to the states exclusively, as political bodies; for the language of the amendment is, that the powers not delegated, &c. are reserved to the states, or to the people. To justify, then, the exercise of the power by a state, it is indispensable to show, that it has not been reserved to the people of the state. The people of the state, by adopting the constitution, have declared what their will is, as to the qualifications for office. And here the maxim, if ever, must apply, Expressio unius est exclusio alterius. It might further be urged, that the constitution, being the act of the whole

people of the United States, formed and fashioned according to their own views, it is not to be assumed, as the basis of any reasoning, that they have given any control over the functionaries created by it, to any state, beyond what is found in the text of the instrument. When such a control is asserted, it is matter of roof, not of assumption; it is matter to be established, as of right, and not to be exercised by usurpation, until it is displaced. The burthen of proof is on the state, and not on the government of the Union. The affirmative is to be established; the negative is not to be denied, and the denial taken for a concession.

§ 628. In regard to the power of a state to prescribe the qualification of inhabitancy or residence in a district, as an additional qualification, there is this forcible reason for denying it, that it is undertaking to act upon the very qualification prescribed by the constitution, as to inhabitancy in the state, and abridging its operation. It is precisely the same exercise of power on the part of the states, as if they should prescribe, that a representative should be forty years of age, and a citizen for ten years. In each case, the very qualification fixed by the constitution is completely evaded, and indirectly abolished.

§ 629. The next clause of the second section of the first article respects the apportionment of the representatives among the states. It is as follows: "Representatives and direct taxes shall be apportioned among the several states, which may be included in this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration

shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner, as they shall, by law, direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative. And until such enumeration shall be made, the state of New-Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, NewJersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North-Carolina five, South Carolina five, and Georgia three."

§ 630. The first apportionment thus made, being of a temporary and fugacious character, requires no commentary.1 The basis assumedwas probably very nearly the same, which the constitution pointed out for all future apportionments, or, at least, of all the free persons in the states.2

It is obvious, that the question, how: the apportionment should be made, was one, upon which a considerable diversity of judgment might, and probably would, exist. Three leading principles of apportionment would, at once, present themselves. One was to adopt the rule already existing, under the confederation; that is, an equality of representation and vote by each state, thus giving each state a right to send not less than two, nor more than seven representatives, and in the determination of questions, each state to have one vote.3 This would naturally receive encouragement from all those, who were attached to the confederation, and preferred

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1 Journ. of Convention, 10th July, 165, 166, 167, 171, 172, 179, 216.

2 Journ. of Convention, 159, note. But see The Federalist, No. 55.

3 Confederation, Art. 5.

a mere league of states, to a government in any degree national.1 And accordingly it formed, as it should seem, the basis of what was called the New-Jersey Plan.2 This rule of apportionment met, however, with a decided opposition, and was negatived in the convention at an early period, seven states voting against it, three being in its favour, and one being divided.3

§ 631. Another principle might be, to apportion the representation of the states according to the relative property of each, thus making property the basis of representation. This might commend itself to some persons, because it would introduce a salutary check into the legislature in regard to taxation, by securing, in some measure, an equalization of the public burthens, by the voice of those, who were called to give most towards the common contributions.4 That taxation ought to go hand in hand with representation, bad been a favourite theory of the American people. Under the confederation, all the common expenses were required to be borne by the states in proportion to the value of the land within each state.5 But it has been already seen, that this mode of contribution was extremely difficult and embarrassing, and unsatisfactory in practice, under the confederation.6 There do not, indeed,

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1 Journ. of Convention, 111, 153, 159.

2 Mr. Patterson's Plan, Journ. of Convention, 123; 4 Elliot's Debates, (Yates's Minutes,) 74; Id. 81; Id. 107 to 113, 116; 2 Pitk. Hist. 228, 229, 232.

3 Journ. of Convention. 11th June, 111. See also Id. 153, 154; 4 Elliot's Debates, (Yates's Minutes,) 68.

4 4 Elliot's Debates, (Yates's Minutes,) 68, 69; Journ. of Convention, 11th June, 111; Id. 5th July, 158; Id. 11th July, 169.

5 Confederation, Art. 8.

6 Journals of Congress, 17th Feb 1783, vol. 8, p. 129 to 133; Id. 27th Sept. 1785, vol. 10, p. 238; Id. 18th April, 1783, vol. 8, p. 188; 1 Elliot's Debates, 56; 2 Elliot's Debates, 113; 1 Tuck. Black. Comm. App. 235, 236, 243 to 246; The Federalist, No. 30; Id. No. 21.

seem to be any traces in the proceedings of the convention, that this scheme had an exclusive influence with any persons in that body. It mixed itself up with other considerations, without acquiring any decisive preponderance. In the first place, it was easy to provide a remedial check upon undue direct taxation, the only species, of which there could be the slightest danger of unequal and oppressive levies. And it will be seen, that this was sufficiently provided for, by declaring, that representatives and direct taxes should be apportioned by the same ratio.

§ 632. In the next place, although property may not be directly aimed at, as a basis in the representation, provided for by the constitution, it cannot, on the other hand, be deemed to be totally excluded, as will presently be seen. In the next place, it is not admitted, that property alone can, in a free government, safely be relied on, as the sole basis of representation. It may be true, and probably is, that in the ordinary course of affairs, it is not the interest, or policy of those, who possess property, to oppress those, who want it. But, in every well ordered commonwealth, persons, as well as property, should possess a just share of influence. The liberties of the people are too dear, and too sacred to be entrusted to any persons, who may not, at all times, have a common sympathy and common interest with the people in the preservation of their public rights, privileges, and liberties. Checks and balances, if not indispensable to, are at least a great conservative in, the operations of all free governments. And, perhaps, upon mere abstract theory, it cannot be justly affirmed, that either persons or property, numbers or wealth, can safely be trusted, as the final repositaries of the dele-

gated powers of government.1 By apportioning influence among each, vigilance, caution, and mutual checks are naturally introduced, and perpetuated.

§ 633. The third and remaining principle was, to apportion the representatives among the states according to their relative numbers. This had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised.2 Besides; although wealth and property cannot be affirmed to be in different states, exactly in proportion to the numbers; they are not so widely separated from it, as, at a hasty glance, might be imagined. There is, if not a natural, at least a very common connexion between them; and, perhaps, an apportionment of taxes according to numbers is as equitable a rule for contributions according to relative wealth, as any, which can be practically obtained.3

§ 634. The scheme, therefore, under all the circumstances, of making numbers the basis of the representation of the Union, seems to have obtained more general favour, than any other in the convention, because it had a natural and universal connexion with the rights and liberties of the whole people.4

§ 635. But here a difficulty of a very serious nature arose. There were other persons in several of the states, than those, who were free. There were some persons, who were bound to service for a term of years; though these were so few, that they would scarcely

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1 The Federalist, No. 51.

2 Id.

3 The Federalist, No. 54; Resolve of Congress, 18th April, 1783, (8 Journals of Congress, 188,1 94,1 98); 1 United States Laws,(Bioren & Duane's edit.) 29, 33, 35.

4 The Federalist, No. 54.

vary the result of the general rule, in any important degree. There were Indians, also, in several, and probably in most, of the states at that period, who were not treated as citizens, and yet, who did not form a part of independent communities or tribes, exercising general sovereignty and powers of government within the boundaries of the states. It was necessary, therefore, to provide for these cases, though they were attended with no practical difficulty. There seems not to have been any objection in including, in the ratio of representation, persons bound to service for a term of years, and in excluding Indians not taxed. The real (and it was a very exciting) controversy was in regard to slaves, whether they should be included in the enumeration, or not.1 On the one hand, it was contended, that slaves were treated in the states, which tolerated slavery, as property, and not as persons.2 They were bought and sold, devised and transferred, like any other property. They had no civil rights, or political privileges. They had no will of their own; but were bound to absolute obedience to their masters. There was, then, no more reason for including them in the census of persons, than there would be for including any brute animals whatsoever.3 If they were to be represented as property, the rule should be extended, so as to embrace all otherproperty. It would be a gross inequality to allow representation for slaves to the southern states; for that, in effect, would be, to allow to their masters a predominant right, founded on mere property. Thus, five thousand free persons, in a slave-state, might possess the same power

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1 2 Pitk. Hist. 233 to 245.

2 The Federalist No. 51; 1 Elliot's Debates, 58 to 60; Id. 204, 212, 213; 4 Elliot's Debates, (Martin's Address,) 24.

3 4 Elliot's Debates, (Yates's Minutes,) 69; Id.2 4.

to choose a representative, as thirty thousand free persons in a non-slave-holding state.1

§ 636. On the other hand, it was contended, that slaves are deemed persons, as well as property. They partake of the qualities of both. In being compelled to labour, not for himself, but for his master; in being vendible by one master to another; and, in being subject, at all times, to be restrained in his liberty, and chastised in his body, by the will of another, the slave may appear to be degraded from the human rank, and classed with the irrational animals, which fall under the denomination of property. But, in being protected in his life and limbs against the violence of others, even of the master of his labour and liberty; and in being punishable himself for all violence committed against others; the slave is no less evidently regarded by law, as a member of the society, and not as a part of the irrational creation; as a moral person, and not as a mere article of property.2 The federal constitution should, therefore, view them in the mixed character of persons and property, which was in fact their true character. It is true, that slaves are

not included in the estimate of representatives in any of the states possessing them. They neither vote themselves, nor increase the vote of their masters. But it is also true, that the constitution itself does not proceed upon any ratio of merely qualified voters, either as to representatives, or as to electors of them. If, therefore, those, who are not voters, are to be excluded from the enumeration or census, a similar inequality will exist in the apportionment among the states. For the representatives are to be chosen by those, who are qualified vot-

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1 4 Elliot's Debates, (Martin's Address,) 24; Id. (Yates's Minutes,) 69.

2 The Federalist, No. 54; 1 Elliot's Debates, 212, 213.

ers, for the most numerous branch of the state legislature; and the qualifications in different states are essentially different; and, indeed, are in no two states exactly alike. The constitution itself, therefore, lays down a principle, which requires; that no regard shall be had to the policy of particular states, towards their own inhabitants. Why should not the same principle apply to slaves, as to other persons, who were excluded as voters in the states?1

§ 637. Some part of this reasoning may not be very satisfactory; and especially the latter part of it. The distinction between a free person, who is not a voter, but who is, in no sense, property, and a slave, who is not a voter, and who is, in every practical sense, property, is, and for ever must form, a sound ground for discriminating between them in every constitution of government.

§ 638. It was added, that the idea was not entirely a just one, that representation relates to persons only, and not to property. Government is instituted no less for the protection of the property, than of the persons of individuals. The one, as well as the other, may, therefore, be considered as proper to be represented by those, who are charged with the government. And, in point of fact, this view of the subject constituted the basis of some of the representative departments in several of the state governments.2

§ 639. There was another reason urged, why the votes allowed in the federal legislature to the people of each state ought to bear some proportion to the comparative wealth of the states. It was, that states

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1 The Federalist, No. 55; 1 Tuck. Black. Comm. App. 190, 191; 1 Elliot's Debates, 213, 214.

2 The Federalist, No. 54; 1 Elliot's Debates, 213.

have not an influence over other states, arising from the superior advantages of fortune, and individuals in the same state possess over their needy fellow citizens from the like cause. The richest state in the Union can hardly indulge the hope of influencing the choice of a single representative in any other state; nor will the representatives of the largest and richest states possess any other advantages in the national legislature, than what results from superior numbers alone.1

§ 640. It is obvious, that these latter reasons have no just application to the subject. They are not only over-strained, and founded in an ingenious attempt to gloss over the real objections; but they have this inherent vice, that, if well rounded, they apply with equal force to the representation of all property in all the states; and if not entitled to respect on this account, they contain a most gross and indefensible inequality in favour of a single species of property (slaves) existing in a few states only. It might have been contended, with full as much propriety, that rice, or cotton, or tobacco, or potatoes, should have been exclusively taken into account in apportioning the representation.

§ 641. The truth is, that the arrangement adopted by the constitution was a matter of compromise and concession, confessedly unequal in its operation, but a necessary sacrifice to that spirit of conciliation, which was indispensable to the union of states having a great diversity of interests, and physical condition, and political institutions.2 It was agreed, that slaves should be

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1 The Federalist, No. 54.

2 1 Elliot' Debates, 212, 213; 2 Pitk. Hist. 233 to 244; Id. 245, 246, 247, 248; 1 Kent's Comm. 216, 217; The Federalist, No. 37, 54; 3 Dall. 171,1 77,1 78. -- It, at the present time, gives twenty-five slave representatives in congress.

represented, under the mild appellation of "other persons," not as free persons, but only in the proportion of three fifths. The clause was in substance borrowed from the resolve, passed by the continental congress on the 18th of April, 1783, recommending the states to amend the articles of confederation in such manner, that the national expenses should be defrayed out of a common treasury, "which shall be supplied by the several states, in proportion to the whole number of white, or other free inhabitants, of every age, sex, and condition, including those bound to

servitude for a term of years, and three fifths of all other persons, not comprehended in the foregoing description, except Indians, not paying taxes, in each state."1 In order to reconcile the non-slave-holding states to this provision, another clause was inserted, that direct taxes should be apportioned in the same manner as representatives. So, that, theoretically, representation and taxation might go pari passu.2 This provision, however, is more specious than solid; for while, in the levy of direct taxes, it apportions them on three fifths of persons not free, it, on the other hand, really exempts the other two fifths from being taxed at all, as property.3 Whereas, if direct taxes had been apportioned, as upon principle they ought to be, according to the real value of property within the state, the whole of the slaves would have been taxable, as property. But a far more striking inequality has been disclosed by the practical operations of the government. The principle of representation is

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1 Journals of Congress, 1783, vol. 8, p. 188; 1 Elliot's Debates, 56

2 The Federalist, No. 54; Journal of Convention, 12th July, 171, 172; Id. 174, 175, 176, 179, 180, 210; Id. 372; 1 Elliot's Debates, 56, 57, 58, 60; Id. 213.

3 1 Tucker's Black. Comm. 190, 191; 1 Elliot's Debates, 58, 59.

constant, and uniform; the levy of direct taxes is occasional, and rare. In the course of forty years, no more than three direct taxes1 have been levied; and those only under very extraordinary and pressing circumstances. The ordinary expenditures of the government are, and always have been, derived from other sources. Imports upon foreign importations have supplied, and will generally supply, all the common wants; and if these should not furnish an adequate revenue, excises are next resorted to, as the surest and most convenient mode of taxation. Direct taxes constitute the last resort; and (as might have been foreseen) would never be laid, until other resources had failed.

§ 642. Viewed in its proper light, as a real compromise, in a case of conflicting interests, for the common good, the provision is entitled to great praise for its moderation, its aim at practical utility, and its tendency to satisfy the people, that the Union, framed by all, ought to be dear to all, by the privileges it confers, as well as the blessings it secures. It had a material influence in reconciling the southern states to other provisions in the constitution, and especially to the power of making commercial regulations by a mere majority, which was thought peculiarly to favour the northern states.2 It has sometimes been complained of, as a grievance; but he, who wishes well to his country, will adhere steadily to it, as a fundamental policy, which extinguishes some of the most mischievous sources of all political divisions, -- those founded on geographical positions, and domestic institutions. It did not, however, pass the convention without objec-

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1 In 1789, 1813, 1815. The last was partially repealed in 1816.

2 1 Elliot's Debates, 212, 213.

tion. Upon its first introduction, it was supported by the votes of nine states against two. In subsequent stages of the discussion, it met with some opposition;1 and in some of the state conventions it was strenuously resisted.2 The wish of every patriot ought now to be, requiescat in pace.

§ 643. Another part of the clause regards the periods, at which the enumeration or census of the inhabitants of the United States shall be taken, in order to provide for new apportionments of representatives, according to the relative increase of the population of the states. Various propositions for this purpose were laid, at different times, before the convention.3 It was proposed to have the census taken once in fifteen years, and in twenty years; but the vote finally prevailed in favour of ten.4 The importance of this provision for a decennial census can scarcely be overvalued. It is the only effectual means, by which the relative power of the several states could be justly represented. If the system first established had been unalterable, very gross inequalities would soon have taken place among the states, from the very unequal increase of their population. The representation would soon have exhibited a system very analogous to that of the house of commons in Great-Britain, where old and decayed boroughs send representatives, not only wholly disproportionate to their importance; but in some cases, with scarcely a single inhabitant, they match the representatives of the most populous counties.5

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1 Journal of Convention, 11th. June, 111, 112. See also Id. 11th July, 168, 169, 170, 235, 236; 4 Elliot's Debates, (Yates's Minutes,) 69.

2 Elliot's Debates, 58, 59, 60, 204, 212, 213, 241.

3 Journal of Convention, 163, 164, 167, 168, 169, 172, 174, 180.

4 Journal of Convention, 12th. July, 168, 170, 173, 180.

5 1 Black. Comm. 158, 173, 174; Rawle on Constit. ch. 4, p. 44.

§ 644. In regard to the United States, the slightest examination of the apportionment made under the first three censuses will demonstrate this conclusion in a very striking manner. The representation of Delaware remains, as it was at thefirst apportionment; those of New-Hampshire, Rhode-Island, Connecticut, NewJersey, and Maryland have had but a small comparative increase; whilst that of Massachusetts (including Maine) has swelled from eight to twenty; that of New-York, from six to thirty-four; and that of Pennsylvania, from eight to twenty-six. In the mean time, the new states have sprung into being; and Ohio, which in 1803 was only entitled to one, now counts fourteen representatives.1 The census of 1831 exhibits still more striking results. In 1790, the whole population of the United States was about three millions nine hundred and twenty-nine thousand; and in 1830, it was about twelve millions eight hundred and fifty-six thousand.2 Ohio, at this very moment, contains at least one million, and New-York two millions of inhabitants. These facts show the wisdom of the provision for a decennial apportionment; and, indeed, it would otherwise have happened, that the system, however sound at the beginning, would by this time have been productive of gross abuses, and probably have engendered feuds and discontents, of themselves sufficient to have occasioned a dissolution of the Union. We probably owe this provision to those in the convention, who were in favour of a national government, in preference to a mere confederation of states.3

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1 Rawle on Constitution, ch. 4, p. 45.

2 American Almanac for 1832, p. 162.

3 See Journal of Convention, 165, 168, 169, 174, 179, 180.

§ 645. The next part of the clause relates to the total number of the house of representatives. It declares, that "the number of representatives shall not exceed one for every thirty thousand." This was a subject of great interest; and it has been asserted, that scarcely. any article of the whole constitution seems to be rendered more worthy of attention by the weight of character, and the apparent force of argument, with which it was originally assailed.1 The number fixed by the constitution to constitute the body, in the first instance, and until a census was taken, was sixty-five.

§ 646. Several objections were urged against the provision; First, that so small a number of representatives would be an unsafe depositary of the public interests, Secondly, that they would not possess a proper knowledge of the local circumstances of their numerous constituents. Thirdly, that they would be taken from that class of citizens, which would sympathize least with the feelings of the people, and be most likely to aim at a permanent elevation of the few, on the depression of the many. Fourthly, that defective, as the number in the first instance would be, it would be more and more disproportionate by the increase of the population, and the obstacles, which would prevent a correspondent increase of the representatives.2

§ 647. Time and experience have demonstrated the fallacy of some, and greatly impaired, if they have not utterly destroyed, the force of all of these objections. The fears, which were at that period so studiously

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1 The Federalist, No. 55; 2 Amer. Museum, 427; Id. 534; Id. 547; 4 Elliot's Debates, (Yates and Lansing's Letter to Gov. Clinton,) 129, 130.

2 The Federalist, No. 53; 1 Elliot's Debates, 56; Id. 206, 214, 215, 218, 219, 220, 221 to 25; Id. 226 to 232.

cherished; the alarms, which were so forcibly spread; the dangers to liberty, which were so strangely exaggerated; and the predominance of aristocratical and exclusive power, which were so confidently predicted, have all vanished into air, into thin air. Truth has silently dissolved the phantoms raised by imaginations, heated by prejudice or controversy; and at the distance of forty years we look back with astonishment at the laborious reasoning, which was employed to tranquillize the doubts, and assuage the jealousies of the people. It is fit, however, even now, to bring this reasoning under review, because it inculcates upon us the important lesson, how little reliance can be placed upon mere theory in any matters of government; and how difficult it is to vindicate the most sound practical doctrines against the specious questioning of ingenuity and hostility.

§ 648. The first objection was, to the smallness of the number composing the house of representatives.1 It was said, that it was unsafe to deposit the legislative powers of the Union with so small a body of men. It was but the shadow of representation.2 Under the confederation, congress might consist of ninety-one; whereas, in the first instance, the house would consist of but sixty-five. There was no certainty, that it would ever be increased, as that would depend upon the legislature itself in its future ratio of apportionments; and it was left completely in its discretion, not only to

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1 It is remarkable, that the American writer, whom I have several times cited, takes an opposite objection. He says, "the national house of representatives will be at first too large; and hereafter may be much too large to deliberate and decide upon the best measures." Thoughts upon the Political Situation of the United States of America, (Worcester, 1788.)

2 2 Amer. Museum, 247, 531, 547, 551, 554.

increase, but to diminish the present number.1 Under such circumstances, there was, in fact, no constitutional security, for the whole depended upon the mere integrity and patriotism of those, who should be called to administer it.2

§ 649. In reply to these suggestions it was said, that the present number would certainly be adequate, until a census was taken. Although under the confederation ninety-one members might be chosen, in point of fact a far less number attended.3 At the very first census, supposing the lowest ratio of thirty thousand were adopted, the number of representatives would be increased to one hundred. At the expiration of twentyfive years it would, upon the same ratio, amount to two hundred; and in fifty years, to four hundred, a number, which no one could doubt would be sufficiently large to allay all the fears of the most zealous admirers of a full representation.4 In regard to the possible diminution of the number of representatives, it must be surely an imaginary case. As every state is entitled to at least one representative, the standard never would probably be reduced below the population of the smallest state. The population of Delaware, which increases more slowly, than that of any other state, would, under such circumstances, furnish the rule. And, if the other states increase to a very large degree, it is idle to suppose, that they will ever adopt a ratio, which will give the smallest stale a greater relative power and influence, than themselves.5

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1 1 Elliot's Debates. 56, 57; Id. 204, 205, 206; 2 Elliot's Debates, 53, 54; Id. 99.

2 1 Elliot's Debates, 205; 2 Elliot's Debates, 53, 54, 132, 206; Id. 223, 224.

3 1 Elliot's Debates, 57, 249.

4 The Federalist, No. 55; 1 Elliot's Debates, 214, 215, 227.

5 1 Elliot's Debates, 242, 249.

§ 650. But the question itself, what is the proper and convenient number to compose a representative legislature, is as little susceptible of a precise solution, as any, which can be stated in the whole circle of politics. There is no point, upon which different nations are more at variance; and the policy of the American states themselves, on this subject, while they were colonies, and since they have become independent, has been exceedingly discordant. Independent of the differences, arising from the population and size of the states, there will be found to be great diversities among those, whose population and size nearly approach each other. In Massachusetts, the house of representatives is composed of a number between three and four hundred; in Pennsylvania, of not more than one fifth of that number; and in New-York, of not more than one fifth. In Pennsylvania the representatives do not bear a greater proportion to their constituents, than one for every four or five thousand. In Rhode-Island and Massachusetts they bear a proportion of at least one for every thousand. And according to the old constitution of Georgia, the proportion may be carried to one for every ten electors.1

§ 651. Neither is there any ground to assert, that the ratio between the representatives and the people ought, upon principle, to be the same, whether the latter be numerous or few. If the representatives from Virginia were to be chosen by the standard of RhodeIsland, they would then amount to five hundred; and in twenty or thirty years to one thousand. On the other hand, the ratio of Pennsylvania applied to Delaware would reduce the representative assembly to seven.

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1 The Federalist, No. 55. See also the State Constitutions of that period. 1 Elliot's Debates, 214, 219, 220, 225, 228, 252, 253.

Nothing can be more fallacious, than to found political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power, than six or seven. But it does not follow, that six or seven hundred would be proportionably a better depositary. And if the supposition is carried on to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that, in all cases, a certain number seems necessary to secure the benefits of free consultation and discussion; to guard against too easy a combination for improper purposes; and to prevent hasty and ill-advised legislation. On the other hand the number ought to be kept within a moderate limit, in order to avoid the confusion, intemperance, and inconvenience of a multitude.1 It was a famous saying of Cardinal De Retz, that every public assembly, consisting of more than one hundred members, was a mere

mob.2 But surely this is just as incorrect, as it would be to aver, that every one, which consisted of ten members, would be wise.

§ 652. The question then is, and for ever must be, in every nation, a mixed question of sound policy and discretion, with reference to its size, its population, its institutions, its local and physical condition, and all the other circumstances affecting its own interests and convenience. As a present number, sixty-five was sufficient for all the exigencies of the United States; and it was wisest and safest to leave all future questions of increase to be judged of by the future condition and exigencies of the Union. What ground could there be to suppose, that such a number chosen biennially, and responsible to their constituents, would voluntarily betray

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1 The Federalist, No. 55; 1 Elliot's Debates, 219, 220, 226, 227, 241, 242, 245, 246, 253; 2 Wilson's Law Lect. 150; 1 Kent's Comm. 217.

2 2 Wilson's Law Lect. 150.

their trusts, or refuse to follow the public will? The very state of the country forbade the supposition. They would be watched with the jealousy and the power of the state legislatures.1 They would have the highest inducements to preform their duty. And to suppose, that the possession of power for so short a period could blind them to a sense of their own interests, or tempt them to destroy the public liberties, was as improbable, as any thing, which could be within the scope of the imagination.2 At all events, if they were guilty of misconduct, their removal would be inevitable; and their successors would be above all false and corrupt conduct. For to reason otherwise would be equivalent to a declaration of the universal corruption of all mankind, and the utter impracticability of a republican government. The congress, which conducted us through the revolution, was a less numerous body, than their successors will be.3 They were not chosen by, nor responsible to, the people at large;4 and though appointed from year to year, and liable to be recalled at pleasure, they were generally continued for three years. They held their consultations in secret. They transacted all our foreign affairs. They held the fate of their country in their hands during the whole war. Yet they never betrayed our rights, or our interests. Nay, calumny itself never ventured to whisper any thing against their purity or patriotism.5

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1 The Federalist, No. 55; 1 Elliot's Debates, 238, 239.

2 The Federalist, No. 55; 1 Elliot's Debates, 252, 253, 254.

3 The Federalist, No. 55; 1 Elliot's Debates, 206, 223, 249.

4 Generally they were chosen by the state legislatures; but in two states, viz. Rhode-Island and Connecticut, they were chosen by the people.*

5 The Federalist, No. 55; 1 Elliot's Debates, 254.

*** The Federalist, No. 40.**

§ 652. The suggestion is often made, that a numerous representation is necessary to obtain the confidence of the people.1 This is not generally true. Public confidence will be easily gained by a good administration; and it will be secured by no other.2 The remark, made upon another occasion by a great man, is correct in regard to representatives -- non numerantur, ponderantur. Delaware has just as much confidence in her representation of twenty-one, as New-York has in hers of sixty-five; and Massachusetts has in hers of more than three hundred.3

§ 653. Nothing can be more unfair and impolitic, than to substitute for argument an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, inflict the most serious injury upon their own cause. As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust; so there are other qualities in human nature, which justify a certain portion of esteem and confidence. A republican government presupposes, and requires the existence of these qualities in a higher degree, than any other form; and wholly to destroy our reliance on them is to sap all the foundation, on which our liberties must rest.4

§ 654. The next objection was, that the house of representatives would be too small to possess a due knowledge of the interests of their constituents. It was said, that the great extent of the United States, the

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1 Elliot's Debates, 206, 217.

2 Id. 227, 228.

3 1 Elliot's Debates, 227, 228, 241, 252, 253, 254; 2 Elliot's Debates, 107, 116.

4 The Federalist, No. 55; 1 Elliot's Debates, 238, 239.

variety of its interests, and occupations, and institutions would require a very numerous body in order to bring home information necessary and proper for wise legislation.1

§ 655. In answer to this objection, it was admitted, that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no farther, than to those interests and circumstances, to which the authority and care of the representative relate. Ignorance of very minute objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to the performance of the legislative trust.2 If the argument, indeed, required the most minute knowledge, applicable even to all the professed objects of legislation, it would overturn itself; for the thing would be utterly impracticable. No representative, either in the state or national councils, ever could know, or even pretend to know, all arts, and sciences, and trades, and subjects, upon which legislation may operate. One of the great duties of a representative is, to inquire into, and to obtain the necessary information to enable him to act wisely and correctly in particular cases. And this is attained by bringing to the investigation of such cases talents, industry, experience, and a spirit of comprehensive inquiry. No one will pretend, that he, who is to make laws, ought not to be well instructed in their nature, interpretation, and practical results. But what would be said, if, upon such a theory, it was to be seriously urged, that none, but practical lawyers, ought ever to be eligible as legislators? The truth is, that we must rest

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1 1 Elliot's Debates, 219, 220, 228, 232, 233, 241.

2 The Federalist, No. 55; 1 Elliot's Debates, 228, 229; 1 Kent's Comm. 217.

satisfied with general attainments; and it is visionary to suppose, that any one man can represent all the skill, and interests, and business, and occupations of all his constituents in a perfect manner, whether they be few or many. The most, that can be done, is, to take a comprehensive survey of the general outlines; and to search, as occasion may require, for that more intimate information, which belongs to particular subjects requiring immediate legislation.

§ 656. It is by no means true, that a large representation is necessary to understand the interests of the people. It is not either theoretically, or practically true, that a knowledge of those interests is augmented in proportion to the increase of representatives.1 The interests of the state of New-York are probably as well understood by its sixty-five representatives, as those of Massachusetts by its three or four hundred. In fact, higher qualifications will usually be sought and required, where the representatives are few, than where they are many. And there will also be a higher ambition to serve, where the smallness of the number creates a desirable distinction, than where it is shared with many, and of course individual importance is essentially diminished.

§ 657. Besides; in considering this subject, it is to be recollected, that the powers of the general government are limited; and embrace only such objects, as are of a national character. Local information of peculiar local interests is, consequently, of less value and importance, than it would be in a state legislature, where the powers are general.2 The knowledge required of a national representative is, therefore, necessarily of a

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1 1 Elliot's Debates, 229.

2 The Federalist, No. 56.

more large and comprehensive character, than that of a mere state representative. Minute information, and a thorough knowledge of local interests, personal opinions, and private feelings, are far more important to the latter than the former.1 Nay, the very devotion to local views, and feelings, and interests, which naturally tends to a narrow and selfish policy, may be a just disqualification and reproach to a member of congress.2 A liberal and enlightened policy, a knowledge of national rights, duties, and interests, a familiarity with foreign governments, and diplomatic history, and a wide survey of the operations of commerce, agriculture, and manufactures, seem indispensable to a lofty discharge of his functions.3 A knowledge of the peculiar interests, and products, and institutions of the different states of the Union, is doubtless of great value; but it is rather as it conduces to the performance of the higher functions already spoken of, than as it sympathizes with the local interests and feelings of a particular district, that it is to be estimated.4 And in regard to those local facts, which are chiefly of use to a member of congress, they are precisely those, which are most easily attainable from the documentary evidence in the departments of the national government, or which lie open to an intelligent man in any part of the state, which he may represent.5 A knowledge of commerce, and taxation, and manufactures, can be obtained with more certainty by inquiries conducted through many, than through a single channel of communication. The representatives of each state

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1 1 Elliot's Debates, 228, 229, 253; 2 Lloyd's Debates, (in 1789,) 189; The Federalist, No. 56.
2 1 Elliot's Debates, 238.
3 1 Elliot's Debates, 228, 229, 253; The Federalist, No. 56.
4 The Federalist, No, 56; 1 Elliot's Debates, 220, 241, 242, 246, 253.
5 The Federalist, No. 56; 1 Elliot's Debates, 228, 229, 253.

will generally bring with them a considerable knowledge of its laws, and of the local interests of their districts. They will often have previously served as members in the state legislatures; and thus have become, in some measure, acquainted with all the local views and wants of the whole state.1

§ 658. The functions, too, of a representative in congress require very different qualifications and attainments, from those required in a state legislature. Information relative to local objects is easily obtained in a single state; for there is no difference in its laws, and its interests are but little diversified. But the legislation of congress reaches over all the states; and as the laws and local circumstances of all differ, the information, which is requisite for safe legislation, is far more difficult and various, and directs the attention abroad, rather than at home.2 Few members, comparatively speaking, will be found ignorant of the local interests of their district or state; but time, and diligence, and a rare union of sagacity and public spirit, are indispensable to avoid egregious mistakes in national measures.

§ 659. The experience of Great Britain upon this subject furnishes a very instructive commentary. Of the five hundred and fifty-eight members of the house of commons one ninth are elected by three hundred and sixty-four persons; and one half by five thousand seven hundred and twenty-three persons.3 And this half certainly have little or no claim to be deemed the guardians of the interests of the people, and indeed are

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1 The Federalist, No. 56.
2 Id. No. 56; Id. No. 35.
3 See Mr. Christian's note, (34,) to 1 Black. Comm. 174, where he states the number, of which the house of commons has consisted at different periods, from which it appears, that it has been nearly doubled since the beginning of the reign of Henry the Eighth. See also 4 Inst. 1.

notoriously elected by other interests.1 Taking the population of the whole kingdom the other half will not average more than one representative for about twenty-nine thousand of the inhabitants.2 It may be added, that nothing is more common, than to select men for representatives of large and populous cities and districts, who do not reside therein; and cannot be presumed to be intimately acquainted with their local interests and feelings. The choice, however, is made from high motives, a regard to talent, public services, and political sagacity. And whatever may be the defects of the representative system of Great Britain, very few of the defects of its legislation have been imputed to the ignorance of the house of commons of the true interests or circumstances of the people.3

§ 660. In the history of the constitution it is a curious fact, that with some statesmen, possessing high political distinction, it was made a fundamental objection against the establishment of any national legislature, that if it " were composed of so numerous a body of men, as to represent the interests of all the inhabitants of the United States in the usual and true ideas of representation, the expense of supporting it would be intolerably burthensome; and that if a few only were vested with a power of legislation, the interests of a great majority of the inhabitants of the United States must be necessarily unknown; or, if known, even in the first stages of the operations of the new government, unattended to."4 In their view a free government seems to

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1 The Federalist, No. 56; Paley's Moral Philosophy, B. 6, ch. 7.
2 The Federalist, No. 56, 57.
3 The Federalist, No. 56. See also Dr. Franklin's Remarks, 2 Pitkin's Hist. 242; 1 Wilson's Law Lect. 431, 432; Paley's Moral Philosophy, B. 6, ch. 7; l Kent's Comm. 219.
4 Letter of Messrs. Yates and Lansing to Gov. Clinton, 1788, (3 Amer. Museum, 156, 158.)

have been incompatible with a great extent of territory, or population. What, then, would become of Great Britain, or of France, under the present constitution of their legislative departments?

§ 661. The next objection was, that the representatives would be chosen from that class of citizens, which would have the least sympathy with the mass of the people; and would be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.1 It was said, that the author of nature had bestowed on some men greater capacities, than on others. Birth, education, talents, and wealth, created distinctions among men, as visible, and of as much influence, as stars, garters, and ribbons. In every society men of this class will command a superior

degree of respect; and if the government is so constituted, as to admit but few to exercise its powers, it will, according to the natural course of things, be in their hands. Men in the middling class, who are qualified as representatives, will not be so anxious to be chosen, as those of the first; and if they are, they will not have the means of so much influence.2

§ 662. It was answered, that the objection itself is of a very extraordinary character; for while it is levelled against a pretended oligarchy, in principle it strikes at the very root of a republican government; for it supposes the people to be incapable of making a proper choice of representatives, or indifferent to it, or utterly corrupt in the exercise of the right of suffrage. It would not be contended, that the first class of society, the men of talents, experience, and wealth, ought to be

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1 The Federalist, No. 57; 1 Elliot's Debates, 220, 221. See also The Federalist, No. 35.

2 1 Elliot's Debates, 221, 222.

constitutionally excluded from office. Such an attempt would not only be unjust, but suicidal; for it would nourish an influence and faction within the state, which, upon the very supposition, would continually exert its whole means to destroy the government, and overthrow the liberties of the people.1 What, then, is to be done? If the people are free to make the choice, they will naturally make it from that class, whatever it may be, which will in their opinion best promote their interests, and preserve their liberties.2 Nor are the poor, any more than the rich, beyond temptation, or love of power. Who are to be the electors of the representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the heirs of distinguished families, more than the children of obscurity and unpropitious fortune.3 The electors are to be the body of the people of the United States, jealous of their rights, and accustomed to the exercise of their power. Who are to be the objects of their choice? Every citizen, whose merit may commend him to the esteem and confidence of his fellow citizens. No qualification of wealth, or birth, or religion, or civil profession, is recognised in the constitution; and consequently, the people are free to choose from any rank of society according to their pleasure.4

§ 663. The persons, who shall be elected representatives, must have all the inducement to fidelity, vigilance, and a devotion to the interests of the people, which can possibly exist. They must be presumed to be selected from their known virtues, and estimable

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1 Elliot's Debates, 222, 223.

2 The Federalist, No. 35; Id. No. 36; Id. No. 57.

3 The Federalist, No. 57; Id. No. 35; Id. No. 36.

4 The Federalist, No. 57; Id. No. 35; Id. No. 36.

qualities, as well as from their talents. They must have a desire to retain, and exalt their reputation, and be ambitious to deserve the continuance of that public favour, by which they have been elevated. There is in every breast a sensibility to marks of honour, of favour, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns.1 But the interest of the representative, which naturally binds him to his constituents, will be strengthened by motives of a selfish character. His election is biennial; and he must soon return to the common rank of a citizen, unless he is re-elected. Does he desire office? Then that very desire will secure his fidelity. Does he feel the value of public distinctions? Then his pride and vanity will equally attach him to a government, which affords him an opportunity to share in its honours and distinctions, and to the people, who alone can confer them.2 Besides; he can make no law, which will not weigh as heavily on himself and his friends, as on others; an he can introduce no oppression, which must not be borne by himself, when he sinks back to the common level. As for usurpation, or a perpetuation of his authority, independent of the popular will, that is hopeless, until the period shall have arrived, in which the people are ready to barter their liberties, and are ready to become the voluntary slaves of any despot.3 Whenever that period shall arrive, it will be useless to speak of guardians, or of rights. Where all are corrupt, it is idle to talk of virtue. Quis custodiet custodes?

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1 The Federalist, No. 57.

2 The Federalist, No. 57.

3 The Federalist, No. 57; Id. No. 35, 36.

Who shall keep watch over the people, when they choose to betray themselves?

§ 664. The objection itself is, in truth, utterly destitute of any solid foundation. It applies with the same force to the state legislatures, as to that of the Union. It attributes to talents, and wealth, and ambition an influence, which may be exerted at all times, and everywhere. It speaks in no doubtful language, that republican government is but a shadow, and incapable of preserving life, liberty, or property.1 It supposes, that the people are always blind to their true interests, and always ready to betray them; that they can safely trust neither themselves, nor others. If such a doctrine be maintainable, all the constitutions of America are founded in egregious errors and delusions.

§ 665. The only perceptible difference between the case of a representative in congress, and in the state legislature, as to this point, is, that the one may be elected by five or six hundred citizens, and the other by as many thousands.2 Even this is true only in particular states; for the representatives in Massachusetts (who are all chosen by the towns) may be elected by six thousand citizens; nay, by any larger number, according to the population of the town. But giving the objection its full force, could this circumstance make any solid objection? Are not the senators in several of the states chosen by as large a number? Have they been found more corrupt, than the representatives? Is the objection supported by reason? Can it be said, that five or six thousand citizens are more easily corrupted, than five or six hundred?3 That the aggregate

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1 The Federalist, No. 57; Id. No. 35, 36.

2 The Federalist, No. 57.

3 The Federalist, No. 57.

mass will be more under the influence of intrigue, than a portion of it? Is the consequence, deducible from the objection, admissible? If it is, then we must deprive the people of all choice of their public servants in all cases, where numbers are not required.1 What, then, is to be done in those states, where the governors are by the state constitution to be chosen by the people? Is the objection warranted by facts? The representation in the British house of commons (as has been already stated) very little exceeds the proportion of one for every thirty thousand inhabitants.2 Is it true, that the house of commons have elevated themselves upon the ruin of the many? Is it true, that the representatives of boroughs have been more faithful, or wise, or honest, or patriotic, than those of cities and of counties? Let us come to our own country. The districts in New-Hampshire, in which the senators are chosen immediately by the people, are nearly as large, as will be necessary for her representatives in congress. Those in Massachusetts come from districts having a larger population; and those in New-York from districts still larger. In New-York and Albany the members of assembly are elected by nearly as many voters, as will be required for a member of congress, calculating on the number of sixty-five only. In some of the counties of Pennsylvania the state representatives are elected in districts nearly as large, as those required for the federal representatives. In the city of Philadelphia (composed of sixty thousand inhabitants) every elector has a right to vote for each of the representatives in the state legislature; and actually elects a single member to the executive council.3 These are facts, which

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1 The Federalist, No. 57.

2 Id. No. 56, 57.

3 Id. No. 57.

demonstrate the fallacy of the objection; for no one will pretend, that the rights and liberties of these states are not as well maintained, and as well understood by their senators and representatives, as those of any other states in the Union by theirs. There is yet one stronger case, that of Connecticut; for there one branch of the legislature is so constituted, that each member of it is elected by the whole state.1

§ 666. The remaining objection was, that there was no security, that the number of members would be augmented from time to time, as the progress of the population might demand.2

§ 667. It is obvious, that this objection is exclusively founded upon the supposition, that the people will be too corrupt, or too indifferent, to select proper representatives; or, that the representatives, when chosen, will totally disregard the true interests of their constituents, or wilfully betray them. Either supposition (if the preceding remarks are well founded) is equally inadmissible. There are, however, some additional considerations, which are entitled to great weight. In the first place, it is observable, that the federal constitution will not suffer in comparison with the state constitutions in regard to the security, which is provided for a gradual augmentation of the number of representatives. In many of them the subject has been left to the discretion of the legislature; and experience has thus far demonstrated not only, that the power is safely lodged, but that a gradual increase of representatives (where it could take place) has kept pace with that of the constituents.3 In the next place, as a new census is to

1 The Federalist, No. 57.

2 The Federalist, No. 58; 1 Elliot's Debates, 204, 224.

3 The Federalist, No. 58.

take place within every successive ten years, for the avowed purpose of readjusting the representation from time to time, according, to the national exigencies, it is no more to be imagined, that congress will abandon its proper duty in this respect, than in respect to any other power confided to it. Every power may be abused; every duty may be corruptly deserted. But, as the power to correct the evil will recur at least biennially to the people, it is impossible, that there can long exist any public abuse or dereliction of duty, unless the people connive at, and encourage the violation.1 In the next place, there is a peculiarity in the federal constitution, which must favour a constitutional augmentation of the representatives. One branch of the national legislature is elected by the people; the other, by the states. In the former, consequently, the large states will have more weight; in the latter, the smaller states will have the advantage. From this circumstance, it may be fairly inferred, that the larger states, and especially those of a growing population, will be strenuous advocates for increasing the number and weight of that part of the legislature, in which their influence predominates.2

§ 668. It may be said, that there will be an antagonist influence in the senate to prevent an augmentation. But, upon a close view, this objection will be found to lose most of its weight. In the first place, the house of representatives, being a co-ordinate branch, and directly emanating from the people, and speaking the known and declared sense of the majority of the people, will, upon every question of this nature, have

1 Elliot's Debates, 239.

2 The Federalist, No. 58; 2 Lloyd's Debates, in 1789, P. 192.

no small advantage, as to the means of influence and resistance. In the next place, the contest will not be to be decided merely by the votes of great states and small states, opposed to each other, but by states of intermediate sizes, approaching the two extremes by gradual advances. They will naturally arrange themselves on the one side, or the other, according to circumstances; and cannot be calculated upon, as identified permanently with either. Besides; in the new states, and those, whose population is advancing, whether they are great or small, there will be a constant tendency to favour augmentations of the representatives; and, indeed, the large states may compel it by making re-apportionments and augmentations mutual conditions of each other.1 In the third place, the house of representatives will possess an exclusive power of proposing supplies for the support or government; or, in other words, it will hold the purse-strings of the nation. This must for ever give it a powerful influence in the operations of the government; and enable it effectually to redress every serious grievance.2 The house of representatives will, at all times, have as deep an interest in maintaining the interests of the people, as the senate can have in maintaining that of the states.3

§ 669. Such is a brief view of the objections urged against this part of the constitution, and of the answers given to them. Time, as has been already intimated, has already settled them by its own irresistible demonstrations. But it is impossible to withhold our tribute of admiration from those enlightened statesmen, whose

1 The Federalist, No. 58.

2 The Federalist, No. 57; 1 Elliot's Debates, 226, 227.

3 The Federalist, No. 58.

profound reasoning, and mature wisdom, enabled the people to see the true path of safety. What was then prophecy and argument has now become fact. At each successive census, the number of representatives has been gradually augmented.1 In 1792, the ratio adopted was 33.000, which gave an aggregate of one hundred and six representatives. In 1802, the same ratio was adopted, which gave an aggregate of one hundred and forty-one members. In 1811, the ratio adopted was 35.000, which gave an aggregate of one hundred and eighty-one members. In 1822, the ratio adopted was 40.000, which gave an aggregate of two hundred and ten members. In 1832, the ratio adopted was 47.700, which gave an aggregate of two hundred and forty members.2

§ 670. In the mean time, the house of representatives has silently acquired vast influence and power over public opinion by its immediate connexion and sympathy with the people. No complaint has been urged, or could now with truth be urged, that it did not understand, or did not represent, the interests of the people, or bring to the public councils a competent knowledge of, and devotion to, the local interests and feelings of its constituents. Nay; so little is, and so little has the force of this objection been felt, that several states have voluntarily preferred to elect their

representatives by a general ticket, rather than by districts. And the electors for president and vice-president are more frequently chosen in that, than in and other manner. The representatives are not, and never have

1 Act of 1792, ch. 23; Act of 1802, ch. 1; Act of 1811, ch. 9; Act of 1822, ch. 10; 1 Tuck. Black. Comm. App. 190; Rawle on Constitution, 45.

2 Act of 22d May, 1832, ch. 91.

been, chosen exclusively from any high, or privileged class of society. At this moment, and at all previous times, the house has been composed of men from almost every rank and class of society; planters, farmers, manufacturers, mechanics, lawyers, physicians, and divines; the rich, and the poor; the educated, and the uneducated men of genius; the young, and the old; the eloquent, and the taciturn; the statesman of a half century, and the aspirant, just released from his academical studies. Merit of every sort has thus been able to assert its claims, and occasionally to obtain its just rewards. And if any complaint could justly be made, it would be, that the choice had sometimes been directed by a spirit of intolerance, that forgot every thing but its own creed; or by a spirit of party, that remembered every thing but its own duty. Such infirmities, however, are inseparable from the condition of human nature; and their occurrence proves nothing more, than that the moral, like the physical world is occasionally visited by a whirlwind, or deluged by a storm.

§ 671. It remains only to take notice of two qualifications of the general principle of representation, which are engrafted on the clause. One is, that each state shall have at least one representative; the other is that already quoted, that the number of representatives shall not exceed one for every 30.000. The former was indispensable in order to secure to each state a just representation in each branch of the legislature; which, as the powers of each branch were not exactly co-extensive, and especially, as the power of originating taxation was exclusively vested in the house of representatives, was indispensable to preserve the equality of the small states, and to reconcile them to a surrender of their sovereignty. This proviso was

omitted in the first draft of the constitution, though proposed in one of the preceding resolutions.1 But it was adopted without resistance, when the draft passed under the solemn discussion of the convention.2 The other was a matter of more controversy. The original limitation proposed was 40.000;3 and it was not until the very last day of the session of the convention, that the number was reduced to 30.000.4 The object of fixing some limitation was to prevent the future existence of a very numerous and unwieldy house of representatives. The friends of a national government had no fears, that the body would ever become too small for real, effective, protecting service. The danger was, that from the natural impulses of the popular will, and the desire of ambitious candidates to attain office, the number would be soon swollen to an unreasonable size, so that it would at once generate, and combine factions, obstruct deliberations, and introduce and perpetuate turbulent and rash counsels.5

§ 672. On this subject, let the Federalist speak in its own fearless and expressive language. "In all legislative assemblies the greater the number composing them may be, the fewer will the men be, who will, in fact, direct their proceedings.6 In the first place, the more numerous any assembly may be, of whatever characters composed, the greater is known to be the

1 Journ. of Convention, 157, 158, 209, 215.

2 Journ. of Convention, 8th Aug. p. 236.

3 Journ. of Convention, 157, 217, 233, 352.

4 Journ. of Convention, 17th Sept. 1787, p. 389.

5 1 Lloyd's Debates in 1789, 427, 434; Lloyd's Debates, 183, 185, 186, 188, 189, 190.

6 The same thought is expressed with still more force in the American pamphlet, entitled, Thoughts upon the Political situation of America. (Worcester, 1788,) 54.

ascendancy of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and weak capacities. Now, it is precisely on characters of this description, that the eloquence and address of the few are known to act with all their force. In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway, as if a scepter had been placed in his single hand. On the same principle, the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning; and passion the slave of sophistry and declamation. The people can never err more than in supposing, that in multiplying their representatives beyond a certain limit, they

strengthen the barrier against the government of a few. Experience will for ever admonish them, that, on the contrary, after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic; but the soul, that animates it, will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs, by which its motions are directed."1

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1 The Federalist, No. 58. -- Mr. Ames, in n debate in congress, in 1789, on amending the constitution in regard to representation, observed, "By enlarging the representation, we lessen the chance of selecting men of the greatest wisdom and abilities; because small districts may be conducted by intrigue; but in large districts nothing but real dignity of character can secure an election."* Unfortunately, the experience of

*** 2 Lloyd's Debates, 183.**

§ 673. As a fit conclusion of this part of the subject it may be remarked, that congress, at its first session in 1789, in pursuance of a desire expressed by several of the state conventions, in favour of further declaratory and restrictive amendments to the constitution, proposed twelve additional articles. The first was on the very subject now under consideration, and was expressed in the following terms: "After the first enumeration required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by congress, that there shall not be less than one hundred representatives, nor less than one for every forty thousand persons, until the number of representatives shall amount to two hundred; after which, the proportion shall be so regulated by congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand."1 This amendment was never ratified by a competent number of the states to be incorporated into the constitution.2 It was probably thought, that the whole subject was safe, where it was already lodged; and that congress ought to be left free to exercise a sound discretion, according to the future exigencies of the nation, either to increase, or diminish the number of representatives.

§ 674. There yet remain two practical questions of no inconsiderable importance, connected with the

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the United States has not justified the belief, that large districts will always choose men of the greatest wisdom, abilities, and real dignity. 1 Journ. of Convention, &c. Suppt. 466 to 481.

2 The debates in congress on this amendment will be found in 2 Lloyd's Debates, 182 to 194; Id. 250.

clause of the constitution now under consideration. One is, what are to be deemed direct taxes within the meaning of the clause. The other is, in what manner the apportionment of representatives is to be made. The first will naturally come under review in examining the powers of congress, and the constitutional limitations upon those powers; and may, therefore, for the present, be passed over. The other was a subject of much discussion at the time, when the first apportionment was before congress after the first census was taken; and has been recently revived with new and increased interest and ability. It deserves, therefore, a very deliberate examination.

§ 675. The language of the constitution is, that "representatives and direct taxes shall be apportioned among the several states, &c. according to their respective numbers;" and at the first view it would not seem to involve the slightest difficulty. A moment's reflection will dissipate the illusion, and teach us, that there is a difficulty intrinsic in the very nature of the subject. In regard to direct taxes, the natural course would be to assume a particular sum to be raised, as three millions of dollars; and to apportion it among the states according to their relative numbers. But even here, there will always be a very small fractional amount incapable of exact distribution, since the numbers in each state will never exactly coincide with any common divisor, or give an exact aliquot part for each state without any remainder. But, as the amount may be carried through a long series of descending money fractions, it may be ultimately reduced to the smallest fraction of any existing, or even imaginary coin.

§ 676. But the difficulty is far otherwise in regard to representatives. Here, there can be no subdivision of the unit; each state must be entitled to an entire representative, and a fraction of a representative is incapable of apportionment. Yet it will be perceived at once, that it is scarcely possible, and certainly is wholly improbable, that the relative numbers in each state should bear such an exact proportion to the aggregate, that there should exist a common divisor for all, which should leave no fraction in any state. Such a case never yet has existed; and in all human probability it never will. Every common divisor, hitherto applied, has left a fraction greater, or smaller, in every state;1 and what has been in the past must continue to be for the future. Assume the whole population to be

three, or six, or nine, or twelve millions, or any other number; if you follow the injunctions of the constitution, and attempt to apportion the representatives according to the numbers in each state, it will be found to be absolutely impossible. The theory, however true, becomes practically false in its application. Each state may have assigned a relative proportion of representatives up to a given number, the whole being divisible by some common divisor; but the fraction of population belonging to each beyond that point is left unprovided for. So that the apportionment is, at best, only an approximation to the rule laid down by the constitution, and not a strict compliance with the rule. The fraction in one state may be ten times as great, as that in another; and so may differ in each state in any assignable mathematical proportion. What then is to be done? Is the constitution to be wholly disre-

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1 See 5 Marshall's Life of Washington, ch. 5, p. 319.

garded on this point? Or is it to be followed out in its true spirit, though unavoidably differing from the letter, by the nearest approximation to it? If an additional representative can be assigned to one state beyond its relative proportion to the whole population, it is equally true, that it can be assigned to all, that are in a similar predicament. If a fraction admits of representation in any case, what prohibits the application of the rule to all fractions? The only constitutional limitation seems to be, that no state shall have more than one representative for every thirty thousand persons. Subject to this, the truest rule seems to be, that the apportionment ought to be the nearest practical approximation to the terms of the constitution; and the rule ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy, or abuse, as possible.

§ 677. But it may be asked, what are the first steps to be taken in order to arrive at a constitutional apportionment? Plainly, by taking the aggregate of population in all the states, (according to the constitutional rule,) and then ascertain the relative proportion of the population of each state to the population of the whole. This is necessarily so in regard to direct taxes;1 and

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1 "By the constitution," says Mr. Chief Judice Marshall in delivering the opinion of the court, "direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one state had been found to contain 59,000 and an other 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty."* This is perfectly correct, because the constitution prohibits more than one representative for every 30,000. But if one state contain 100,000 souls, and another

*** Loughborough v. Blake, 5 Wheaton's R. 317, 320.**

there is no reason to say, that it can, or ought to be otherwise in regard to representatives; for that would be to contravene the very injunctions of the constitution, which require the like rule of apportionment in each case. In the one, the apportionment may be run down below unity; in the other, it cannot. But this does not change the nature of the rule, but only the extent of its application.

§ 678. In 1790, a bill was introduced into the house of representatives, giving one representative for every thirty thousand, and leaving, the fractions unrepresented; thus producing an inequality, which was greatly complained of. It passed the house; and was amended in the senate by allowing an additional representative to the states having the largest fractions. The house finally concurred in the amendment, after a warm debate. The history of these proceedings is summarily stated by the biographer of Washington, as follows: -- "Construing," says he, "the constitution to authorize a process, by which the whole number of representatives should be ascertained on the whole population of the United States, and afterwards apportioned among the several states according to their respective numbers, the senate applied the number thirty thousand, as a divisor, to the total population, and taking the quotient, which was one hundred and twenty, as the number of representatives given by the ratio, which had been adopted in the house, where the bill originated, they apportioned that number among the several states by that ratio, until as many representatives, as it

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200,000, there is no logic, which, consistently with common sense, or justice, could, upon any constitutional apportionment, assign three representatives to one, and seven to the other, any more than it could of a direct tax the proportion of three to one, and seven to the other.

would give, were allotted to each. The residuary members were then distributed among the states having the highest fractions. Without professing the principle, on which this apportionment was made, the amendment of the senate

merely allotted to the states respectively the number of members, which the process just mentioned would give.1 The result was a more equitable apportionment of representatives to population, and a still more exact accordance, than was found in the original bill, with the prevailing sentiment, which, both within doors and without, seemed to require, that the popular branch of the legislature should consist of as many members, as the fundamental laws of the government would admit. If the rule of construing that instrument was correct, the amendment removed objections, which were certainly well founded, and was not easily assailable by the advocates of a numerous representative body.But the rule was novel, and overturned opinions, which had been generally assumed, and were supposed to be settled. In one branch of the legislature, it had been already rejected; and in the other, the majority in its favour was only one."2

§ 679. The debate in the two houses, however, was purely political, and the division of the votes purely geographical; the southern states voting against it, and the northern in its favour.3 The president returned the bill with two objections." 1. That the constitu-

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1 The words of the bill were, "That from and after the third day of March, 1793, the house of representatives shall be composed of one hundred and twenty-seven members, elected within the several states according to the following apportionment, that is to say, within the state of New-Hampshire, five, within the state of Massachusetts, sixteen," &c. &c. enumerating all the states.

2 5 Marshall's Life of Washington, ch. 5, p. 321, 322.

3 4 Jefferson's Correspondence, 466.

tion has prescribed, that representatives shall be apportioned among, the several states according to their respective numbers; and there is no proportion or divisor, which, applied to the respective numbers of the states, will yield the number and allotment of representatives proposed by the bill. 2. The constitution has also provided, that the number of representatives shall not exceed one for thirty thousand, which restriction is by the context, and by fair and obvious construction, to be applied to the several and respective numbers of the states, and the bill has allotted to eight of the states more than one for thirty thousand."1 The bill was accordingly lost, two thirds of the house not being in its favour. It is understood, that the president's cabinet was greatly divided on the question.2

§ 680. The second reason assigned by the president against the bill was well founded in fact, and entirely conclusive. The other, to say the least of it, is as open to question, as any one, which can well be imagined in a case of real difficulty of construction. It assumes, as its basis, that a common ratio, or divisor, is to be taken, and applied to each state, let the fractions and inequalities left be whatever they may. Now, this is a plain departure from the terms of the constitution. It is not there said, that any such ratio shall be taken. The language is, that the representatives shall be apportioned among the several states according to their respective numbers, that is, according to the proportion of the whole population of each state to the aggregate of all the states. To apportion according to a ratio, short of the whole number in a state, is not an apportionment according to the respective

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1 5 Marshall's Life of Washington, ch. 5, p. 324 note.

2 Id. p. 323; 4 Jefferson's Correspondence, 466.

numbers of the state. If it is said, that it is impracticable to follow the meaning of the terms literally, that may be admitted; but it does not follow, that they are to be wholly disregarded, or language substituted essentially different in its import and effect. If we must depart, we must depart as little as practicable. We are to act on the doctrine of cypres, or come as nearly as possible to the rule of the constitution. If we are at liberty to adopt a rule varying from the terms of the constitution, arguing ab inconvenienti, then it is clearly just as open to others to reason on the other side from opposing inconvenience and injustice.

§ 681. This question, which a learned commentator has supposed to be now finally at rest,1 has been (as has been already intimated) recently revived and discussed with great ability. Instead of pursuing my own reasoning upon this subject it will be far more satisfactory to give to the reader, in a note, the arguments on each side, as they are found collected in the leading reports and documents now forming a portion of contemporary history.2

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1 Rawle on Constitution, 43; 5 Marshall's Life of Washington, 324.

2 Mr. Jefferson's opinion, given on the apportionment bill in 1792, presents all the lending reasons against the doctrine of apportioning the representatives in any other manner than by a ratio without regard to fractions. It is as follows:

"The constitution has declared that 'representatives and direct taxes shall be apportioned among the several states according to their respective numbers;' that 'the number of representatives shall not exceed one for every 30,000, but each state shall have, at least, one representative; and, until such enumeration shall be made, the state of NewHampshire shall be entitled to choose three, Massachusetts,' &c.

"The bill for apportioning representatives among the several states, without explaining any principle at all, which may show its conformity with the constitution, or guide future apportionments, says, that NewHampshire shall have three members, Massachusetts sixteen, &c. We are, therefore, to find by experiment what has been the principle of the

§ 682. The next clause of the second section of the first article, is: "When vacancies happen in the representation of any state, the executive authority thereof shall issue writs of election to fill such vacancies."

§ 683. The propriety of adopting this clause does not seem to have furnished any matter of discussion, either in, or out of the convention.1 It was obvious, that the power ought to reside somewhere; and must be exercised, either by the state or national government, or by some department thereof. The friends of state powers would naturally rest satisfied with leaving it with the state executive; and the friends of the national

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bill; to do which, it is proper to state the federal or representable numbers of each state, and the members allotted to them by the bill. They are as follows:

Vermont,	**85,532**	**3**	**It happens that this representation,**
New-Hampshire,	**141,832**	**5**	**whether tried a between great and**
Massachusetts,	**475,327**	**15**	**small states, or as between north**
Rhode-Island,	**68,444**	**2**	**and south, yields, in the present**
Connecticut,	**325,941**	**8**	**instance, a tolerably just result,**
New-York,	**325,915**	**11**	**and consequently could not be objected**
New-Jersey,	**179,556**	**6**	**to on that ground, if it were obtained**
Pennsylvania,	**432,880**	**14**	**by the process prescribed in the**
Delaware,	**55,538**	**2**	**constitution; but if obtained by any**
Maryland,	**278,513**	**9**	**process out of that, it becomes**
Virginia,	**630,558**	**21**	**inadmissible.**
Kentucky,	**68,705**	**2**	
North Carolina,	**353,521**	**11**	
South Carolina,	**206,236**	**7**	
Georgia,	**70,843**	**2**	
	3,636,312	**120**	

"The first member of the clause of the constitution above cited, is express -- that representatives shall be apportioned among the several states according to their respective numbers; that is to say, they shall be apportioned by some common ratio, for proportion and ratio are equivalent words; and it is the definition of proportion among numbers, that they have a ratio common to all, or, in other words, a common divisor. Now, trial will show that there is no common ratio, or divisor, which, applied to the numbers of each state, will give to them the number of re- 1 Journal of Convention, 217, 237, 352.

government would acquiesce in that arrangement, if other constitutional provisions existed sufficient to preserve its due execution. The provision, as it stands has the strong recommendation of public convenience, and facile adaptation to the particular local circum-

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presentatives allotted in this bill; for, trying the several ratios of 29, 30, 31, 32, 33, the allotments would be as follows:

Vermont,	2	2	2	2	2	3
New-Hampshire,	4	4	4	4	4	5
Massachusetts	16	15	15	14	14	16
Rhode-Island,	2	2	2	2	2	2
Connecticut,	8	7	7	7	7	8
New-York,	12	11	11	11	10	11
New-Jersey,	6	5	5	5	5	6
Pennsylvania,	14	14	13	13	13	14
Delaware,	1	1	1	1	1	2
Maryland,	9	9	8	8	8	9
Virginia,	21	21	20	19	19	21
Kentucky,	2	2	2	2	2	2
North Carolina,	12	11	11	11	10	2
South Carolina,	7	6	6	6	6	7
Georgia,	2	2	2	2	2	2
	118	112	109	107	105	120

Then the bill reverses the constitutional precept; because, by it, representatives are not apportioned among the several states according to their respective numbers.'

"It will be said, that, though for taxes there may always be found a divisor, which will apportion them among the states according to numbers exactly, without leaving any remainder; yet, for representatives, there can be no such common ratio, or divisor, which, applied to the several numbers, will divide them exactly, without a remainder or fraction. I answer, then, that taxes must be divided exactly, and representatives as nearly as the nearest ratio will admit, and the fractions must be neglected; because the constitution wills, absolutely, that there be an apportionment, or common ratio; and if any fractions result from the operation, it has left them unprovided for. In fact, it could not but foresee that such fractions would result, and it meant to submit to them. It knew they would be in favour of one part of the Union at one time, and of another part of it at another, so as, in the end, to balance occasional inequalities. But, instead of such a single common ratio, or uniform divisor, as prescribed by the constitution, the bill has applied two ratios, at least, to the different states to wit, that of 30,026 to the seven following: Rhode-Island, New-York, Pennsylvania, Maryland, Virginia, Kentucky, and Georgia; and that of 27,770 to the eight others; namely,

stances of each state. Any general regulation would have worked with some inequality.

§ 684. The next clause is, that "the house of representatives shall choose their speaker, and other

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Vermont, New-Hampshire, Massachusetts, Connecticut, New-Jersey, Delaware, North Carolina, and South Carolina. As follows:

Rhode Island,	68,444	2	And Vermont, 85,532 3
New York,	352,915	11	New-Hampshire, 141,823 5
Pennsylvania,	432,880	14	Massachusetts, 475,327 16
Maryland,	278,513	9	Connecticut,

235,941	8				
Virginia,		630,558	21	New-Jersey,	
179,556	6				
Kentucky,		68,705	2	Delaware,	
55,538	2				
Georgia,		70,843	2	North Carolina,	
353,521	12				
				South Carolina,	
206,236	7				

"And if two ratios may be applied, then fifteen may, and the distribution become arbitrary, instead of being apportioned to numbers.

"Another member of the clause of the constitution, which has been cited, says, 'the number of representatives shall not exceed one for every 30,000, but each state shall have, at least, one representative.' This last phrase proves that it had in contemplation, that all fractions, or numbers below the common ratio, were to be unrepresented; and it provides specially, that in the case of a state whose whole number shall be below the common ratio, one representative shall be given to it. This is the single instance where it allowsrepresentation to any smaller number than the common ratio, and, by providing specially for it in this, shows it was understood, that, without special provision, the smaller number would, in this ease, be involved in the general principle.

"The first phrase of the above citation, that 'the number of representatives shall not exceed one for every 30,000,' is violated by this bill, which has given to eight states a number exceeding one for every 30,000, to wit, one for every 27,770.

"In answer to this, it is said, that this phrase may mean either the thirty thousands in each slate, or the thirty thousands in the whole Union; and that, in the latter case, it serves only to find the amount of the whole representation, which, in the present state of population, is one hundred and twenty members. Suppose the phrase might bear both meanings, which will common sense apply to it? Which did the universal understanding of our country apply to it? Which did the senate and representatives apply to it during the pendency of the first bill, and even till an advanced stage of this second bill, when an ingenious gentleman found out the doctrine of fractions -- a doctrine so difficult and inobvious, as to be rejected, at first sight, by the very persons who afterwards be-

"officers, and shall have the sole power of impeachment."

§ 685. Each of these privileges is of great practical value and importance. In Great Britain the house of

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came its most zealous advocates? The phrase stands in the midst of a number of others, every one of which relates to states in their separate capacity. Will not plain common sense, then, understand it, like the rest of its context, to relate to states in their separate capacities?

"But if the phrase of one for 30,000, is only meant to give the aggregate of representatives, and not at all to influence their apportionment among the states, then the one hundred and twenty being once found, in order to apportion them, we must recur to the former rule, which does it according to the numbers of the respective states; and we must take the nearest common divisor as the ratio of distribution, that is to say, that divisor, which, applied to every state, gives to them such numbers as, added together, come nearest to 120. This nearest common ratio will be found to be 28,858, and will distribute 119 of the 120 members, leaving only a single residuary one. It will be found, too, to place 96,648 fractional numbers in the eight northernmost states, and 105,582, in the southernmost. The following table shows it:

	Ratio of	Fractions	
	28,858		
Vermont, - -	85,532	2	27,816
New-Hampshire -	141,823	4	26,391
Massachusetts - -	475,397	16	13,599
Rhode-Island - -	68,444	2	10,728
Connecticut - -	235,941	8	5,077
New-York - -	352,915	12	6,619
New-Jersey - -	179,556	6	6,408
Pennsylvania - -	432,880	15	10

					96,648		
Delaware	-	-			55,538	1	26,680
Maryland	-	-			278,513	9	18,791
Virginia	-	-		-	630,558	21	24,540
Kentucky	-	-			68,705	2	10,989
North Carolina		-		-	353,521	12	7,225
South Carolina		-		-	206,236	7	4,230
Georgia	-	-		-	70,843	2	13,127
105,582							
					3,636,312	119	202,230
202,230							

"Whatever may have been the intention, the effect of rejecting the nearest divisor, (which leaves but one residuary member,) and adopting a distant one, (which leaves eight,) is merely to take a member from New-York and Pennsylvania each, and give them to Vermont and New-

commons elect their own speaker; but he must be approved by the king.1 This approval is now altogether a matter of course; but anciently, it seems, the king intimated his wish previously, in order to avoid the necessity of a refusal; and it was acceded to.2 The very language used by the speakers in former times, in order to procure the approval of the crown, was such as would not now be tolerated; and indicated, at least,

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Hampshire. But it will be said, 'this is giving more than one for 30,000.' True; but has it not been just said, that the one for 30,000 is prescribed only to fix the aggregate number, and that we are not to mind it when we come to apportion them among the states; that for this we must recur to the former rule, which distributes them according to the numbers in each state? Besides, does not the bill itself, apportion among seven of the state, by the ratio of 27,770, which is much more than one for 30,000?

"Where a phrase is susceptible of two meanings, we ought certainly to adopt that which will bring upon us the fewest inconveniences. Let us weigh those resulting from both constructions.

"From that giving to each state a member for every 30,000 in that state, results the single inconvenience, that there may be large fractions unrepresented. But it being a mere hazard on which states this will fall, hazard will equalize it in the long run.

"From the other, results exactly the same inconvenience. A thousand cases may be imagined to prove it Take one; suppose eight of the states had 45,000 inhabitants each, and the other seven 44,999 each, that is to say, each one less than each of the others, the aggregate would be 674,993, and the number of representatives, at one for 30,000 of the aggregate, would be 22. Then, after giving one member to each state, distribute the seven residuary members among the seven highest fractions; and, though the difference of population be only an unit, the representation would be the double. Here a single inhabitant the more would count as 30,000. Nor is this case imaginable only; it will resemble the real one, whenever the fractions happen to be pretty equal through the whole states. The numbers of our census happen, by accident, to give the fractions all very small or very great, so as to produce the strongest case of inequality that could possibly have occurred, and which may newer occur again. The probability is, that the fractions will generally descend gradually from 39,999 to 1. The inconvenience, then, of large unrepresented fractions attends both constructions; and,

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1 1 Black. Comm. 181.

2 Corn. Dig. Parliament, E. 5; 4 Inst. 8, Lax. Parl. ch. 12, p. 74.

a disposition to undue subserviency.1 A similar power of approval existed in the royal governors in many of the colonies before the revolution. The exclusive

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while the most obvious construction is liable to no other, that of the bill incurs many and grievous ones.

Fractions.							
Ist	-	-	-	45,000		2	15,000
2d	-	-		45,000	2	15,000	

2d	-	-	-	45,000		2	15,000	
4th	-	-	-	45,000		2	15,000	
5th	-	-	-	45,000		2	15,000	
6th	-	-	-	45,000		2	15,000	
7th	-	-	-	45,000		2	15,000	
8th		-	-	45,000		2		15,000
9th		-	-	44,999		1		14,999
10th		-	-	44,999		1	14,999	
11th		-	-	44,999		1	14,999	
12th		-	-	44,999		1	14,999	
13th		-	-	44,9.r9		1	14,999	
14th		-	-	44,999		1	14,999	
15th		-	-	44,999		1	14,999	
				674,993				

"1. If you permit the large fraction in one state to choose a representative for one of the small fractions in another state, you take from the latter its election, which constitutes real representation, and substitute a virtual representation of the disfranchised fractions; and the tendency of the doctrine of virtual representation has been too well discussed and appreciated by reasoning and resistance, on a former great occasion, to need development now.

"2. The bill does not say, that it has given the residuary representatives to the greatest fractions; though, in fact, it has done so. It seems to have avoided establishing that into a rule, lest it might not suit on another occasion. Perhaps it may be found the next time more convenient to distribute them among, the smaller states; at another time among the larger states; at other times. according to any other crotchet, which ingenuity may invent, and the combination of the day give strength to carry; or they may do it arbitrarily, by open bargain and cabal. In short, tiffs construction introduces into congress a scramble, or a vendue for the surplus members. It generates waste of time, hot blood, and may, at some time, when the passions are high, extend a disagreement between the two houses, to the perpetual loss of the thing, as happens

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1 See Christian's Note to 1 Black. Comm. 181; Com. Dig. Parliament, E. 5.; 1 Wilson's Law Lect. 159, 160; 4 Co. Inst. 8.

right of choosing a speaker, without any appeal to, or approval by any other department of the government, is an improvement upon the British system. It secures

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now In Pennsylvania assembly: whereas the other construction reduces the apportionment always to an arithmetical operation, about which no two men can possibly differ.

"3. It leaves in full force the violation of the precept which declares, that representatives shall be apportioned among the states according to their numbers, that is, by some common ratio.

"Viewing this hill either as a violation of the constitution, or as giving an inconvenient exposition to its words, is it a case wherein the president ought to interpose his negative? I think it is.

"1. The non-user of his negative begins. already to excite a belief, that no president will ever venture to use it; and, consequently, has begotten a desire to raise up barriers in the state legislatures against congress throwing off the control of the constitution.

"2. It can ever be used more pleasingly to the public, than in the protection of the constitution.

"3. No invasions of the constitution are so fundamentally dangerous, as the tricks played on their own numbers, apportionment, and other circumstances respecting themselves, and affecting their legal qualifications to legislate. for the Union.

"4. The majorities, by which this bill has been carried, (to wit, of one in the senate, and two in the house of representatives,) show how divided the opinions were there.

"5. The whole of both houses admit the constitution will bear the other exposition; whereas the minorities in both deny it will hear that of the bill.

"6. The application of any one ratio is intelligible to the people, and will, therefore, be approved; whereas the complex operations of this bill will never be comprehended by them; awl, though they may acquiesce, they cannot approve, what they do not understand."

Mr. Webster's report on the same subject, in the senate in April, 1832, presents the leading arguments on the other side.

"This bill, like all laws on the same subject, must be regarded, as of an interesting and delicate nature. It respects the distribution of political power among the states of the Union. It is to determine the number of voices, which, for ten years to come, each state is to possess in the popular branch of the legislature. In the opinion of the committee, there can be few or no questions, which it is more desirable should be settled on just, fair, and satisfactory principles, than this; and, availing themselves of the benefit of the discussion, which the bill has already undergone in the senate, they have given to it a renewed and anxious consideration. The result is, that, in their opinion, the bill ought to be

a more independent and unlimited choice on the part of the house, according to the merits of the individual, and their own sense of duty. It avoids those incon-

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amended. Seeing the difficulties, which belong to the whole subject, they are fully convinced, that the hill has been framed and passed in the other house, with the sincerest desire to overcome those difficulties, and to enact a law, which should do as much justice as possible to all the states. But the committee are constrained to say, that this object appears to them not to have been obtained. The unequal operation of the bill on some of the states, should it become a law, seems to the committee most manifest; and they cannot but express a doubt, whether its actual apportionment of the representative power among the several states can be considered, as conformable to the spirit of the constitution. The bill provides, that, from and after the third of March, 1833, the house of representatives shall be composed of members, elected agreeably to a ratio of one representative for every forty-seven thousand and seven hundred persons in each state, computed according to the rule prescribed by the constitution. The addition of the seven hundred to the forty-seven thousand, in the composition of this ratio, produces no effect whatever in regard to the constitution of the house. It neither adds to, nor takes from, the number of members assigned to any state. Its only effect is, a reduction of the apparent amount of the fractions, as they are usually called, or residuary numbers, alter the application of the ratio. For all other purposes, the result is precisely the same, as if the ratio had been 47,000.

"As it seems generally admitted, that inequalities do exist in this bill, and that injurious consequences will arise from its operation, which it would be desirable to avert, if any proper means of averting them, without producing others equally injurious, could be found, the committee do not think it necessary to go into a full and particular statement of these consequences. They will content themselves with presenting a few examples only of these results, and such as they find it most difficult to reconcile with justice, and the spirit of the constitution.

"In exhibiting, these examples, the committee must necessarily speak of particular states; but it is hardly necessary to say, that they speak of them as examples only, and with the most perfect respect, not only for the states themselves, but for all those, who represent them here.

"Although the bill does not commence by fixing the whole number of the proposed house of representatives, yet the process adopted by it brings out the number of two hundred and forty members. Of these two hundred and forty members, forty are assigned to the state of NewYork, that is to say, precisely one sixth part of the whole. This assignment would seem to require, that New-York should contain one sixth part of the whole population of the United States; and would be bound

veniences and collisions, which might arise from the interposition of a negative in times of high party excitement. It extinguishes a constant source of jealousy

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to pay one sixth part of all her direct taxes. Yet neither of these is the case. The whole representative population of the United Stares is 11,929,005; that of New-York is 1,918,623, which is less than one sixth of the whole, by nearly 70,000. Of a direct tax of two hundred and forty thousand dollars, New-York would pay only $38.59. But if, instead of comparing the numbers assigned to New-York with the whole numbers of the house, we compare her with other states, the inequality is still more evident and striking.

"To the state of Vermont, the bill assigns five members. It gives, therefore, eight times as many representatives to New-York, as to Vermont; but the population of New-York is not equal to eight times

the population of Vermont, by more than three hundred thousand. Vermont has five members only for 280,657 persons. If the same proportion were to be applied to New-York, it would reduce the number of her members from forty to thirty-four --- making a difference more than equal to the whole representation of Vermont, and more than sufficient to overcome her whole power in the house of representatives.

"A disproportion, almost equally striking, is manifested, if we compare New-York with Alabama. The population of Alabama is 262,208; for this, she is allowed five members. The rule of proportion, which gives to her but five members for her number, would give to New-York but thirty-six for her number. Yet New-York receives forty. As compared with Alabama, then, New-York has an excess of representation equal to four fifths of the whole representation of Alabama; and this excess itself will give her, of course, as much weight in the house, as the whole delegation of Alabama, within a single vote. Can it be said, then, that representatives are apportioned to these states according to their respective numbers?

"The ratio assumed by the bill, it will be perceived, leaves large fractions, so called, or residuary numbers, in several of the small states, to the manifest loss of a part of their just proportion of representative power. Such is the operation of the ratio, in this respect, that NewYork, with a population less than that of New-England by thirty or thirty-five thousand, has yet two more members, than all the New-England states; and there are seven states in the Union, whose members amount to the number of 123, being a clear majority of the whole house, whose aggregate fractions altogether amount only to fifty-three thousand; while Vermont and New-Jersey, having together but eleven members, have a joint fraction of seventy-five thousand.

"Pennsylvania by the bill will have, as it happens, just as many members as Vermont, New-Hampshire, Massachusetts, and New-Jersey;

and heart-burning; and a disposition on one side to exert an undue influence, and on the other, to assume a hostile opposition. It relieves the executive depart-

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but her population is not equal to theirs by a hundred and thirty thousand; and the reason of this advantage, derived to her from the provisions of the bill, is, that her fraction, or residuum, is twelve thousand only, while theirs is a hundred and forty-four.

"But the subject is capable of being presented in a more exact and mathematical form. The house is to consist of two hundred and forty members. Now the precise proportion of power, out of the whole mass represented by the numbers two hundred and forty, which New-York would be entitled to according to her population, is 38.59; that is to say, she would be entitled to thirty-eight members, and would have a residuum, or fraction; and, even if a member were given her for that fraction, she would still have but thirty-nine; but the bill gives her forty.

"These are a part, and but a part, of those results produced by the bill in its present form, which the committee cannot bring themselves to approve. While it is not to be denied, that, under any rule of apportionment, some degree of relative inequality must always exist, the committee cannot believe, that the senate will sanction inequality and injustice to the extent, in which they exist in this bill, if they can be avoided. But recollecting the opinions, which had been expressed in the discussions of the senate, the committee have diligently sought to learn, whether there was not some other number, which might be taken for a ratio, the application of which would work out more justice sad equality. In this pursuit the committee have not been successful. There are, it is true, other numbers, the adoption of which would relieve many of the states, which suffer under the present; but this relief would be obtained only by shifting the pressure on to other States, thus creating new grounds of complaint in other quarters. The number forty-four thousand has been generally spoken of, as the most acceptable substitute for forty-seven thousand seven hundred; but should this be adopted, great relative inequality would fall on several states, and, among them, on some of the new and growing states, whose relative disproportion, thus already great, would be constantly increasing. The committee, therefore, are of opinion, that the bill should be altered in the mode of apportionment. They think, that the process, which begins by assuming a ratio, should be abandoned, and that the bill ought to be framed on the principle of the amendment, which has been the main subject of discussion before the senate. The fairness of the principle of this amendment, and the general equity of its results, compared with those, which flow from the other

process, seem plain and undeniable. The main question has been, whether the principle itself be constitutional; and this question the committee proceeded to exam-

ment from all the embarrassments of opposing the popular will; and the house from all the irritation of not consulting the cabinet wishes.

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ine, respectfully asking of those, who have doubted its constitutional propriety, to deem the question of so much importance, as to justify a second reflection.

"The words of the constitution are, 'representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner, as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative.'

"There would seem to be little difficulty in understanding these provisions. The terms used are designed, doubtless, to be received in no peculiar or technical sense, but according to their common and popular acceptation. To apportion, is to distribute by right measure; to set off in just parts; to assign in due and proper proportion. These clauses of the constitution respect, not only the portions of power, but the portions of the public burden, also, which should fall to the several states; and the same language is applied to both. 'Representatives are to be apportioned among the states according to their respective numbers, and direct taxes are to be apportioned by the same rule. The end aimed at is, that representation and taxation should go hand in hand; that each state should be represented in the same extent, to which it is made subject to the public charges by direct taxation. But, between tim apportionment of representatives and the apportionment of taxes there necessarily exists one essential difference. Representation, founded on numbers, must have some limit; and being, from its nature, a thing not capable of indefinite subdivision, it cannot be made precisely equal. A tax, indeed, cannot always, or often be apportioned with perfect exactness; as, in other matters of account there will be fractional parts of the smallest coins, and the smallest denomination of money of account, yet, by the usual subdivisions of the coin, and of tim denomination of money, the apportionment of taxes is capable of being made so exact, that tire inequality becomes minute and invisible. But representation cannot be thus divided. Of representation, there can be nothing less than one representative; nor by our constitution, more representatives than one for every thirty thousand. It is quite obvious, therefore, that tim apportionment of representative power can never be precise anti

§ 686. The other power, the sole power of impeachment, has a far wider scope and operation. An impeachment, as described in the common law of England,

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perfect. There must always exist some degree of inequality. Those, who framed, and those, who adopted the constitution, were, of course, fully acquainted with this necessary operation of the provision. In the senate, the states are entitled to a fixed number of senators; and, therefore, in regard to their representation, in that body, there is no consequential or incidental inequality arising. But, being represented in the house of representatives according to their respective numbers of people, it is unavoidable, that, in assigning to each, state its number of members, the exact proportion of each, out of a given number, cannot always or often be expressed in whole numbers; that is to say, it will not often be found, that there belongs to a state exactly one tenth, or one twentieth, or one thirtieth of the whole house; and, therefore, no number of representatives will exactly correspond with the right of such state, or the precise share of representation, which belongs to it, according to its population.

"The constitution, therefore, must be understood, not as enjoining an absolute relative equality -- because that would be demanding an impossibility -- but as requiring of congress to make the apportionment of representatives among the several states, according to their respective numbers, as near as may be. That, which cannot be done perfectly, must be done in a manner as near perfection, as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made.

"Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case, approximation becomes a rule; it takes the place of that other tale. which would be preferable, but which is found inapplicable, and becomes, itself, an obligation of binding force. The nearest approximation to exact truth, or exact right. when that exact truth, or that exact right cannot itself be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind; a rule of no less binding force in cases, to which it is applicable, and no more to be departed from, than any other rule or obligation.

"The committee understand the constitution, as they would have understood it, if it had said, in so many words, that representatives should be apportioned among the states, according to their respective numbers, as near as may be. If this be not its true meaning, then it has either given. on this most delicate and important subject, a rule, which is always impracticable, or else it has given no rule at all; because, if the rule be, that representatives shall be apportioned exactly according

is a presentment by the house of commons, the most solemn grand inquest of the whole kingdom, to the house of lords, the most high and supreme court of

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to numbers, it is impracticable in every case; and if, for this reason, that cannot be the rule, then there is no rule whatever, unless the rule be, that they shall be apportioned, as near as may be.

"This construction, indeed, which the committee adopt, has not, to [heir knowledge, been denied; and they proceed in the discussion of the question before the senate, taking for granted, that such is the true and undeniable meaning of the.constitution.

"The next thing to be observed is, that the constitution prescribes no particular process, by which this apportionment is to be wrought out. It has plainly described the end to be accomplished, viz. the nearest approach to relative equality of representation among the states; and whatever accomplishes this end, and nothing else, is the true process. In-truth, if, without any process whatever, whether elaborate or easy, congress could perceive the exact proportion of representative power rightfully belonging to each state, it would perfectly fulfil its duty by conferring that portion on each, without reference to any process whatever. It would be enough, that the proper end had been attained. And it is to be remarked further, that, whether this end be attained best by one process or by another, it becomes, when each process has been carried through, not matter of opinion, but matter of mathematical certainty. If the whole population of the United States, the population of each state, and the proposed number of the house of representatives, be all given, then, between two bills apportioning the members among the several states, it can be told, with absolute certainty, which bill assigns to any and every state the number nearest to the exact proportion of that state; in other words, which of the two hills, if either, apportions the representatives according to the number of the states, respectively, as near as may be. If, therefore, a particular process of apportionment be adopted, and objection be made to the injustice or inequality of its result, it is, surely, no answer to such objection to say, that the inequality necessarily results from the nature of the process. Before such answer could avail, it would be necessary to show, either that the constitution prescribes such process, and makes it necessary, or that there is no other mode of proceeding, which would produce less inequality and less injustice. If inequality, which might have otherwise been avoided, be produced by a given process, then that process is a wrong one. It is not suited to the case, and should be rejected.

"Nor do the committee perceive how it can be matter of constitutional propriety or validity, or in any way a constitutional question, whether the process, which may be applied to the case, be simple or compound, one process or many processes; since, in the end, it may

criminal jurisdiction of the kingdom.1 The articles of impeachment are a kind of hill of indictment found by the commons, and tried by the lords, who are, in cases

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always be seen, whether the result be that, which has been aimed at, namely, the nearest practicable approach to precise justice and relative inequality. The committee, indeed, are of opinion, in this case, that the simplest, and most obvious way of proceeding, is also the true and constitutional way. To them it appears, that in carrying into effect this part of the constitution, the first thing naturally to be done is, to decide on the whole number, of which the house is to be composed; as when, under the same clause of the

constitution, a tax is to be apportioned among the states, the amount of the whole tax is, in the first place, to be settled.

"When the whole number of the proposed house is thus ascertained, and fixed, it becomes the entire representative power of all the people in the Union. It is then a very simple matter to ascertain how much of this representative power each state is entitled to by its numbers. If, for example, the house is to contain 240 members, then the number 240 expresses the representative power of all the states; and a plain calculation readily shows how much of this power belongs to each state. This portion, it is true, will not always, nor often, be expressed in whole numbers, but it may always be precisely exhibited by a decimal form of expression. If the portion of any state be seldom, or never, one exact tenth, one exact fifteenth, or one exact twentieth, it will still always, be capable of precise decimal expression, as one tenth and two hundredths, one twelfth and four hundredths, one fifteenth and six hundredths, and so on; and the exact portion of the state, being thus decimally expressed, will always show, to mathematical certainty, what integral number comes nearest to such exact portion. For example, in a house consisting of two hundred and forty members, the exact mathematical proportion, to which her numbers entitle the state of NewYork, is 38.5 9; it is certain, therefore, that thirty-nine is the integral or whole number, nearest to her exact proportion of the representative power of the Union. Why, then, should she not have thirty-nine? and why should she have forty? She is not quite entitled to thirty-nine; that number is something more than her right. But, allowing her thirtynine, from the necessity of giving her whole numbers, and because that is the nearest whole number, is not the constitution fully obeyed, when she has received the thirty-ninth number? Is not her proper number of representatives then apportioned to her, as near as may be? And is not the constitution disregarded, when the bill goes further, and gives

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1 2 Hale's Pl. Comm. 150; 4 Black. Comm. 259; 2 Wilson's Lay Lect. 165, 166.

of misdemeanors, considered, not only as their own peers, but as the peers of the whole nation.1 The origin and history of the jurisdiction of parliament, in

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her a fortieth member? For what is such a fortieth member given? Not for her absolute numbers; for her absolute numbers do not entitle her to thirty-nine. Not for the sake of apportioning her members to her numbers, as near as tony be, because thirty-nine is a nearer apportionment of members to numbers than forty. But it is given, say the advocates of the bill, because the process, which has been adopted, gives it. The answer is, no such process is enjoined by the constitution.

"The case of New York may be compared or contrasted with that of Missouri. The exact proportion of Missouri, in a general representation of two hundred sad forty, is two and six tenths; that is to say, it comes nearer to three members, than to two, yet it is confined to two. But why is not Missouri entitled to that number of representatives, which comes nearest to her exact proportion? Is the constitution fulfilled as to her, while that number is withheld, and while, at the same time, in another state, not only is that nearest number given, but an additional member given also? Is it an answer, with which the people of Missouri ought to be satisfied, when it is said, that this obvious injustice is the necessary result of the process adopted by the bill? May they not say, with propriety, that since three is the nearest whole number to their exact right, to that number they are entitled, and the process, which deprives them of it, must be a wrong process? A similar comparison might be made between New-York and Vermont. The exact proportion, to which Vermont is entitled, in a representation of two hundred and forty, is 5.646. Her nearest whole number, therefore, would be six. Now, two things are undeniably true: first, that to take away the fortieth member from New-York would bring her representation nearer to her exact proportion, than it stands by leaving her that fortieth member. Secondly, that giving the member, thus taken from New-York, to Vermont, would bring her representation nearer to her exact right, than it is by the bill. And both these propositions are equally. true of a transfer of the twenty-eighth member assigned by the bill to Pennsylvania, to Delaware, and of the thirteenth member assigned to Kentucky, to Missouri; in other words, Vermont has, by her numbers, more right to six members, than New-York has to forty. Delaware, by her numbers, has more right to two members, than Pennsylvania has to twenty-eight; and Missouri, by her numbers, has more right to three members, than Kentucky has to thirteen. Without disturbing the proposed number of the house, the mere changing of these three members, from and to the six states respectively, would

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1 4 Black. Comm. 260.

cases of impeachment, are summarily given by Mr. Woodeson; but little can be gathered from it, which is now of much interest, and, like most other legal anti-

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bring the representation of each of the whole six nearer to their due proportion, according to their respective numbers, than the bill,'in its present form makes it. In the face of this indisputable truth, how can it be said, that the bill apportions these members among those states, according to their respective number, at near as may be?

"The principle, on which the proposed amendment is founded, is an effectual corrective for these, and all other equally great inequalities. It may be applied, at all times, and in all cases, and its result will always be the nearest approach to perfect justice. It is equally simple and impartial. As a rule of apportionment, it is little other than a transcr ipt of the words of the constitution, and its results are mathematically certain. The constitution, as the committee understand it, says, representatives shall be apportioned among the states, according to their respective numbers of people, as near as may be. The rule adopted by the committee says, out of the whole number of the house, that number shall be apportioned to each state, which comes nearest to its exact right, according to its number of people.

"Where is the repugnancy between the constitution and the rule? The arguments against the rule seem to assume, that there is a necessity of instituting some process adopting some number as the ratio, or as that number of people, which each member shall be understood to represent; but the committee see no occasion for any other process whatever, than simply the ascertainment of that quantum, out of the whole mass of the representative power, which each state may claim.

"But it is said, that, although a state may receive a number of representatives, which is something less than its exact proportion of representation, yet, that it can, in no case, constitutionally receive more. How is this proposition proved? How is it shown, that the constitution is less perfectly fulfilled by allowing a state a small excess, than by subjecting her to a large deficiency? What the constitution requires, is the nearest practicable approach to precise justice. The rule is approximation; and we ought to approach, therefore, on whichever. side we can approach nearest.

"But there is still a more conclusive answer to be given to this suggestion. The whole number of representatives, of which the house is to be composed, is, of necessity, limited. This number, whatever it is, is that which is to be apportioned, and nothing else can be apportioned. This is the whole sum to be distributed. If, therefore, in making the apportionment, some state receive less than their just share, it must necessarily follow, that some other states have received more than their

quities, it is involved in great obscurity.1 To what classes of offenders it applies, will be more properly an inquiry hereafter. In the constitution of the United

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just share. If there be one state in the Union with less than its right, some other state has more than its right, so.that the argument, whatever be its force, applies to the hill in its present form, as strongly as it can ever apply to any bill.

"But the objection most usually urged against the principle of the proposed amendment is, that it provides for the representation of fractions. Let this objection be examined and considered. Let it be ascertained, in the first place, what these fractions, or fractional numbers, or residuary numbers, really are, which, it is said, will be represented, should the amendment prevail.

"A fraction is the broken part of some integral number. It is, therefore, a relative or derivative idea. It implies the previous existence of some fixed number, of which it is lint a part, or remainder. If there be no necessity for fixing or establishing such previous number, then the fraction, resulting from it, is itself no matter of necessity, but matter of choice or of accident. Now the argument, which considers the plan proposed in the amendment, as a representation of fractions, and therefore unconstitutional, assumes, as its basis, that, according to the constitution, every member of the house of representatives represents, or ought to represent, the same, or nearly the same, number of constituents: that this number is to be regarded, as an integer; and any thing less than this is, therefore, called n fraction, or a residuum, and cannot be entitled to a representative. But all this is not the provision of the constitution of the United States. That constitution contemplates no integer, or any common number for the constituents of a member of the house of representatives. It goes not at all into these subdivisions of the population of a

state. It provides for the apportionment of representatives among the several states, according to their respective numbers, and stops there. It makes no provision for the representation of districts, of states, or for the representation of any portion or the people of a state, less than the whole. It says nothing of ratios or of constituent numbers. All these things it leaves to state legislation. The right, which each state possesses to its own due portion of the representative power, is a state right, strictly; it belongs to the state, as a state; and it is to be used and exercised, as the state may see fit, subject only to the constitutional qualifications of electors. In fact, the states do make, and always have made, different provisions for the exercise of this power. In some, a single member is chosen for a certain defined district; in others, two or three members are chosen

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1 2 Woodeson's Lect. 40, p. 596, &c.

States, the house of representatives exercises the functions of the house of commons in regard to impeachments; and the senate (as we shall hereafter see) the

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for the same district; and, in some again, as New-Hampshire, RhodeIsland, Connecticut, New-Jersey, and Georgia, the whole representation of the state is exerted, as a joint, undivided representation. In these last-mentioned states, every member of the house of representatives has for his constituents all the people of the state; and all the people of those states are consequently represented in that branch of congress. If the bill before the senate should pass into a law, in its present form, whatever injustice it might do to any of those states, it would not be correct to say of them, nevertheless, that any portion of their people was unrepresented. The well-founded objection would be, as to some of them at least, that they were not adequately, competently, fairly represented; that they had not as many voices and as many votes in the house of representatives, as they were entitled to. This would be the objection. There would be no unrepresented fractions; but the state, as a state, as a whole would be deprived of some part of its just rights.

"On the other hand, if the bill should pass, as it is now proposed to be amended, there would be no representation of fractions in any state; for a fraction supposes a division and a remainder. All, that could justly be said, would be, that some of these states, as states, possessed a portion of legislative power, a little larger than their exact right; as it must be admitted, that, should the bill pass unamended, they would posses, of that power, much less than that exact right. The same remarks are substantially true, if applied to those states, which adopt the district system, as most of them do. In Missouri, for example, there will be no fraction unrepresented, should the bill become a law in its present form; nor any member for a fraction, should the amendment prevail; because the mode of apportionment, which assigns to each state that number, which is nearest to its exact right, applies no assumed ratios, makes no subdivisions, and, of course, produces no fractions. In the one case, or in the other, the state, as a state, will have something more, or something less, than its exact proportion of representative power; but she will part out this power among her own people, in either case, in such mode, as she may choose, or exercise it altogether, as an entire representation of the people of the state.

"Whether the subdivision of the representative power within any state, if there be a subdivision, be equal or unequal, or fairly or unfairly made, congress cannot know, and has no authority to inquire. It is enough, that the state presents her own representation on the floor of congress in the mode she chooses to present it. If a state were to give

functions of the house of lords in relation to the trial of the party accused. The principles of the common law, so far as the jurisdiction is to be exercised, are

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to one portion of her territory a representative for every twenty-five thousand persons, and to the rest a representative only for every fifty thousand, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in congress; because the constitution has left all this to the state itself.

"These considerations, it is thought, may show, that the constitution has not, by any implication, or necessary construction, enjoined that, which it certainly has not ordained in terms, viz. that every member of the house shall be supposed to represent the same number of constituents; and therefore, that the assumption of a ratio, as representing the common number of constituents, is not called for by the

constitution. All that congress is at liberty to do, as it would seem, is to divide the whole representative power of the Union into twenty-four parts, assigning one part to each state, as near as practicable, according to its right, and leaving all subsequent arrangement, and all subdivisions, to the state itself.
"If the view thus taken of the rights of the states, and the duties of congress, be the correct view, then the plan proposed in the amendment is, in no just sense, a representation of fractions. But suppose it was otherwise; suppose a direct division were made for allowing a representative to every state, in whose population, it being first divided by a Common ratio, there should be found a fraction exceeding half the amount, of that ratio, what constitutional objection could be fairly urged against such a provision? Let it be always remembered, that the case here supposed provides only for a fraction exceeding the moiety of the ratio; for the committee admit, at once, that the representation of fractions, less than a moiety, is unconstitutional; because, should a member be allowed to a state for such a fraction, it would be certain, that her representation would not be so near her exact right, as it was before. But the allowance of n member for a major fraction is a direct approximation towards justice and quality. There appears to the committee to be nothing, either in the letter or the spirit of the constitution, opposed to such a mode of apportionment. On the contrary, it seems entirely consistent with the very object, which the constitution contemplated, and well calculated to accomplish it. The argument commonly urged against it is, that it is necessary to apply some one common divisor, and to abide by its results.
"If, by this, it be meant, that there must be some common rule, or common measure, applicable, and applied impartially to all the states, it is quite true. But, if that which is intended, be, that the population of each

deemed of primary obligation and government. The object of prosecutions of this sort in both countries is to reach high and potent offenders, such as might be

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state must be divided by a fixed ratio, and all resulting fractions, great or small, disregarded, this is but to take for granted the very thing in controversy. The question is, whether it be unconstitutional to make approximation to equality, by allowing representatives for major fractions. The affirmative of this question is, indeed, denied; but iris not disproved, by saying, that we must abide by the operation of division, by an assumed ratio, and disregard fractions. The question still remains, as it was before; anti it is still to be shown, what there is in the constitution, which rejects approximation, as the rule of apportionment. But suppose it to be necessary to find a divisor, and to abide its results. What is a divisor? Not necessarily a simple number. It may be composed of a whole number and a fraction; it may itself be the result of a previous process; it may be any thing, in short, which produces accurate and uniform division: whatever does this, is a common rule, a common standard, or, if the word be important, a common divisor. The committee refer, on this part of the case, to some observations by Professor Dean, with a table, both of which accompany this report.
"As it is not improbable, that opinion has been a good deal influenced on this subject by what took place on the passing of the first act, making an apportionment of representatives among the states, the committee have examined and considered that precedent. If it be in point to the present case, it is certainly entitled to very great weight; but if it be of questionable application, the text of the constitution, even if it were doubtful, could not be explained by a doubtful commentary. In the opinion of the committee, it is only necessary, that what was said on that occasion should be understood in connexion with the subject-matter then under consideration; and, in order to see what that subjectmatter really was, the committee think it necessary to state, shortly, the case.
"The two houses of congress passed a bill, after the first enumeration of the people, providing for a house of representatives, which should consist of one hundred and twenty members. The bill expressed no rule or principle, by which these members were assigned to the several states. It merely said, that New-Hampshire should have five members, Massachusetts ten, and so on; going through all the states, and assigning the whole number of one hundred and twenty. Now, by the census, then recently taken, it appeared, that the whole representative population of the United States was 3,615,920; and it was evidently the wish of congress to make the house as numerous, as the constitution would allow. But the constitution has said, that there should not be

presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those

more than one member for every thirty thousand persons. This prohibition was, of course, to be obeyed; but did the constitution mean, that no states should have more than one member for every thirty thousand persons? or did it only mean, that the whole house, as compared with the whole population of the United States, should not contain more than one member for every thirty thousand persons? If this last were the true construction, then the bill, in that particular, was right; if the first were the true construction, then it was wrong; because so many members could not be assigned to the states, without giving to some o! them more members than one for every thirty thousand. In fact, the bill did propose to do this in regard to several states.

"President Washington adopted that construction of the constitution, which applied its prohibition to each state individually. He thought, that no state could, constitutionally, receive more than one member for every thirty thousand of her own population. On this, therefore, his main objection to the bill was founded. That objection he states in these words:

"The constitution has also provided, that the number of representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the states; and the bill has allotted to eight of the states more than one for every thirty thousand.'

"It is now necessary to see what there was further objectionable in this bill. The number of one hundred and twelve members was all that could be divided among the states, without giving to some of them more than one member fur thirty thousand inhabitants. Therefore, having allotted these one hundred and twelve, there still remained eight of the one hundred and twenty to be assigned; and these eight the bill assigned to the states having the largest fractions. Some of these fractions were large, and some were small. No regard was paid to fractions over a moiety of the ratio, any more than to fractions under it. There was no rule laid down, stating what fractions should entitle the states, to whom they might happen to fall, or in whose population they might happen to be found, to a representative therefor. The assignment was net made on the principle, that each state should have a member for a fraction greater than half the ratio; or that all the states should have a member for a fraction, in all cases where the allowance of such member would bring her representation nearer to its exact proportion than its disallowance. There was no common measure, or common

tribunals.1 These prosecutions are, therefore, conducted by the representatives of the nation,' in their public capacity, in the face of the nation, and upon a

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rule, adopted, but the assignment was matter of arbitrary discretion. A member was allowed to New-Hampshire for example, for a fraction of less than one half the ratio, thus placing her representation further from her exact proportion, than it was without such additional member; while a member was refused to Georgia, whose case closely resembled that of New-Hampshire, both having what were thought large fractions, but both still under a moiety of the ratio, and distinguished from each other only by a very slight difference of absolute numbers. The committee have already fully expressed their opinion on such a mode of apportionment.

"In regard to this character of the bill. President Washington said: 'The constitution has prescribed, that representatives shall be apportioned among the several states according to their respective numbers; and there is no one proportion, or divisor, which, applied to the respective numbers of the states, will yield the number and allotment of representatives proposed by the bill.'

"This was all undoubtedly true, and was, in the judgment of the committee, a decisive objection against the bill. It is nevertheless to be observed, that the other objection completely covered the whole ground. There could, in that bill, be no allowance for a fraction, great or small; because congress had taken for the ratio the lowest number allowed by the constitution, viz. thirty thousand. Whatever fraction a state might have less than that ratio, no member could be allowed for it. It is scarcely necessary to observe, that no such objection applies to the amendment now proposed. No state should the amendment prevail, will have a greater number of members than one for every thirty thousand; nor is it likely, that that objection will ever again occur. The whole force of the precedent, whatever it be, in its application to the present case is drawn from the other objection. And what is the true import of that objection? Does it mean any thing more than, that the apportionment was not made on a common rule or principle, applicable, and applied alike to all the states?

"President Washington's words are, 'there is no one proportion or divisor, which, applied to the respective numbers of the states, will yield the number and allotment of representatives proposed by the bill.'

"If, then, he could have found a common proportion, it would have removed this objection. He required a proportion or divisor. These

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1 4 Black. Comm. 260; Rawle on the Constitution, ch. 22, p. 210, 211; 2 Woodeson's Lect. 40, p. 596, &c.

responsibility, which is at once felt, and reverenced by the whole community.1 The notoriety of the proceedings; the solemn manner, in which they are conducted;

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words he evidently uses, as explanatory of each other. He meant by divisor, therefore, no more than by proportion. What he sought was, some common and equal rule, by which the allotment had been made among the several states; he did not find such common rule; and on that ground, he thought the bill objectionable.

"In the opinion of the committee, no such objection applies to the amendment recommended by them. That amendment gives a rule, plain, simple, just, uniform, and of universal application. The rule has been frequently stated. It may be clearly expressed in either of two ways. Let the rule be, that the whole number of the proposed house shall be apportioned among the several states according to their respective numbers, giving to each state that number of members, which comes nearest to her exact mathematical part or proportion; or, let the rule be, that the population of each state shall be divided by a common divisor, and that, in addition to the number of members resulting from such division, a member shall be allowed to each state, whose fraction exceeds a moiety of the divisor.

"Either of these is it seems to the committee, a fair and just rule, capable of uniform application, and operating with entire impartiality. There is no want of a common proportion, or a common divisor; there is nothing left to arbitrary discretion. If the rule, in either of these forms, be adopted, it can never be doubtful how every member of any proposed number for a house of representatives ought to be assigned. Nothing will be left in the discretion of congress; the right of each state will be a mathematical right, easily ascertained, about which there can be neither doubt nor difficulty; and, in the application of the rule, there will be no room for preference, partiality, or injustice. In any case, in all time to come, it will do all, that human means can do, to allot to every state in the Union its proper and just proportion of representative power. And it is because or this, its capability of constant application, as well as because of its impartiality and justice, that the committee are earnest in recommending its adoption to congress. If it shall be adopted, they believe it will remove a cause of uneasiness and dissatisfaction, recurring, or liable to recur, with every new census, and place the rights of the states, in this respect, on a fixed basis, of which none can with reason complain. It is true, that there may be some numbers assumed for the composition of the house of representatives, to which, if the rule were applied, the result might give a member to the

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1 Rawle on the Constitution, ch. 22, p. 209.

the deep extent, to which they affect the reputations of the accused; the ignominy of a conviction, which is to be known through all time; and the glory of an acquittal, which ascertains and confirms innocence; -- these are all calculated to produce a vivid and lasting interest in the public mind; and to give to such prosecutions, when necessary, a vast importance, both as a check to crime, and an incitement to virtue.

§ 687. This subject will be resumed hereafter, when the other provisions of the constitution, in regard to impeachments, come under review. It does not appear, that the vesting of the power of impeachment in the house of representatives was deemed a matter of serious doubt or question, either in the convention, or with the people.1 If the true spirit of the constitution is consulted, it would seem difficult to arrive at any other conclusion, than of its fitness. It is designed, as a method of national inquest into the conduct of public men. If such is the design, who can so properly be the inquisitors

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house more than was proposed. But it will be always easy to correct this, by altering the proposed number by adding one to it, or taking one from it; so that this can be considered no objection to the rule.

"The committee, in conclusion, cannot admit, that it is sufficient reason for rejecting this mode of apportionment, that a different process has heretofore prevailed. The truth is, the errors and inequalities of that process were at first not obvious and startling. But they have gone on increasing; they are greatly augmented and accumulated every new census; and it is of the very nature of the process itself, that its unjust results must grow greater and greater in proportion as the population of the country enlarges. What was objectionable, though tolerable yesterday, becomes intolerable to-morrow. A change, the committee are persuaded, must come, or the whole just balance and proportion of representative power among the states will be disturbed and broken up."

Mr. Everett also made a very able speech on the same subject, in which he pressed some additional arguments with great force on the same side. See his printed Speech of 17th May. 1832.

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1 Journal of Convention, p. 69, 121, 137, 225, 226, 236; 3 Elliot's Debates, 43, 44, 45, 46.

for the nation, as the representatives of the people themselves? They must be presumed to be watchful of the interests; alive to the sympathies, and ready to redress the grievances, of the people. If it is made their duty to bring official delinquents to justice, they can scarcely fail of performing it without public denunciation, and political desertion, on the part of their con- stituents.

CHAPTER X.
THE SENATE.

§ 688. The third section of the first article relates to the organization and powers of the senate.

§ 689. In considering the organization of the senate, our inquiries naturally lead us to ascertain; first, the nature of the representation and rote of the states therein; secondly, the mode of appointment; thirdly, the number of the senators; fourthly, their term of service; and fifthly, their qualifications.

§ 690. The first clause of the third section is in the following words: "The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each senator shall hare one vote."

§ 691. In the first place, the nature of the representation and vote in the senate. Each state is entitled to two senators; and each senator is entitled to one rote. This, of course, involves in the very constitution of this branch of the legislature a perfect equality among all the states, without any reference to their respective size, population, wealth, or power. In this respect there is a marked contrast between the senate and the house of representatives. In the latter, there is a representation of the people according to the relative population of each state upon a given basis; in the former, each state in its political capacity is represented upon a footing of perfect equality, like a congress of sovereigns, or ambassadors, or like an assembly of peers. The only difference between it and the continental congress under the old confederation is, that in this

the vote was by states; in the senate, each senator has a single vote. So that, though they represent states, they vote as individuals. The vote of the senate thus may, and often does, become a mixed vote, embracing a part of the senators from some of the states on one side, and another part on the other.

§ 692. It is obvious, that this arrangement could only arise from a compromise between independent states; and it must have been less the result of theory, than "of a spirit of amity, and of mutual deference and concession, which the peculiarity of the situation of the United States rendered indispensable."1 It constituted one of the great struggles between the large and the small states, which was constantly renewed in the convention, and impeded it in every step of its progress in the formation of the constitution.2 The struggle applied to the organization of each branch of the legislature. The small states insisted upon an equality of vote and representation in each branch; and the large states upon a vote in proportion to their relative importance and population. Upon this vital question there was so near a balance of the states, that a union in any form of government, which provided either for a perfect equality or inequality of the states in both branches of the legislature, became utterly hopeless.3 If the basis of the senate was an equality of representation, the basis of the house must bein proportion to the relative population of the states.4 A compromise was, therefore, in-

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1 Letter of the convention, 17th Sept. 1787; 1 Kent Comm. §11, p. 210, 211.

2 2 Pitkin's Hist. 233, 245, 247, 248; Yates's Minutes, 4 Elliot's Debates, 68, 74, 75, 81, 89, 90, 92; Id. 99, 100, 101; Id. 107, 108, 112 to 124; Id. 125, 126, 127; 1 Elliot's Debates, 66.

3 2 Pitkin's Hist. 233, 245; Journal of the Convention, 112.

4 On this subject see the Journal of the Convention, 111, 112, 153 to 158, 162, 178, 180, 235, 236, 237, 238; Yates's Minutes, 4 Elliot's Debates, from 68 to 127.

dispensable, or the convention must be dissolved. The small states at length yielded the point, as to an equality of representation in the house, and acceded to a representation proportionate to the federal numbers. But they insisted upon an equality in the senate. To this the large states were unwilling to assent; and for a time the states were, on this point, equally divided.1 Finally, the subject was referred to a committee, who reported a scheme, which became, with some amendments, the basis of the representation, as it now stands.2

§ 693. The reasoning, by which each party in the convention supported its own project, naturally grew out of the relative situation and interests of their respective states. On the side of the small states, it was urged, that the general government ought to be partly federal, and partly national, in order to secure a just balance of power and sovereignty, and influence among the states. This is the only means to preserve small communities, when associating with larger, from being overwhelmed, and annihilated. The large states, under other circumstances, would naturally pursue their own interests, and by combinations usurp the prerogatives, or disregard the rights of the smaller. Hitherto, all the states had held a footing of equality; and no one would now be willing to surrender it. The course now proposed would allay jealousies, and produce tranquillity. Any other would only perpetuate discontents, and lead to disunion. There never was a confederacy formed, where an equality of voice was not a fundamental principle. It would be a novel thing in politics, in such

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1 2 Pitkin's Hist. 245; Journal of Convention, 2d July, p. 156, 158; Id. 162, 175, 178, 180, 211; Yates's Minutes, 4 Elliot's Debates, 124 to 127; 2 Amer. Museum. 379.

2 1 Elliot's Debates, 67; Journal of Convention, 157.

cases, to permit the few to control the many. The large states, upon the present plan, have a full security. The small states must possess the power of self-defence, or they are ruined.

§ 694. On the other hand, it was urged, that to give an equality of vote to all the states, was adopting a principle of gross injustice and inequality. It is not true, that all confederacies have been founded upon the principle of equality. It was not so in the Lycian confederacy. Experience has shown, that the old confederation is radically defective, and a national government is indispensable. The present plan will defeat that object. Suppose the first branch grants money; the other branch (the senate) might, from mere state views, counteract it. In congress, the single state of Delaware prevented an embargo at the time, when all the other states thought it absolutely necessary for the support of the army. In short, the senate will have the power by its negative of defeating all laws. If this plan prevails, seven states will control the whole; and yet these seven states are, in point of population and strength, less than one third of the Union. So, that two thirds are compellable to yield to one third. There is no danger to the small states from the combination of the large ones. A rivalry, rather than a confederacy, will exist among them. There can be no monarchy; and an aristocracy is more likely to arise from a combination of the small states. There are two kinds of bad governments; the one,which does too much, and is therefore oppressive; and the other, which does too little, and is therefore weak. The present plan will fasten the latter upon the country. The only reasonable principle, on which to round a general government, is, that the decision shall be by a majority of members,

and not of states. No advantage can possibly be proposed by the large states by swallowing up the smaller. The like fear existed in Scotland at the time of the union with England; but it has turned out to be wholly without foundation. Upon the present plan, the smaller states may swallow up the larger. It was added by one most distinguished statesman,1 (what has hitherto proved prophetically too true,) that the danger was not between the small and the large states. "The great danger to our general government is, the great southern and northern interests of this continent being opposed to each other. Look to the votes in congress, and most of them stand divided by the geography of the country, not according to the size of the states."2

§ 695. Whatever may now be thought of the reasoning of the contending parties, no person, who possesses a sincere love of country, and wishes for the permanent union of the states, can doubt, that the compromise actually made was well founded in policy, and may now be fully vindicated upon the highest principles of political wisdom, and the true nature of the government, which was intended to be established.

§ 696. It may not be unprofitable to review a few of the grounds, upon which this opinion is hazarded. In the first place, the very structure of the general government contemplated one partly federal, and partly national. It not only recognized the existence of the state governments; but perpetuated them, leaving them

1 Mr. Madison.

2 This summary is abstracted principally from Yates's Minutes of the Debates, and Luther Martin's Letter and Speech, January 27, 1788. See Martin's Letter in 4 Elliot's Debates, 1 to 55. See Yates's Minutes in 4 Elliot's Debates, 68; Id. 74, 75, 81, 89 to 93, 99 to 102, 107, 108, 112 to 127; 2 Pitkin's Hist. 233 to 248. See also The Federalist, No. 22.

in the enjoyment of a large portion of the rights of sovereignty, and giving to the general government a few powers, and those only, which were necessary for national purposes. The general government was, therefore, upon the acknowledged basis, one of limited and circumscribed powers; the states were to possess the residuary powers. Admitting, then, that it is right, among a people thoroughly incorporated into one nation, that every district of territory ought to have a proportional share of the government; and that among independent states, bound together by a simple league, there ought, on the other hand, to be an equal share in the common councils, whatever might be their relative size or strength, (both of which propositions are not easily controverted;) it would follow, that a compound republic, partaking of the character of each, ought to be founded on a mixture of proportional, and of equal representation.1 The legislative power being that, which is predominant in all governments, ought to be, above all, of this character; because there can be no security for the general government, or the state governments, without an adequate representation, and an adequate check of each in the functions of legislation. Whatever basis, therefore, is assumed for one branch of the legislature, the antagonist basis should be assumed for the other. If the house is to be proportional to the relative size, and wealth, and population of the states, the senate should be fixed upon an absolute equality, as the representative of state sovereignty. There is so much reason, and justice, and security in such a course, that it can with difficulty be overlooked by those, who sincerely consult the public good, without

1 The Federalist, No. 62; 2 Amer. Museum, 376, 379.

being biassed by the interests or prejudices of their peculiar local position. The equal vote allowed in the senate is, in this view, at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against (what they meant to resist, as improper) a consolidation of the states into one simple republic;1 and, on the other hand, the weight of the other branch counterbalances an undue preponderance of state interests, tending to disunion.

§ 697. Another and most important advantage arising from this ingredient is, the great difference, which it creates in the elements of the two branches of the legislature; which constitutes a great desideratum in every practical division of the legislative power.2 In fact, this division (as has been already intimated) is of little or no intrinsic value, unless it is so organized, that each can operate, as a real check upon undue and rash legislation. If each branch is substantially framed upon the same plan, the advantages of the division are shadowy and imaginative; the visions and speculations of the brain, and not the walking thoughts of statesmen, or patriots. It may be safely asserted, that for all the purposes of liberty, and security, of state laws, and of solid institutions, of personal rights, and of the protection of property, a single branch is quite as good, as two, if their composition is the same, and their spirits and impulses the same. Each will act, as the other does; and each will be led by the same common influence of ambition, or intrigue, or passion, to the same disregard

1 The Federalist, No. 62; Rawle on Constit. 36, 37; 1 Kent. Comm. Lect. 11, p. 210, 211; 2 Amer. Museum, 376, 379; 1 Tucker's Black. Comm. App. 195.

2 2 Wilson's Law Lect. 146, 147, 148.

of the public interests, and the same indifference to, and prostration of private rights. It will only be a duplication of the evils of oppression and rashness, with a duplication of obstructions to effective redress. In this view, the organization of the senate becomes of inestimable value. It represents the voice, not of a district, but of a state; not of one state, but of all; not of the interest of one state, but of all not of the chosen pursuits of a predominant population in one state, but of all the pursuits in all the states.

§ 698. It is a misfortune incident to republican governments, though in a less degree than to other governments, that those, who administer it, may forget their obligations to their constituents, and prove unfaithful to their trusts. In this point of view, a senate, as a second branch of legislative power, distinct from, and dividing, power with the first; must always operate as a salutary check. It doubles the security to the people, by requiring the concurrence of two

distinct bodies in any scheme of usurpation or perfidy, where otherwise the ambition of a single body would be sufficient. The improbability of sinister combinations will always be in proportion to the dissimilarity of the genius of the two bodies; and therefore every circumstance, consistent with harmony in all proper measures, which points out a distinct organization of the component materials of each, is desirable.1

§ 699. No system could, in this respect, be more admirably contrived to ensure due deliberation and inquiry, and just results in all matters of legislation. No law or resolution can be passed without the concurrence, first of a majority of the people, and then of

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1 The Federalist, No. 62.

a majority of the states. The interest, and passions, and prejudices of a district are thus checked by the influence of a whole state; the like interests, and passions, and prejudices of a state, or of a majority of the states, are met and controlled by the voice of the people of the nation.1 It may be thought, that this complicated system of checks may operate, in some instances, injuriously, as well as beneficially. But if it should occasionally work inequally, or injuriously, its general operation will be salutary and useful.2 The disease most incident to free governments is the facility and excess of law-making;3 and while it never can be the permanent interest of either branch to interpose any undue restraint upon the exercise of all fit legislation, a good law had better occasionally fail, rather than bad laws be multiplied with a heedless and mischievous frequency. Even reforms, to be safe, must, in general, be slow; and there can be little danger, that public opinion will not sufficiently stimulate all public bodies to changes, which are at once desirable, and politic. All experience proves, that the human mind is more eager and restless for changes, than tranquil and satisfied with existing institutions. Besides; the large states will always be able, by their power over the supplies, to defeat any unreasonable exertions of this prerogative by the smaller states.

§ 700. This reasoning, which theoretically seems entitled to great weight, has, in the progress of the government, been fully realized. It has not only been demonstrated, that the senate, in its actual or-

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1 The Federalist, No. 27.

2 The Federalist, No. 62; Yates's Minutes, 4 Elliot's Debates, 63, 64; 2 Wilson's Law Lect. 146, 147, 148.

3 The Federalist, No. 62; 1 Kent's Comm. Lect. 11, p. 212, 213.

ganization, is well adopted to the exigencies of the nation; but that it is a most important and valuable part of the system, and the real balance-wheel, which adjusts, and regulates its movements.1 The other auxiliary provisions in the same clause, as to the mode of appointment and duration of office, will be found to conduce very largely to the same beneficial end.2

§ 701. Secondly; the mode of appointment of the senators. They are to be chosen by the legislature of each state. Three schemes presented themselves, as to the mode of appointment; one was by the legislature of each state; another was by the people thereof; and a third was by the other branch of the national legislature, either directly, or out of a select nomination. The last scheme was proposed in the convention, in what was called the Virginia scheme, one of the resolutions, declaring, "that the members of the second branch (the senate) ought to be elected by those of the first (the house of representatives) out of a proper number nominated by the individual legislatures" (of the states.) It met, however, with no decided support, and was negatived, no state voting in its favour, nine states voting against it, and one being divided.3 The second scheme, of an election by the people in districts, or otherwise, seems to have met with as little favour.4 The first scheme, that of an election by the legislature, finally prevailed by an unanimous vote.5

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1 2 Wilson's Law Lect. 148.

2 The Federalist, No. 63.

3 See Mr. Randolph's fifth Resolution, Journ. of Convention, 67, 86; Yates's Minutes, 4 Elliot's Debates, 58, 59.

4 Journ. of Convention, 105, 106, 130; Yates's Minutes, 4 Elliot's Debates, 58, 59, 63, 64, 99 to 103.

5 Journ. of Convention, 105, 106, 107, 207, 217, 238; Yates's Minutes, 4 Elliot's Debates, 63, 64.

§ 702 The reasoning, by which this mode of appointment was supported, does not appear at large in any contemporary debates. But it may be gathered from the imperfect lights left us, that the main grounds were, that it would immediately connect the state governments with the national government, and thus harmonize the whole into one universal system; that it would introduce a powerful check upon rash legislation, in a manner not unlike that

created by the different organizations of the house of commons, and the house of lords in Great Britain; and that it would increase public confidence by securing the national government from undue encroachments on the powers of the states.1 The Federalist notices the subject in the following brief and summary manner, which at once establishes the general consent to the arrangement, and the few objections, to which it was supposed to be obnoxious. "It is unnecessary to dilate on the appointment of senators by the state legislatures. Among the various modes, which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former, and may form a convenient link between the two systems."2 This is very subdued praise; and indicates more doubts, than experience has, as yet, justified.3

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1 Yates's Minutes, 1 Elliot's Debates. 62, 63, 64; :3 Elliot's Debates, 49.

2 The Federalist, No. 62, 27; 1 Kent's Comm. Lect. 11, p. 211.

3 See also The Federalist, No. 27.

§ 703. The constitution has not provided for the manner, in which the choice shall be made by the state legislatures, whether by a joint, or by a concurrent vote; the latter is, where both branches form one assembly, and give a united vote numerically; the former is, where each branch gives a separate and independent vote.1 As each of the state legislatures now consists of two branches, this is a very important practical question. Generally, but not universally, the choice of senators is made by a concurrent vote.2 Another question might be suggested, whether the executive constitutes a part of the legislature for such a purpose, in cases where the state constitution gives him a qualified negative upon the laws. But this has been silently and universally settled against the executive participation in the appointment.

§ 704. Thirdly; the number of senators. Each state is entitled to two senators. It is obvious, that to ensure competent knowledge and ability to discharge all the functions entrusted to the senate, (of which more will be said hereafter,) it is indispensable, that it should consist of a number sufficiently large to ensure a sufficient variety of talents, experience, and practical skill, for the discharge of all their duties. The legislative power alone, for its enlightened and prudent exercise, requires (as has been already shown) no small share of patriotism, and knowledge, and ability. In proportion to the extent and variety of the labours of

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1 Rawle on Const, 37; 1 Kent's Comm. Lect. 11, p. 211, 212.

2 1 Kent's Comm Lect. 1, p. 211, 212. -- Mr. Chancellor Kent says, in his commentaries,* that in New-York the senators are elected by a joint vote, if the two houses do not separately concur. But his own opinion is, that the true construction of the constitution upon principle is, that it should be by a concurrent vote.

*** 1 Kent's Comm. Lect. 11, p. 212.**

legislation, there should be members, who should share them, in order, that there may be a punctual and perfect performance of them. If the number be very small, there is danger, that some of the proper duties will be overlooked, or neglected, or imperfectly attended to. No human genius, or industry, is adequate to all the vast concerns of government, if it be not aided by the power and skill of numbers. The senate ought, therefore, on this account alone, to be somewhat numerous, though it need not, and indeed ought not, for other reasons, to be as numerous, as the house. Besides; numbers are important to give to the body a sufficient firmness to resist the influence, which the popular branch will ever be solicitous to exert over them. A very small body is more easy to be overawed, and intimidated, and controlled by external influences, than one of a reasonable size, embracing weight of character, and dignity of talents. Numbers alone, in many cases, confer power; and what is of not less importance, they present more resistance to corruption and intrigue. A body of five may be bribed, or overborne, when a body of fifty would be an irresistible barrier to usurpation.

§ 705. In addition to this consideration, it is desirable, that a state should not be wholly unrepresented in the national councils by mere accident, or by the temporary absence of its representative. If there be but a single representative, sickness or casualty may deprive the state of its vote on the most important occasions. It was on this account, (as well as others,) that the confederation entitled each state to send not less than two, nor more than seven delegates. In critical cases, too, it might be of great importance to have an opportunity of consulting with a colleague or col-

leagues, having a common interest and reeling for the state. And if it be not always in the strictest sense true, that in the multitude of counsel there is safety; there is a sufficient foundation in the infirmity of human nature to make it desirable to gain the advantage of the wisdom, and information, and reflection of other independent minds, not labouring under the suspicion of any unfavourable bias. These reasons may be presumed to have had their appropriate weight in the deliberations of the convention. If more than one representative of a state was to be admitted into the senate, the least practicable ascending number was that adopted. At that time a single representative of each state would have made the body too small for all the purposes of its institution, and all the objects before explained. It would have been composed but of thirteen; and supposing no absences, which could not ordinarily be calculated upon, seven would constitute a majority to decide all the measures. Twenty-six was not, at that period, too large a number for dignity, independence, wisdom, experience, and efficiency. And, at the present moment, when the states have grown to twenty-four, it is found, that forty-eight is a number quite small enough to perform the great national functions confided to it, and to embody the requisite skill and ability to meet the increased exigencies, and multiplied duties of the office.1 There is probably no legislative body on earth, whose duties are more various, and interesting, and important to the public wel-

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1 Mr. Tucker, (the learned Commentator on Blackstone,) in 1803 said: "The whole number of senators is at present limited to thirtytwo. It is not probable, that it will ever exceed fifty."* How strangely has our national growth already outstripped all human calculation!

*** 1 Tuck. Black. Comm. App. 223.**

fare; and none, which calls for higher talents, and more comprehensive attainments, and more untiring industry, and integrity.

§ 706. In the convention there was a considerable diversity of opinion, as to the number, of which the senate should consist, and the apportionment of the number among the states. When the principle of an equality of representation was decided, the only question seems to have been, whether each state should have three, or two members. Three was rejected by a vote of nine states against one; and two inserted by a vote of nine states against one.1 It does not appear, that any proposition was ever entertained for a less number than two; and the silence of all public discussion on this subject seems to indicate, that the public opinion decidedly adopted the lowest number under the confederation to be the proper number, if an equality of representation was to be admitted into the senate. Whatever may be the future increase of states in the Union, it is scarcely probable, that the number will ever exceed that, which will fit the senate for the best performance of all its exalted functions. The British house of lords, at this moment, probably exceeds any number, which will ever belong to the American senate; and yet, notwithstanding the exaggerated declamation of a few ardent minds, the sober sense of the nation has never felt, that its number was either a burthen, or an infirmity inherent in the constitution.2

§ 707. Fourthly; the term of service of the senators. It is for six years; although, as will be present-

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1 Journal of Convention, 23d July, 189. See also Id. 156, 162, 175, 178, 180, 198.

2 See the Remarks quoted in 1 Tucker's Black. Comm. App. 223; 2 Wilson's Law Lect. 150. In 1803 the house of lords was said to be composed of about 220; it now probably exceeds 350.

ly seen, another element in the composition of that body is, that one third of it is changed every two years.

What would be the most proper period of office for senators, was an inquiry, admitting of a still wider range of argument and opinions than what would be the most proper for the members of the house of representatives. The subject was confessedly one full of intricacy, and doubt, upon which the wisest statesmen might well entertain very different views, and the best patriots might well ask for more information, without, in the slightest degree, bringing into question their integrity, their love of liberty, or their devotion to a republican government. If, in the present day, the progress of public opinion, and the lights of experience, furnish us with materials for a decided judgment, we ought to remember, that the question was then free to debate, and the fit conclusion was not easily to be seen, or justly to be measured. The problem to be solved by the great men of that day was, what organization of the legislative power, in a republican government, is best adapted to give permanency to the Union, and security to public liberty. In the convention, a great diversity of judgment was apparent among those, whose purity and patriotism were above all suspicion, and whose talents and public services were equally unquestionable. Various propositions were entertained; that the period of service of senators should be during good behaviour; for nine years; for seven years; for six years; for five years; for four years; for three years.1 All these propositions successively failed, except that for seven years, which was eventually abandoned for six years with the addi-

1 Journal of Convention, 118, 130, 147, 148; Yates's Minutes, 4 Elliot's Debates, 70, 71, 103, 104, 105, 106.

tional limitation, that one third should go out biennially.1

§ 708. No inconsiderable array of objections was brought to bear against this prolonged term of service of the senators beyond that fixed for the members of the house of representatives, both in the convention, and before the people, when the constitution was under their advisement.2 Perhaps some of those objections still linger in the minds of many, who entertain a general jealousy of the powers of the Union; and who easily persuade themselves on that account, that power should frequently change hands in order to prevent corruption and tyranny. The perpetuity of a body (it has been said) is favourable to every stride it may be

1 Journal of Convention, 67, 72, 118, 130, 147, 148, 149, 207, 217, 238, 353, 373; Yates's Minutes, 4 Elliot's Debates 70, 71, 103, 104,1 05, 106.--Montesquieu seems to have been decidedly of opinion, that a senate ought to be chosen for life, as was the custom at Rome, at Sparta, and even at Athens.* It is well known, that this was Gen. Hamilton's opinion, or rather his proposition was, that the senators should be chosen to serve during good behaviour. (Journ. of Convention, p. 130); North American Review, Oct. 1827, p 266). It appears to have been that of Mr. Jay. (North American Review, Oct. 1827, p. 263.) Mr. Madison's original opinion seems to have been, to have a senate chosen for a longer term, than the house of representatives.# But in the convention, it is said, that he was favourably inclined to Mr. Hamilton's plan.+ In a question of so much difficulty andde licacy, as the due formation of a government, it is not at all surprising, that such opinions should have been held by them, and many others of the purest and most enlightened patriots. They wished durability and success to a republican government, and were, therefore, urgent to secure it against the imbecility resulting from what they deemed too frequent changes in the administration of its powers. To hold such opinions was not then deemed a just matter of reproach, though from the practical operations of the constitution they may now be deemed unsound. 2 2 American Museum, 547.

*** Montesquieu Spirit of Laws, B. 5. ch. 7.**

 # North American Review, Oct. 1827, p. 265.

+ 2 Pitkin's Hist. 259, note.

disposed to make towards extending its own power and influence in the government. Such a tendency is to be discovered in all bodies, however constituted, and to which no effectual check can be opposed, but frequent dissolutions and elections.1 The truth of this remark may be admitted; but there are many circumstances, which may justly vary its force and application. While, on the one hand, perpetuity in a body may be objectionable, on the other hand, continual fluctuations may be no less so, with reference to its duties and functions, its powers, and its efficiency. There are dangers arising from too great frequency in elections, as well as from too small. The path of true wisdom is probably best attained by a moderation, which avoids either extreme. It may be said of too much jealousy, and of too much confidence, that, when either is too freely admitted into public councils, it betrays like treason.

§ 709. It seems paradoxical to assert, (as has been already intimated,) but it is theoretically, as well as practically true, that a deep-felt responsibility is incompatible with great frequency of elections.2 Men can feel little interest in power, which slips away almost as soon, as it is grasped; and in measures, which they can scarcely do more than begin, without hoping to perfect. Few measures have an immediate and sensible operation, exactly according to their wisdom or policy. For the most part, they are dependent upon other measures, or upon time, and gradual intermixtures with the business of life, and the general institutions of society.3 The first superficial view may shock popular prejudices, or errors; while the ultimate results may be as admira-

1 Tucker's Black. Comm. App. 196.

2 See ante, §587, &c. on the same point.

3 The Federalist, No. 63.

ble and excellent, as they are profound and distant. Who can take much interest in weaving a single thread into a measure, which becomes an evanescent quantity in the main fabric, whose texture requires constant skill, and many adaptations from the same hand, before its perfection can be secured, or even be prophesied?

§ 710. The objections to the senatorial term of office all resolve themselves into a single argument, however varied in its forms, or illustrations. That argument is, that political power is liable to be abused; and that the great security for public liberty consists in bringing home responsibility, and dependence in those, who are entrusted with office; and these are best attained by short periods of office, and frequent expressions of public opinion in the choice of officers. If the argument is admitted in its most ample scope, it still leaves the question open to much discussion, what is the proper period of office, and how frequent the elections should be. This question must, in its nature, be complicated; and may admit, if it does not absolutely require, different answers, as applicable to different functionaries. Without wandering into ingenious speculations upon the topic in its most general form, our object will be to present the reasons, which have been, or may be relied on, to establish the sound policy and wisdom of the duration of office of the senators as fixed by the constitution. In so doing, it will become necessary to glance at some suggestions, which have already occurred in considering the organization of the other branch of the legislature. It may be proper, however, to premise, that the whole reasoning applies to a moderate duration only in office; and that it assumes, as its basis, the absolute necessity of short limitations of office, as constituting indispensable checks to power in all republican governments. It

would almost be useless to descant upon such a basis, because it is universally admitted in the United States as a fundamental principle of all their constitutions of government.

§ 711. In the first place, then, all the reasons, which apply to the duration of the legislative office generally, founded upon the advantages of various knowledge, and experience in the principles and duties of legislation, may be urged with increased force in regard to the senate. A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means, by which that object is to be attained. Some governments are deficient in both these qualities; most ate deficient in the first. Some of our wisest statesmen have not scrupled to assert, that in the American governments too little attention has been paid to the latter.1 It is utterly impossible for any assembly of men, called for the most part from the pursuits of private life, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to the study of the nature and operations of government, to escape from the commission of many errors in the discharge of their legislative functions.2 In proportion to the extent and variety of these functions, the national interests, which they involve, and the national duties, which they imply, ought to rise the intellectual qualifications, and solid attainments of the members. Even in our domestic concerns, what are our voluminous, and even changing codes, but monu-

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1 The Federalist, No. 62; 2 Wilson's Law Lect. 146, 147, 148.

2 The Federalist, No. 62; 1 Elliot's Debates, 65, 66; Id. 269 to 284; 3 Elliot's Debates, 50, 51; 2 Wilson's Law Lect. 152; 1 Kent's Comm. Lect. 11, p. 212.

ments of deficient wisdom, hasty resolves, and still more hasty repeals? What are they, but admonitions to the people of the dangers of rash, and premature legislation,1 of ignorance, that knows not its own mistakes, or of overweening confidence, which heeds not its own follies?

§ 712. A well constituted senate, then, which should interpose some restraints upon the sudden impulses of a more numerous branch, would, on this account, be of great value.2 But its value would be incalculably increased by making its term of office such, that with moderate industry, talents, and devotion to the public service, its members could scarcely fail of having the reasonable information, which would guard them against gross errors, and the reasonable firmness, which would enable them to resist visionary speculations, and popular excitements. If public men know, that they may safely wait for the gradual action of a sound public opinion, to decide upon the merit of their actions and measures, before they can be struck down, they will be more ready to assume responsibility, and pretermit present popularity for future solid reputation.3 If they are designed, by the very structure of the government, to secure the states against encroachments upon their rights and liberties, this very permanence of office adds new means to effectuate the object. Popular opinion may, perhaps, in its occasional extravagant sallies, at the instance of a fawning demagogue, or a favorite chief, incline to overleap the constitutional barriers, in order

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1 The Federalist, No. 62.

2 The Federalist, No. 63; 1 Elliot's Debates, 259, 260, 261, 269 to 284; 2 Wilson's Law Lect. 146, 147, 148, 152; 1 Kent's Comm. 212.

3 See 1 Elliot's Debates, 263, 264, 269 to 278; 3 Elliot's Debates, 48 to 51.

to aid their advancement, or gratify their ambition. But the solid judgment of a senate may stay the evil, if its own duration of power exceeds that of the other branches of the government, or if it combines the joint durability of both. In point of fact, the senate has this desirable limit. It combines the period of office of the executive with that of the members of the house; while at the same time, from its own biennial changes, (as we shall presently see,) it is silently subjected to the deliberate voice of the states.

§ 713. In the next place, mutability in the public councils, arising from a rapid succession of new members, is found by experience to work, even in domestic concerns, serious mischiefs. It is a known fact in the history of the states, that every new election changes nearly or quite one half of its representatives;1 and in the national government changes less frequent, or less numerous can scarcely be expected. From this change of men, there must unavoidably arise a change of opinions; and with this change of opinions a correspondent change of measures. Now experience demonstrates, that a continual change, even of good measures, is inconsistent with every rule of prudence and every prospect of success.2 In all human affairs, time is required to consolidate the elements of the best concerted measures, and to adjust the little interferences, which are incident to all legislation. Perpetual changes in public institutions not only occasion intolerable controversies, and sacrifices of private interests; but check the growth of that steady industry and enterprise, which, by wise forecast, lay up the means of future prosperity. Besides; the instability of public councils gives an unrea-

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1 The Federalist, No. 62.

2 The Federalist, No. 62; 1 Kent's Comm. 212, 213.

sonable advantage to the sagacious, the cunning, and the monied capitalists. Every new regulation concerning commerce, or revenue, or manufactures, or agriculture, or in any manner affecting the relative value of the different species of property, presents a new harvest to those, who watch the change, and can trace the consequences; a harvest, which is torn from the hand of the honest labourer, or the confiding artisan, to enrich those, who coolly look on to reap profit, where they have sown nothing.1 In short, such a state of things generates the worst passions of selfishness, and the worst spirit of gaming. However paradoxical it may seem, it is nevertheless true, that in affairs of government, the best measures, to be safe, must be slowly introduced; and the wisest councils are those, which proceed by steps, and reach, circuitously, their conclusion. It is, then, important in this general view, that all the public functionaries should not terminate their offices at the same period. The gradual infusion of new elements, which may mingle with the old, secures a gradual renovation, and a permanent union of the whole.

§ 714. But the ill effects of a mutable government are still more strongly felt in the intercourse with foreign nations. It forfeits the respect and confidence of foreign nations, and all the advantages connected with national character.2 It not only lays its measures open to the silent operations of foreign intrigue and management; but it subjects its whole policy to be counteracted by the wiser and more stable policy of its foreign rivals and adversaries. One nation is to another, what one individual is to another, with this mel-

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1 The Federalist, No. 62.

2 The Federalist, No. 62; 1 Elliot's Debates, 268, 269.

ancholy distinction perhaps, that the former, with fewer benevolent emotions than the latter, are under fewer restraints also from taking undue advantages of the indiscretions of each other.1 If a nation is perpetually fluctuating in its measures, as to the protection of agriculture, commerce, and manufactures, it exposes all its infirmities of purpose to foreign nations; and the latter with a systematical sagacity will sap all the foundations of its prosperity. From this cause, under the confederation, America suffered the most serious evils. "She finds," said the Federalist,2 with unusual boldness and freedom, "that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation, which has an interest in speculating on her fluctuating councils, and embarrassed affairs."

§ 715. Further; foreign governments can never safely enter into any permanent arrangements with one, whose councils and government are perpetually fluctuating. It was not unreasonable, therefore, for them to object to the continental congress, that they could not guaranty the fulfilment of any treaty; and therefore it was useless to negotiate any. To secure the respect of foreign nations, there must be power to fulfil engagements; confidence to sustain them; and durability to ensure their execution on the part of the government. National character in cases of this sort is inestimable. It is not sufficient, that there should be a sense of justice, and disposition to act right; but there must be an enlightened permanency in the policy

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1 The Federalist, No. 62; 1 Elliot's Debates, 269, 270 to 273; 1 Kent. Comm. 212, 213.
2 The Federalist, No. 62.

of the government.1 Caprice is just as mischievous, as folly, and corruption scarcely worse, than perpetual indecision and fluctuation. In this view, independent of its legislative functions, the participation of the senate in the functions of the executive, in appointing, ambassadors, and in forming treaties with foreign nations, gives additional weight to the reasoning in favour of its prolonged term of service. A mole full survey of its other functions will make that reasoning absolutely irresistible, if the object is, that they should be performed with independence, with judgment, and with scrupulous integrity and dignity.

§ 716. In answer to all reasoning of this sort, it has been strenuously urged, that a senate, constituted, not immediately by the people, for six years, may gradually acquire a dangerous pre-eminence in the government, and eventually transform itself into an aristocracy.2 Certainly, such a case is possible; but it is scarcely within the range of probability, while the people, or the government, are worthy of protection or confidence. Liberty may be endangered by the abuses of liberty, as well as by the abuses of power. There are quite as numerous instances of the former, as of the latter.3 Yet, who would reason, that there should be no liberty, because it had been, or it might be, abused? Tyranny itself would not desire a more cogent argument, than that the danger of abuse was a ground for the denial of a right.

§ 717. But the irresistible reply to all such reasoning is, that before such a revolution can be effected, the

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1 See 1 Elliot's Debates, 269, 272, 273, 274.
2 See 2 Amer. Museum, 547.
3 The Federalist, No. 63; 1 Elliot's Debates, 269, 272.

senate must, in the first place, corrupt itself; it must next corrupt the state legislatures; it must then corrupt the house of representatives; and, lastly, it must corrupt the people at large. Unless all these things are done, and continued, the usurpation of the senate would be as vain, as it would be transient. The periodical change of its members would otherwise regenerate the whole body. And if such universal corruption should prevail, it is quite idle to talk of usurpation and aristocracy; for the government would then be exactly, what the people would choose it to be. It would represent exactly, what they would deem fit. It would perpetuate power in the very form, which they would advise. No form of government ever proposed to contrive a method, by which the will of the people should be at once represented, and defeated; by which it should choose to be enslaved, and at the same time, by which it should be protected in its freedom. Private and public virtue is the foundation of republics; and it is folly, if it is not madness, to expect, that rulers will not buy, what the people are eager to sell. The people may guard themselves against the oppressions of their governors; but who shall guard then against their own oppression of themselves?

§ 718. But experience is, after all, the best test upon all subjects of this sort. Time, which dissolves the frail fabrics of men's opinions, serves but to confirm the judgments of nature. What are the lessons, which the history of our own and other institutions teach us? In Great-Britain, the house of lords is hereditary; and yet it has never hitherto been able successfully to assail the public liberties; and it has not unfrequently preserved, or enforced them. The house of commons is now chosen for seven years. Is it now less an organ

of the popular opinion, and less jealous of the public rights, than it was during annual, or triennial parliaments? In Virginia, the house of delegates before the revolution, was chosen for seven years; and in some of the other colonies for three years.1 Were they then subservient to the crown, or faithless to the people? In the present constitutions of the states of America, there is a great diversity in the terms of office, as well as the qualifications, of the state senates. In New-York, Virginia, Pennsylvania, and Kentucky the senate is chosen for four years;2 in Delaware, Mississippi, and Alabama, for three years; in South-Carolina, Tennessee, Ohio, Missouri, and Louisiana, biennially; in Maryland, for five years; in the other states annually.3 These diversities are as striking in the constitutions, which were framed as long ago, as the times of the revolution, as in those, which are the growth, as it were, of yesterday. No one, with any show of reason or fact, can pretend, that the liberties of the people have not been quite as safe, and the legislation quite as enlightened and pure in those states, where the senate is chosen for a long, as for a short period.

§ 719. If there were any thing in the nature of the objections, which have been under consideration, or in general theory to warrant any conclusion, it would be, that the circumstances of the states being nearly equal, and the objects of legislation the same, the same duration of office ought to be applied to all. Yet this diversity has existed without any assignable inconvenience in its practical results. It is manifest,

1 1 Elliot's Debates, 272.

2 The Federalist, No. 39.

3 Dr. Lieber's Encycl. Americana, art. Constitutions of the States; The Federalist, No. 39.

then, that the different manners, habits, institutions, and other circumstances of a society, may admit, if they do not require, many different modifications of its legislative department, without danger to liberty on the one hand, or gross imbecility on the other. There are many guards and checks, which are silently in operation, to fortify the benefits, or to retard the mischiefs of an imperfect system. In the choice of organizations, it may be affirmed, that that is on the whole best, which secures in practice the most zeal, experience, skill, and fidelity in the discharge of the legislative functions. The example of Maryland is perhaps more striking and instructive, than any one, which has been brought under review; for it is more at variance with all the objections raised against the national senate. In Maryland, the senate is not only chosen for five years; but it possesses the exclusive right to fill all vacancies in its own body, and has no rotation during the term.1 What a fruitful source might not this be of theoretical objections, and colourable alarms, for the safety of the public liberties? Yet, Maryland continues to enjoy all the blessings of good government, and rational freedom, without molestation, and without dread. If examples are sought from antiquity, the illustrations are not less striking. In Sparta, the ephori, the annual representatives of the people, were found an over-match for a senate for life; continually gaining authority; and finally drawing all power into their own hands. The tribunes of Rome, who were the representatives of the people, prevailed, in almost every contest, with the senate for life; and in the end gained a complete triumph over it, notwithstanding unanimity

1 The Federalist, No. 63.

among the tribunes was indispensable. This fact proves the irresistible force possessed by that branch of the government, which represents the popular will.1

§ 720. Considering, then, the various functions of the senate, the qualifications of skill, experience, and information, which are required to discharge them, and the importance of interposing, not a nominal, but a real check, in order to guard the states from usurpations upon their authority, and the people from becoming the victims of violent paroxysms in legislation; the term of six years would seem to hit the just medium between a duration of office, which would too much resist, and a like duration, which would too much invite those changes of policy, foreign and domestic, which the best interests of the country may require to be deliberately weighed, and gradually introduced. If the state governments are found tranquil, and prosperous, and safe, with a senate of two, three, four, and five years' duration, it would seem impossible for the Union to be in danger from a term of service of six years.2

§ 721. But, as if to make assurance doubly sure, and take a bond of fate, in order to quiet the last lingering scruples of jealousy, the succeeding clause of the constitution has interposed an intermediate change in the elements of the body, which would seem to make it absolutely above exception, if reason, and not fear, is to prevail; and if government is to be a reality, and not a vision.

§ 722. It declares, "Immediately after they (the senators) shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of

1 The Federalist, No. 63; Id. No. 34.

2 1 Elliot's Deb. 64 to 66; Id. 91; 1 Kent's Comm. Lect 11, p. 212, 213.

the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year, so that one third may be chosen every second year." A proposition was made in the convention, that the senators should be chosen for nine years, one third to go out biennially, and was lost, three states voting in the affirmative, and eight in the negative; and then the present limitation was adopted by a vote of seven states against four.1 Here, then, is a clause, which, without impairing the efficiency of the senate for the discharge. of its high functions, gradually changes its members, and introduces a biennial appeal. to the states, which must for ever prohibit any permanent combination for sinister purposes. No person would probably propose a less duration of office for the senate, than double the period of the house. In effect, this provision changes the composition of two thirds of that body within that period.2 § 723. And here, again, it is proper to remark, that experience has established the fact beyond all controversy, that the term of the senate is not too long, either for its own security, or that of the states. The reasoning of those exalted minds, which framed

the constitution, has been fully realized in practice. While the house of representatives has gone on increasing, and deepening its influence with the people with an irresistible power, the senate has, at all times, felt the im-

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1 Journ. of convention, 26th June, 1787, p. 149; Yates's Minutes, 4 Elliot's Debates, 103 to 106.

2 1 Elliot's Deb. 64 to 66; Id. 91, 92; 1 Kent's Comm. Lect. 11, p. 213, 214. A power to recall the senators was proposed as an amendment in some of the state conventions; but it does not seem to have obtained general favour.* Many potent reasons might be urged against it.

*** 1 Elliot's Debates, 257, 258 to 264, 265 to 272; 3 Elliot's Debates, 303.**

pulses of the popular will, and has never been found to resist any solid improvements. Let it be added, that it has given a dignity, a solidity, and an enlightened spirit to the operations of the government, which have maintained respect abroad, and confidence at home.

§ 724. At the first session of congress under the constitution, the division of the senators into three classes was made in the following manner. The senators present were divided into three classes by name, the first consisting of six persons, the second of seven, and the third of six. Three papers of an equal size. numbered one, two, and three, were, by the secretary, rolled up, and put into a box, and drawn by a committee of three persons, chosen for the purpose in behalf of the respective classes, in which each of them was placed; and the classes were to vacate their seats in the senate, according to the order of the numbers drawn for them, beginning with number one. It was also provided, that when senators should take their seats from states, which had not then appointed senators, they should be placed by lot in the foregoing classes, but in such a manner, as should keep the classes as nearly equal, as possible.1 In arranging the original classes, care was taken, that both senators from the same state should not be in the same class, so that there never should be a vacancy, at the same time, of the seats of both senators.

§ 725. As vacancies might occur in the senate during the recess of the state legislature, it became indispensable to provide for that exigency. Accordingly the same clause proceeds to declare: "And if vacancies happen by resignation, or otherwise, during the recess

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1 Journals of the Senate, 15th May, 1789, p. 25, 26, (edit. 1820.)

of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies." It does not appear, that any strong objection was urged, in the convention, against this proposition, although it was not adopted without some opposition.1 There seem to have been three courses presented for the consideration of the convention; either to leave the vacancies unfilled until the meeting of the state legislature; or to allow the state legislatures to provide at their pleasure, prospectively for the occurrence; or to confide a temporary appointment to some select state functionary or body. The latter was deemed the most satisfactory and convenient course. Confidence might justly be reposed in the state executive, as representing at once the interests and wishes of the state, and enjoying all the proper measures of knowledge and responsibility, to ensure a judicious appointment.2

§ 726. Fifthly; the qualifications of senators. The constitution declares, that "No person shall be a sen-

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1 Journ. of Convention, 9th Aug. 237, 238.

2 In the ease of Mr. Lanman, a senator from Connecticut, a question occurred, whether the state executive could make an appointment in the recess of the state legislature in anticipation of the expiration of the term of office of an existing senator. It was decided by the senate, that he could not make such an appointment. The facts were, that Mr. Lanman's term of service, as senator expired on the third of March, 1825. The president had convoked the senator to meet on the fourth of March. The governor of Connecticut in the recess of the legislature, (whose session would be in May,) on the ninth of the preceding February appointed Mr. Lanman, as senator, to sit in the senate after the third of March. The senate, by a vote of 23 to 18, decided, that the appointment could not be constitutionally made, until after the vacancy had actually occurred. See Gordon's Digest of the Laws of the United States, 1827, Appendix, Note 1, B.

ator, who shall not have attained the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state, for which he shall be chosen." As the nature of the duties of a senator require more experience, knowledge, and stability of character, than those of a representative, the qualification in point of age is raised. A person may be a representative at twenty-five; but he cannot be a senator

until thirty. A similar qualification of age was required of the members of the Roman senate.1 It would have been a somewhat singular anomaly in the history of free governments, to have found persons actually exercising the highest functions of government, who, in some enlightened and polished countries, would not be deemed to have arrived at an age sufficiently mature to be entitled to all the private and municipal privileges of manhood. In Rome persons were not deemed at full age until twenty-five; and that continues to be the rule in France, and Holland, and other civil law countries; and in France, by the old law, in regard to marriage full age was not attained until thirty.2 It has since been varied, and the term diminished.3

§ 727. The age of senators was fixed in the constitution at first by a vote of seven states against four; and finally, by an unanimous vote.4 Perhaps no one, in our day, is disposed to question the propriety of this limitation; and it is, therefore, useless to discuss a point, which is so purely speculative. If counsels are to be wise, the ardour, and impetuosity, and confi-

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1 1 Kent's Comm. Lect. 11, p. 214.

2 1 Black Comm. 463, 464.

3 Code Civil, art. 388.

4 Journ. of Convention, 118, 147.

dence of youth must be chastised by the sober lessons of experience; and if knowledge, and solid judgment, and tried integrity, are to be deemed indispensable qualifications for senatorial service, it would be rashness to affirm, that thirty years is too long a period for a due maturity and probation.1

§ 728. The next qualification is citizenship. The propriety of some limitation upon admissions to office, after naturalization, cannot well be doubted. The senate is to participate largely in transactions with foreign governments; and it seems indispensable, that time should have elapsed sufficient to wean a senator from all prejudices, resentments, and partialities, in relation to the land of his nativity, before he should be entrusted with such high and delicate functions.2 Besides; it can scarcely be presumed, that any foreigner can have acquired a thorough knowledge of the institutions and interests of a country, until he has been permanently incorporated into its society, and has acquired by the habits and intercourse of life the feelings and the duties of a citizen. And if he has acquired the requisite knowledge, he can scarcely feel that devoted attachment to them, which constitutes the great security for fidelity and promptitude in the discharge of official duties. If eminent exceptions could be stated, they would furnish no safe rule; and should rather teach us to fear our being misled by brilliancy of talent, or disinterested patriotism, into a confidence, which might betray, or an acquiescence, which might weaken, that jealousy of foreign influence, which is one of the main supports of republics. In the convention

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1 Rawle on the Constitution, 37; 1 Kent's Comm. Lect. 11, p. 214; 1 Tuck. Black. Comm. App. 223.

2 The Federalist, No. 62.

it was at first proposed, that the limitation should be four years; and it was finally altered by a vote of six states against four, one being divided, which was afterwards confirmed by a vote of eight states to three.1 This subject has been already somewhat considered in another place; and it may be concluded, by adopting the language of the Federalist on the same clause. "The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merit and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence in the national councils."2

§ 729. The only other qualification is, that the senator shall, when elected, be an inhabitant of the state, for which he is chosen. This scarcely requires any comment; for it is manifestly proper, that a state should be represented by one, who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty, its rights, or its influence. The only surprise is, that provision was not made for his ceasing to represent the state in the senate, as soon as he should cease to be an inhabitant. There does not seem to have been any debate in the convention on the propriety of inserting the clause, as it now stands.

§ 730. In concluding this topic, it is proper to remark, that no qualification whatsoever of property is established in regard to senators, as none had been established in regard to representatives. Merit, there-

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1 Journ. of Convention, 218, 238, 239, 248, 249.

2 The Federalist, No. 62; Rawle on the Constitution, 37; 1 Kent's Comm. Lect. 11, p. 214.

fore, and talent have the freest access open to them into every department of office under the national government. Under such circumstances, if the choice of the people is but directed by a suitable sobriety of judgment, the senate cannot fail of being distinguished for wisdom, for learning, for exalted patriotism, for incorruptible integrity, and for inflexible
independence.1

§ 731. The next clause of the third section of the first article respects the person, who shall preside in the senate. It declares, that "the Vice President of the United States shall be president of the senate; but shall have no vote, unless they be equally divided;" and the succeeding clause, that "the senate shall choose their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States."

§ 732. The original article, as first reported, authorized the senate to choose its own president, and other officers; and this was adopted in the convention.2 But the same draft authorized the president of the senate, in case of the removal, death, resignation,3 or disability of the president, to discharge his duties. When at a late period of the convention it was deemed advisable, that there should be a vice president, the propriety of retaining him, as presiding officer of the senate, seems to have met with general favour, eight states voting in the affirmative, and two only in the negative.4

§ 733. Some objections have been taken to the appointment of the vice president to preside in the senate. It was suggested in the state conventions,

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1 See the Federalist, No. 27.

2 Journal of Convention, p. 218, 240.

3 Ibid, 225, 226.

4 Journal of Convention, 325, 339.

that the officer was not only unnecessary, but dangerous; that it is contrary to the usual course of parliamentary proceedings to have a presiding officer, who is not a member; and that the state, from which he comes, may thus have two votes, instead of one.1 It has also been coldly remarked by a learned commentator, that "the necessity of providing for the case of a vacancy in the office of president doubtless gave rise to the creation of that officer; and for want of something, else for him to do, whilst there is a president in office, he seems to have been placed, with no very great propriety, in the chair of the senate."2

§ 734. The propriety of creating the office of vice president will be reserved for future consideration, when, in the progress of these commentaries, the constitution of the executive department comes under review.3 The reasons, why he was authorized to preside in the senate, belong appropriately to this place.

§ 735. There is no novelty in the appointment of a person to preside, as speaker, who is not a constituent member of the body, over which he is to preside. In the house of lords in England the presiding officer is the lord chancellor, or lord keeper of the great seal,

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1 2 Elliot's Debates, 359, 361; 3 Elliot's Debates, 37, 38.

2 1 Tucker's Black. Comm. App. 224; Id. 199, 200. -- It is a somewhat curious circumstance in the history of congress, that the exercise of the power of the vice president in defeating a bill for the apportionment of representatives in 1792, has been censured, because such a bill seemed (if any) almost exclusively fit for the house of representatives to decide upon;* and that A like bill, to which the senate interposed a strong opposition, in 1832, has been deemed by some of the states so exceptionable, that this resistance has been thought worthy of high praise. There is some danger in drawing conclusions from a single exercise of any power against its general utility or policy.

3 Sec 2 Amer. Museum, 557; The Federalist, No. 68.

*** 1 Tuck. Black Comm. App. 199, 200, 225.**

or other person appointed by the king's commission; and if none such be so appointed, then it is said, that the lords may elect. But it is by no means necessary, that the person appointed by the king should be a peer of the realm or lord of parliament.1 Nor has this appointment by the king ever been complained of, as a grievance, nor has it operated with inconvenience or oppression in practice. It is on the contrary deemed an important advantage, both to the officer, and to the house of peers, adding dignity and weight to the former, and securing great legal ability and talent in aid of the latter. This consideration done might have had some influence in the convention. The vice president being himself chosen by the states, might well be deemed, in point of age, character, and dignity, worthy

to preside over the deliberations of the senate, in which the states were all assembled and represented. His impartiality in the discharge of its duties might be fairly presumed; and the employment would not only bring his character in review before the public; but enable him to justify the public confidence, by performing his public functions with independence, and firmness, and sound discretion. A citizen, who was deemedworthy of being one of the competitors for the presidency, could scarcely fail of being distinguished by private virtues, by comprehensive acquirements, and by eminent services. In all questions before the senate he might safely be appealed to, as a fit arbiter upon an equal division, in which case alone he is entrusted with a vote.

§ 736. But the strong motive for this appointment was of another sort, founded upon state jealousy, and state equality in the senate. If the speaker of the

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1 1 Black. Comm. 181; 3 Black. Comm. 47; 1 Tuck. Black. Comm. App., 224.

senate was to be chosen from its own members, the state, upon whom the choice would fall, might possess either more or less, than its due share of influence. If the speaker were not allowed to vote, except where there was an equal division, independent of his own vote, then the state might lose its own voice;1 if he were allowed to give his vote, and also a casting vote, then the state might, in effect, possess a double vote. Either alternative would of itself present a predicament sufficiently embarrassing. On the other band, if no casting vote were allowed in any case, then the indecision and inconvenience might be very prejudicial to the public interests, in case of an equality of votes.2 It might give rise to dangerous feuds, or intrigues, and create sectional and state agitations. The smaller states might well suppose, that their interests were less secure, and less guarded, than they ought to be. Under such circumstances, the vice president would seem to be the most fit arbiter to decide, because he would be the representative, not of one state only, but of all; and must be presumed to feel a lively interest in promoting all measures for the public good. This reasoning appears to hare been decisive in the convention, and satisfactory to the people.3 It establishes, that there was a manifest propriety in making the arrangement conducive to the harmony of the states, and the dignity of the general government. And as the senate possesses the power to make rules for its own proceedings, there is little danger, that there can ever arise any abuse of the presiding power. The danger, if any, is rather the other way, that the presiding power will be either silently weakened, or openly surrendered, so as to leave

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1 The Federalist, No. 68.

2 The Federalist, No. 68.

3 2 Elliot's Debates, 359, 360, 361; 3 Elliot's Debates, 37, 38, 51, 52.

the office little more, than the barren honour of a place, without influence and without action.

§ 737. A question, involving the authority of the vice president, as presiding officer in the senate, has been much discussed in consequence of a decision recently made by that officer. Hitherto the power of preserving order during the deliberations of the senate in all cases, where the rules of the senate did not specially prescribe another mode, had been silently supposed to belong to the vice president, as an incident of office. It had never been doubted, much less denied, from the first organization of the senate, and its existence had been assumed, as an inherent quality, constitutionally delegated, subject only to such rules, as the senate should from time to time prescribe. In the winter session of 1826, the vice president decided in effect, that, as president of the senate, he had no power of preserving order, or of calling any member to order, for words spoken in the course of debate, upon his own authority, but only so far, as it was given, and regulated by the rules of the senate.1 This was a virtual surrender of the presiding power (if not universally, at least in that case) into the hands of the senate; and disarmed the officer even of the power of selfprotection from insult or abuse, unless the senate should choose to make provision for it. If, therefore, the senate should decline to confer the power of preserving order, the vice president might become a mere pageant and cipher in that body. If, indeed, the vice president had not this power virtute officii, there was nothing to prevent the senate from confiding it to any other officer chosen by itself. Nay, if the power to preside had not this incident, it was difficult to perceive, what other

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1 American Annual Register, 86, 87; 3 American Annual Register, 99; 4 Elliot's Debates, 311 to 315.

incident it had. The power to put questions, or to declare votes, might just as well, upon similar reasoning, be denied, unless it was expressly conferred. The power of the senate to prescribe rules could not be deemed omnipotent. It must be construed with reference to, and in connexion with the power to preside; and the latter,

according to the common sense of mankind, and of public bodies, was always understood to include the power to keep order; upon the clear ground, that the grant of a power includes the authority to make it effectual, and also of self-preservation.

§ 738. The subject at that time attracted a good deal of discussion; and was finally, as a practical inquiry, put an end to in 1828, by a rule made by the senate, that "every question of order shall be decided by the president without debate, subject to appeal to the senate."1 But still the question, as one of constitutional right and duty, liable to be regulated, but not to be destroyed by the senate, deserves, and should receive, the most profound investigation of every man solicitous for the permanent dignity and independence of the vice presidency.2

§ 739. The propriety of entrusting the senate with the choice of its other officers, and also of a president pro tempore in the absence of the vice president, or when he exercises the office of president, seems never to have been questioned; and indeed is so obvious, that it is wholly unnecessary to vindicate it. Confidence between the senate and its officers, and the power to make a suitable choice, and to secure a suitable responsibility for the faithful discharge of the duties of office, are so indispensable for the public good,

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1 3 American Annual Register, 99.

2 See Jefferson's Manual, §15, 17.

that the provision will command universal assent, as soon as it is mentioned. It has grown into a general practice for the vice president to vacate the senatorial chair a short time before the termination of each session, in order to enable the senate to choose a president pro tempore, who might already be in office, if the vice president in the recess should be called to the chair of state. The practice is hounded in wisdom and sound policy, as it immediately provides for an exigency, which may well be expected to occur at any time; and prevents the choice from being influenced by temporary excitements or intrigues, arising from the actual existence of a vacancy. As it is useful in peace to provide for war; so it is likewise useful in times of profound tranquillity to provide for political agitations, which may disturb the public harmony.

§ 740. The next clause of the third section of the first article respects the subject of impeachment. It is as follows: "The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside. And no person shall be convicted without the concurrence of two thirds of the members present"

§ 741. Upon the subject of impeachments something has already been said, in treating of that branch of the constitution, which delegates to the house of representatives the sole power of impeachment. Upon the propriety of delegating the power it is unnecessary to enlarge. But the next inquiry naturally presented is, by what tribunal shall an impeachment be tried? It is obviously incorrect in theory, and against

the general principles of justice, that the same tribunal should at once be the accusers and the judges; that they should first decide upon the verity of the accusation, and then try the offenders.1 The first object in the administration of justice is, or ought to be, to secure an impartial trial. This is so fundamental a rule in all republican governments, that it can require little reasoning to support it; and the only surprise is, that it could ever have been overlooked.

§ 742. The practice of impeachments seems to have been originally derived into the common law from the Germans, who, in their great councils, sometimes tried capital accusations relating to the public. Licet apud concilium accusare, quoque et discrimen capitis intendere.2 When it was adopted in England, it received material improvements. In Germany, and also in the Grecian and Roman republics, the people were, at the same time, the accusers and the judges; thus trampling down, at the outset, the best safeguards of the rights and lives of the citizens.3 But in England, the house of commons is invested with the sole power of impeachment, and the house of lords with the sole power of trial. Thus, a tribunal of high dignity, independence, and intelligence, and not likely to be unduly swayed by the influence of popular opinion, is established to protect the accused, and secure to him a favourable hearing.4 Montesquieu has deemed such a tribunal worthy of the highest praise.5 Machiavel has ascribed the ruin of the republic of Florence to the want of a mode of providing by

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1 Rawle on Const. ch. 22, p. 209, 210.

2 4 Black. Comm. 260; Tacit. de Morib. Germ. 12.

3 4 Black. Comm. 261; 2 Wilson's Law Lect. 164, 165, 166.

4 4 Black. Comm. 261; but see Paley's Moral Philosophy, B. 6, ch. 8; 1 Wilson's Law Lect. 450, 451.

5 Montesq. Spirit of Laws, B. 11, ch. 6.

impeachment against those, who offend against the state. An American commentator has hazarded the extraordinary remark, that, "If the want of a proper tribunal for the trial of impeachments can endanger the liberties of the United States, some future Machiavel may perhaps trace their destruction to the same source."1 The model, from which the national court of impeachments is borrowed, is, doubtless, that of Great Britain; and a similar constitutional distribution of the power exists in many of the state governments.2

§ 743. The great objects, to be attained in the selection of a tribunal for the trial of impeachments, are, impartiality, integrity, intelligence, and independence. If either of these is wanting, the trial must be radically imperfect. To ensure impartiality, the body must be in some degree removed from popular power and passions, from the influence of sectional prejudice, and from the more dangerous influence of mere party spirit. To secure integrity, there must be a lofty sense of duty, and a deep responsibility to future times, as well as to God. To secure intelligence, there must be age, experience, and high intellectual powers, as well as attainments. To secure independence, there must be numbers, as well as talents, and a confidence resulting at once from permanency of place, and dignity of station, and enlightened patriotism. Does the senate combine, in a suitable degree, all these qualifications? Does it combine them more perfectly, than any other tribunal, which could be constituted? What other tribunal could be entrusted with the authority? These are questions of the highest importance, and of the most frequent occurrence. They arose in the convention, and underwent

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1 Tucker's Black. Comm. App. 318.

2 The Federalist, No. 65, 66.

a full discussion there. They were again deliberately debated in the state conventions; and they have been at various times since agitated by jurists and statesmen, and political bodies. Few parts of the constitution have been assailed with more vigour; and few have been defended with more ability. A learned commentator, at a considerable distance of time after the adoption of the constitution, did not scruple to declare, that it was a most inordinate power, and in some instances utterly incompatible with the other functions of the senate;1 and a similar opinion has often been propagated with an abundance of zeal.2 The journal of the convention bears testimony also to no inconsiderable diversity of judgment on the subject in that body.

§ 744. The subject is itself full of intrinsic difficulty in a government purely elective. The jurisdiction is to be exercised over offences, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political; and, indeed, in other cases, to which the power of impeachment will probably be applied, they will respect functionaries of a high character, where the remedy would otherwise be wholly inadequate, and the grievance be incapable of redress. Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character; and, on this account, it requires to be guarded in its exercise against the spirit of faction, the intolerance of party, and the sudden movements of popular feeling. The prosecution will seldom fail to agitate the passions of the whole community, and to

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1 Tucker's Black. Comm. App. 200; Id. 335, 336, 137.

2 Amer. Museum, 549; 3 Amer. Museum, 71; The Federalist, No. 65, 66; 1 Tuck. Black. Comm. App. 337; Jour. of Convention, Supplement, p. 425, 437.

divide it into parties, more or less friendly, or hostile to the accused; The press, with its unsparing vigilance, will arrange itself on either side, to control, and influence public opinion; and there will always be some danger, that the decision will be regulated more by the comparative strength of parties, than by the real proofs of innocence or guilt.1

§ 745. On the other hand, the delicacy and magnitude of a trust, which so deeply concerns the political existence and reputation of every man engaged in the administration of public affairs, cannot be overlooked.2 It ought not to be a power so operative and instant, that it may intimidate a modest and conscientious statesman, or other functionary from accepting office; nor so weak and torpid, as to be capable of lulling offenders into a general security and indifference. The difficulty of placing it rightly in a government, resting entirely on the basis of periodical elections, will be more strikingly perceived, when it is considered, that the ambitious and the cunning will often make strong accusations against public men the means of their own elevation to office; and thus give an impulse to the power of impeachment, by pre-occupying the public opinion. The convention appears to have been very strongly impressed with the difficulty of constituting a suitable tribunal; and finally came to the result, that the senate was the most fit depositary of this exalted trust. In so doing, they had the example before them of several of

the best considered state constitutions; and the example, in some measure, of Great Britain. The most strenuous opponent cannot, therefore, allege, that it was a rash and novel experiment; the most unequivocal friend

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1 The Federalist, No. 65.

2 The Federalist, No. 65; 2 Wilson's Law Lect. 165.

must, at the same time, admit, that it is not free from all plausible objections.1

§ 746. It will be well, therefore, to review the ground, and ascertain, how far the objections are well founded; and whether any other scheme would have been more unexceptionable. The principal objections were as follows: (1.) That the provision confounds the legislative and judiciary authorities in the same body, in violation of the well known maxim, which requires a separation of them. (2.) That it accumulates an undue proportion of power in the senate, which has a tendency to make it too aristocratic. (3.) That the efficiency of the court will be impaired by the circumstances, that the senate has an agency in appointment to office. (4.) That its efficiency is still further impaired by its participation in the functions of the treaty-making power.2

§ 747. The first objection, which relates to the supposed necessity of an entire separation of the legislative and judicial powers, has been already discussed in its most general form in another place. It has been shown, that the maxim does not apply to partial intermixtures of these powers; and that such an intermixture is not only unobjectionable, but is, in many cases, indispensable for the purpose of preserving the due independence of the different departments of government, and their harmony and healthy operation in the advancement of the public interests, and the preservation of the public liberties.3 The question is not so much, whether any intermixture is allowable, as whether the intermixture of the authority to try impeachments with the other functions of the senate is salutary

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1 The Federalist, No. 65, 66.

2 Id. No. 66.

3 Ante, vol. ii. §524 to 510; Rawle on Constitution, ch. 22, p. 212.

and useful. Now, some of these functions constitute a sound reason for the investment of the power in this branch. The offences, which the power of impeachment is designed principally to reach, are those of a political, or of a judicial character. They are not those, which lie within the scope of the ordinary municipal jurisprudence of a country. They are founded on different principles; are governed by different maxims; are directed to different objects; and require different remedies from those, which ordinarily apply to crimes.1 So far as they are of a judicial character, it is obviously more safe to the public to confide them to the senate, than to a mere court of law. The senate may be presumed always to contain a number of distinguished lawyers, and probably some persons, who have held judicial stations. At the same time they will not have any undue and immediate sympathy with the accused from that common professional, or corporation spirit, which is apt to pervade those, who are engaged in similar pursuits and duties.

§ 748. In regard to political offences, the selection of the senators has some positive advantages. In the first place, they may be fairly presumed to have a more enlarged knowledge, than persons in other situations, of political functions, and their difficulties, and embarrassments; of the nature of diplomatic rights and duties; of the extent, limits, and variety of executive powers and operations; and of the sources of involuntary error, and undesigned excess, as contradistinguished from those of meditated and violent disregard of duty and right. On the one hand, this very experience and knowledge will bring them to the trial with a spirit of candour and intelligence, and an ability to comprehend,

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1 1 Wilson's Law Lect. 451, 452.

and scrutinize the charges against the accused; and, on the other hand, their connection with, and dependence on, the states, will make them feel a just regard for the defence of the rights, and the interests of the states and the people. And this may properly lead to another remark; that the power of impeachment is peculiarly well fitted to be left to the final decision of a tribunal composed of representatives of all the states, having a common interest to maintain the rights of all; and yet, beyond the reach of local and sectional prejudices. Surely, it will not readily be admitted by the zealous defenders of state rights and state jealousies, that the power is not safe in the hands of all the states, to be used for their own protection and honour.

§ 749. The next objection regards the undue accumulation of power in the senate from this source connected with other sources. So far as any other powers are incompatible with, and obstructive of, the proper exercise of the power of impeachment, they will fall under consideration under another head. But it is not easy to perceive, what the precise nature and extent of the objection is. What is the due measure or criterion of power to be given to the senate? What is the standard, which is to be assumed? If we are to regard theory, no power in any department of government is undue, which is safe and useful in its actual operations, which is not dangerous in its form, or too wide in its extent. It is incumbent, then, on those, who press the objection, to establish, by some sound reasoning, that the power is not safe, but mischievous or dangerous.1 Now, the power of impeachment is not one expected in any government to be in constant or frequent exercise. It is rather intended for occasional and extraor-

1 The Federalist No. 66.

dinary cases, where a superiour power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation. Such a power cannot, if its actual exercise is properly guarded, in the hands of functionaries, responsible and wise, be justly said to be unsafe or dangerous; unless we are to say, that no power, which is liable to abuse, should be, under any circumstances, delegated. The senators cannot be presumed in ordinary decency, not to be a body of sufficient wisdom to be capable of executing, the power; and their responsibility arises from the moderate duration of their office, and their general stake in the interests of the community, as well as their own sense of duty and reputation. If, passing from theory, resort is had to the history of other governments, there is no reason to suppose, that the possession of the power of trying impeachments has ever been a source of undue aristocratical authority, or of dangerous influence. The history of Great Britain has not established, that the house of lords has become a dangerous depositary of influence of any sort from its being a high court of impeachments. If the power of impeachment has ever been abused, it has not trampled upon popular rights. If it has struck down high victims, it has followed, rather than led, the popular opinion. If it has been an instrument of injustice, it has been from yielding too much, and not too little. If it has sometimes suffered an offender to escape, it has far more frequently purified the fountains of justice, and brought down the favourite of courts, and the perverter of patronage to public humiliation and disgrace. And to bring the case home to our own state governments, the power in our state senates has hitherto been without danger, though certainly not without efficiency.

§ 750. The next objection is, that the power is not efficient or safe in connexion with the agency of the senate in appointments. The argument is, that senators, who have concurred in an appointment, will be too indulgent judges of the conduct of the men, in whose efficient creation they have participated.1 The same objection lies with equal force against all governments, which entrust the power of appointment to any persons, who have a right to remove them at pleasure. It might in such cases be urged, that the favouritism of the appointor would always screen the misbehaviour of the appointees. Yet no one doubts the fitness of entrusting such a power; and confidence is reposed, and properly reposed, in the character and responsibility of those, who make the appointment.2 The objection is greatly diminished in its force by the consideration, that the senate has but a slight participation in the appointments to office. The president is to nominate and appoint; and the senate are called upon merely to confirm, or reject the nomination. They have no right of choice; and therefore must feel less solicitude, as to the individual, who is appointed.3 But, in fact, the objection is itself not well founded; for it will rarely occur, that the persons, who have concurred in the appointment, will be members of the senate at the time of the trial. As onethird is, or may be, changed every two years, the case is highly improbable; and still more rarely can the fact of the appointment operate upon the minds of any considerable number of the senators. What possible operation could it have upon the judgment of a man of reasonable intelligence and integrity, that he had assented to the ap-

1 The Federalist, No. 66. Id.
2 No. 66.
3 Id. No. 66.

pointment of any individual, of whom he ordinarily could have little, or no personal knowledge, and in whose appointment he had concurred upon the judgment and recommendation of others? Such an influence is too remote to be of much weight in human affairs; and if it exists at all, it is too common to form a just exception to the competency of any forum.

§ 761. The next objection is to the inconvenience of the union of the power with that of making treaties. It has been strongly urged, that ambassadors are appointed by the president, with the concurrence of the senate; and if he makes a treaty, which is ratified by two thirds of the senate, however corrupt or exceptionable his conduct may have been, there can be little chance of redress by an impeachment. If the treaty be ratified, and the minister be impeached for concluding it, because it is derogatory to the honour, the interest, or perhaps to the sovereignty of the nation, who (it is said) are to be his judges? The senate, by whom it has been approved and ratified? If the president be impeached for giving, improper instructions to the minister, and for ratifying the treaty pursuant to his instructions, who are to be his judges? The senate, to whom the treaty has been submitted, and by whom it has been approved and ratified?1 This would be to constitute the senators their own judges in every case of a corrupt or perfidious execution of their trust.2

§ 752. Such is the objection pressed with unusual earnestness, and certainly having a more plausible foundation, than either of the preceding. It pre-supposes, however, a state of facts of a very extraordinary character, and having, put an extreme case, argues from

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1 1 Tucker's Black. Comm. App. 335, 336.

2 The Federalist, No. 66

it against the propriety of any delegation of the power, which in such a case might be abused. This is not just reasoning in any case; and least of all in cases respecting the polity and organization of governments; for in all such cases there must be power reposed in some person or body; and wherever it is reposed, it may be abused. Now, the case put is either one, where the senate has ratified an appointment or treaty, innocently believing it to be unexceptionable, and beneficial to the country; or where the senate has corruptly ratified it, and basely betrayed their trust. In the former case, the senate having acted with fidelity, according to their best sense of duty, would feel no sympathy for a corrupt executive or minister, who had acted with fraud or dishonour unknown to them. If the treaty were good, they might still desire to punish those, who had acted basely or corruptly in negotiating it. If bad, they would feel indignation for the imposition practised upon them by an executive, or minister, in whom they placed confidence, instead of sympathy for his misconduct. They would feel, that they had been betrayed into an error; and would rather have a bias against, than in favour of the deceiver.

§ 753. If, on the other hand, the senate had corruptly assented to the appointment and treaty, it is certain, that there would remain no effectual remedy by impeachment, so long as the same persons remained members of the senate. But even here, two years might remove a large number of the guilty conspirators; and public indignation would probably compel the resignation of all. But is such a case supposable? If it be, then there are others quite within the same range of supposition, and equally mischievous, for which there can be no remedy. Suppose a majority of the senate,

or house of representatives, corruptly pass any law, or violate the constitution, where is the remedy? Suppose the house of representatives carry into effect and appropriate money corruptly in aid of such a corrupt treaty, where is the remedy? Why might it not be as well urged, that the house of representatives ought not to be entrusted with the power of impeachment, because they might corruptly concur with the executive in an injurious or unconstitutional measure? or might corruptly aid the executive in negotiating a treaty by public resolves, or secret instructions? The truth is, that all arguments of this sort, which suppose a combination of the public functionaries to destroy the liberty of the people, and the powers of the government, are so extravagant, that they go to the overthrow of all delegated power; or they are so rare, and remote in practice, that they ought not to enter, as elements, into any structure of a free government. The constitution supposes, that men may be trusted with power under reasonable guards. It presumes, that the senate and the executive will no more conspire to overthrow the government, than the house of representatives. It supposes the best pledges for fidelity to be in the character of the individuals, and in the collective wisdom of the people in the choice of agents. It does not in decency presume, that the two thirds of the senate, representing the states, will corruptly unite with the executive, or abuse their power. Neither does it suppose, that a majority of the house of representatives will corruptly refuse to impeach, or corruptly pass a law.1

§ 754. But passing by, for the present, this general reasoning on the objections stated, let us see, if any

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1 The Federalist, No. 66.

other and better practical scheme for the trial of impeachments can be devised. One scheme might be to entrust it to the Supreme Court of the United States; another, to entrust it to that court, and the senate jointly; a third, to entrust it

to a special tribunal appointed permanently, or temporarily for the purpose. If it shall appear, that to all of these schemes equally strong objections may be made, (and probably none more unexceptionable could be suggested,) the argument in favour of the senate will acquire more persuasive cogency.

§ 755. First, the entrusting of the trial of impeachments to the Supreme Court. This was, in fact, the original project in the convention.1 It was at first agreed, that the jurisdiction of the national judiciary should extend to impeachments of national officers.2 Afterwards this clause was struck out;3 and the power to impeach was given to the house of representatives;4 and the jurisdiction of the trial of impeachments was also given to the Supreme Court.5 Ultimately, the same jurisdiction was assigned to the senate by the vote of nine states against two.6

§ 756. The principal reasons, which prevailed in the convention in favour of the final decision, and against vesting the jurisdiction in the Supreme Court, may fairly be presumed to have been those, which are stated in the Federalist. Its language is as follows: "Where else, than in the senate, could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve, unawed and

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1 Journal of Convention, 69, 121, 137, 189, 217, 226, 324, 325, 326, 344, 346.

2 Id. 69, 121, 137.

3 Id. 188.

4 Id. 217, 236.

5 Id. 226.

6 Journal of Convention, 324, 326, 346.

uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers? Could the Supreme Court have been relied upon, as answering this description? It is much to be doubted, whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude, as would be called for in the exercise of so difficult a task. And it is still more to be doubted, whether they would possess a degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision, which should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects could only be avoided by rendering that tribunal more numerous, than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down to such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favour of personal security. There will be no jury to stand between the judges, who are to pronounce the sentence of the law, and the party, who is to receive, or suffer it. The awful discretion, which a court of impeachments must necessarily have, to doom to honour or to infamy the most confidential, and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons. These considerations seem alone to authorize a conclusion, that the Supreme Court would have been an improper substitute for the senate, as a court of impeachments.

§ 757. "There remains a further consideration, which will not a little strengthen this conclusion. It is this. The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem, and confidence, and honours, and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper, that the persons, who had disposed of his fame, and his most valuable rights, as a citizen, in one trial, should, in another trial, for the same offence, be also the disposers of his life and fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision? Those, who know any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those, who might happen to be the objects of prosecution, would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence, which in its terms imported nothing more, than dismission from a present, and disqualification for a future office. It may be said, that the intervention of a jury in the second instance would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to

find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life

and his estate upon a verdict of a jury acting under the auspices of judges, who had predetermined his guilt?"1

§ 758. That there is great force in this reasoning all persons of common candour must allow, that it is in every respect satisfactory and unanswerable, has been denied, and may be fairly questioned. That part of it, which is addressed to the trial at law by the same judges might have been in some degree obviated by confiding the jurisdiction at law over the offence (as in fact it is now confided) to an inferior tribunal, and excluding any judge, who sat at the impeachment, from sitting in the court of trial. Still,however, it cannot be denied, that even in such a case the prior judgment of the Supreme Court, if an appeal to it were not allowable, would have very great weight upon the minds of inferior Judges. But that part of the reasoning, which is addressed to the importance of numbers in giving weight to the decision, and especially that, which is addressed to the public confidence and respect, which ought to follow upon a decision, are entitled to very great weight. It is fit, however, to give the answer to the whole reasoning by the other side in the words of a learned commentator, who has embodied it with no small share of ability and skill. The reasoning, "seems," says he, "to have forgotten, that senators may be discontinued from their seats, merely from the effect of popular diapprobation, but that the judges of the Supreme Court cannot. It seems also to have forgotten, that whenever the president of the United States is impeached, the constitution expressly requires, that the chief justice of the Supreme Court shall preside at the

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1 The Federalist, No. 65. -- But see Rawle on the Constitution, ch. 22, p. 211, 212.

trial. Are all the confidence, all the firmness, and all the impartiality of that court, supposed to be concentred in the chief justice, and to reside in his breast only? If that court could not be relied on for the trial of impeachments, much less would it seem worthy of reliance for the determination of any question between the United States and a particular state; much less to decide upon the life and heath of a person, whose crimes might subject him to impeachment, but whose influence might avert a conviction. Yet the courts of the United States, are by the constitution regarded, as the proper tribunals, where a party, convicted upon an impeachment, may receive that condign punishment, which the nature of his crimes may require; for it must not be forgotten, that a person, convicted upon an impeachment, will nevertheless be liable to indictment, trial, judgment, and punishment according to law, &c. The question, then, might be retorted; can it be supposed, that the senate, a part of whom must have been either particeps criminis with the person impeached, by advising the measure, for which he is to be tried, or must have joined the opposition to that measure, when proposed and debated in the senate, would be a more independent, or a more unprejudiced tribunal, than a court, composed of judges, holding their offices during good behaviour; and who could neither be presumed to have participated in the crime, nor to have prejudged the criminal?"1

§ 759. This reasoning also has much force in it; but in candour also it must be admitted to be not wholly unexceptionable. That part, which is addressed to the circumstance of the chief justice's presiding at the trial of the president of the United States, was (as

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1 1 Tuck. Black. Comm. App. 237.

we shall hereafter see) not founded on any supposition, that the chief justice would be superior in confidence, and firmness, and impartiality, to the residue of the judges, (though in talents and public respect, and acquirements, he might fairly be presumed their superior;) but on the necessity of excluding the vice president from the chair, when he might have a manifest interest, which would destroy his impartiality. That part, which is addressed to the supposition of the senators being participes criminis, is still more exceptionable; for it is not only incorrect to affirm, that the senators must be, in such a predicament, but in all probability the senators would, in almost all cases, be without any participation in the offence. The offences, which would be generally prosecuted by impeachment, would be those only of a high character, and belonging to persons in eminent stations, -- such as a head of department, a foreign minister, a judge, a vice president, or a president. Over the conduct of such persons the senate could ordinarily have no control; and a corrupt combination with them, in the discharge of the duties of their respective offices, could scarcely be presumed. Any of these officers might be bribed, or commit gross misdemeanours, without a single senator having the least knowledge, or participation in the offence. And, indeed, very few of the senators could, at any time, be presumed to be in habits of intimate personal confidence, or connexion with many of these officers. And so far, as public responsibility is concerned, or public confidence is

required, the tenure of office of the judges would have no strong tendency to secure the former, or to assuage public jealousies, so as peculiarly to encourage the latter. It is, perhaps, one of the circumstances, most

important in the discharge of judicial duties, that they rarely carry with them any strong popular favour, or popular influence. The influence, if any, is of a different sort, arising from dignity of life and conduct, abstinence from political contests, exclusive devotion to the advancement of the law, and a firm administration of justice; circumstances, which are felt more by the profession, than they can be expected to be praised by the public.

§ 760. Besides; it ought not to be overlooked, that such an additional accumulation of power in the judicial department would not only furnish pretexts for clamour against it, but might create a general dread of its influence, which could hardly fail to disturb the salutary effects of its ordinary functions.1 There is nothing, of which a free people are so apt to be jealous, as of the existence of political functions, and political checks, in those, who are not appointed by, and made directly responsible to themselves. The judicial tenure of office during good behaviour, though in some respects most favourable for an independent discharge of these functions and checks, is at the same time obnoxious to some strong objections, as a remedy for impeachable offences.

§ 761. There are, however, reasons of great weight, besides those, which have been already alluded to, which fully justify the conclusion, that the Supreme Court is not the most appropriate tribunal to be invested with authority to try impeachments.

§ 762. In the first place, the nature of the functions to be performed. The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character. Not but that

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1 The Federalist, No. 65.

crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits, and rules, and principles of diplomacy, of departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations, of foreign, as well as of domestic political movements; and in short, by a great variety of circumstances, as well those, which aggravate, as those, which extenuate, or justify the offensive acts, which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence. They are duties, which are easily understood by statesmen, and are rarely known to judges. A tribunal, composed of the former, would therefore be far more competent, in point of intelligence and ability, than the latter, for the discharge of the functions, all other circumstances being equal. And surely, in such grave affairs, the competency of the tribunal to discharge the duties in the best manner is an indispensable qualification.

§ 763. In the next place, it is obvious, that the strictness of the forms of proceeding in cases of offen-

ces at common law are ill adapted to impeachments. The very habits growing out of judicial employments; the rigid manner, in which the discretion of judges is limited, and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents; and the adherence to technical principles, which, perhaps, distinguishes this branch of the law, more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments. And it has been observed with great propriety, that a tribunal of a liberal and comprehensive character, confined, as little as possible, to strict forms, enabled to continue its session as long, as the nature of the law may require; qualified to view the charge in all its bearings and dependencies, and to appropriate on sound principles of public policy the defence of the accused, seems indispensable to the value of the trial.1 The history of impeachments, both in England and America, justifies the remark. There is little technical in the mode of proceeding; the charges are sufficiently clear, and yet in a general form; there are few exceptions, which arise in the application of the evidence, which grow out of mere technical roles, and quibbles. And it has repeatedly been seen, that the functions have been better understood, and more liberally and justly expounded by statesmen, than by mere lawyers. An illustrious instance of this sort is upon record in the case of the trial of Warren Hastings, where the question, whether an impeachment was abated by a dissolution of parliament, was decided in the negative by the house of lords, as well as the house of commons, against what seemed to be the weight of professional opinion.2

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1 Rawle on the Constitution, ch. 22, p. 212.

2 4 Black. Comm, 400, Christian's Note.

§ 764. In the next place, the very functions, involving political interests and connexions, are precisely those, which it seems most important to exclude from the cognizance and participation of the judges of the Supreme Court. Much of the reverence and respect, belonging to the judicial character, arise from the belief, that the tribunal is impartial, as well as enlightened; just, as well as searching. It is of very great consequence, that judges should not only be, in fact, above all exception in this respect; but that they should be generally believed to be so. They should not only be pure; but, if possible, above suspicion. Many of the offences, which will be charged against public men, will be generated by the heats and animosities of party; and the very circumstances, that judges should be called to sit, as umpires, in the controversies of party, would inevitably involve them in the common odium of partizans, and place them in public opinion, if not in fact, at least in form, in the array on one side, or the other. The habits, too, arising from such functions, will lead them to take a more ardent part in public discussions, and in the vindication of their own political decisions, than seems desirable for those, who are daily called upon to decide upon the private rights and claims of men, distinguished for their political consequence, zeal, or activity, in the ranks of party. In a free government, like ours, there is a peculiar propriety in withdrawing, as much as possible, all judicial functionaries from the contests of mere party strife. With all their efforts to avoid them, from the free intercourse, and constant charges in a republican government, both of men and measures, there is, at all times, the most imminent danger, that all classes of society will be drawn into the vortex of politics. Whatever shallhave

a tendency to secure, in tribunals of justice, a spirit of moderation and exclusive devotion to juridical duties is of inestimable value. What can more surely advance this object, than the exemption of them from all participation in, and control over, the acts of political men in their official duties? Where, indeed, those acts fall within the character of known crimes at common law, or by positive statute, there is little difficulty in the duty, because the rule is known, and equally applies to all persons in and out of office; and the facts are to be tried by a jury, according to the habitual course of investigation in common cases. The remark of Mr. Woodeson on this subject is equally just and appropriate. After having enumerated some of the cases, in which impeachments have been tried for political offences, he adds, that from these "it is apparent, how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the state."1

§ 765. In the next place, the judges of the Supreme Court are appointed by the executive; and will naturally feel some sympathy and attachment for the person, to whom they owe this honour, and for those, whom he selects, as his confidential advisers in the departments. Yet the president himself, and those confidential advisers, are the very persons, who are eminently the objects to be reached by the power of impeachment. The very circumstance, that some, perhaps a majority of the court, owe their elevation to the same chief magistrate, whose acts, or those of his confidential advisers, are on trial, would have some tendency to diminish the public confidence in the impartiality and independence of the tribunal.

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1 2 Woodeson, Lect. 40, p. 602.

§ 766. But, in the next place, a far more weighty consideration is, that some of the members of the judicial department may be impeached for malconduct in office; and thus, that spirit, which, for want of a better term, has been called the corporation spirit of organized tribunals and societies, will naturally be brought into play. Suppose a judge of the Supreme Court should himself be impeached; the number of his triers would not only be diminished; but all the attachments, and partialities, or it may be the rivalries and jealousies of peers on the same bench, may be, or (what is practically almost as mischievous) may be suspected to be put in operation to screen or exaggerate the offence. Would any person soberly decide, that the judges of the Supreme Court would be the safest and the best of all tribunals for the trial of a brother judge, taking human feelings, as they are, and human infirmity, as it is? If not, would there not be, even in relation to inferior judges, a sense of indulgence, or a bias of opinion, upon certain judicial acts and practices, which might incline their minds to undue extenuation, or to undue harshness? And if there should be, in fact, no danger from such a source, is there not some danger, under such circumstances, that a jealousy of the operations of judicial tribunals over judicial offences, would create in the minds of the community a broad distinction in regard to convictions and punishments; between them and merely political offences? Would not the power of impeachment cease to possess its just reverence and authority, if such a distinction should prevail; and especially, if political victims rarely escaped, and Judicial officers as rarely suffered? Can it be desirable thus to create any tendency in the public mind

towards the judicial department, which may impair its general respect and daily utility?1
§ 767. Considerations of this sort cannot be overlooked in inquiries of this nature; and if to some minds they may not seem wholly satisfactory, they, at least, establish, that the Supreme Court is not a tribunal for the trial of impeachment, wholly above all reasonable exceptions. But if, to considerations of this sort, it is added, that the common practice of free governments, and especially of England, and of the states composing the Union, has been, to confide this power to one department of the legislative body, upon the accusation of another; and that this has been found to work well, and to adjust itself to the public feelings and prejudices, to the dignity of the legislature, and to the tranquillity of the state, the inference in its favour cannot but be greatly strengthened and confirmed.
§ 768. To those, who felt difficulties in confiding to the Supreme Court alone the trial of impeachments, the scheme might present itself, of uniting that court with the senate jointly for this purpose. To this union many of the objections already stated, and especially those, founded on the peculiar functions of the judicial department, would apply with the same force, as they do to vesting the Supreme Court with the exclusive jurisdiction. In some other respects there would result advantages from the union; but they would scarcely overbalance the disadvantages.2 If the judges, compared with the whole body of the senate, were few in number, their weight would scarcely be felt in that body. The habits of co-operation in common daily duties

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1 But see Rawle on the Constitution, ch. 22, p. 214.

2 The Federalist, No. 65.

would create among the senators an habitual confidence, and sympathy with each other; and the same habits would produce a correspondent influence among the judges. There would, therefore, be two distinct bodies, acting together pro re nata, which were in a great measure strangers to each other, and with feelings, pursuits, and modes of reasoning wholly distinct from each other. Great contrariety of opinion might naturally be presumed under such circumstances to spring up, and, in all probability, would become quite marked in the action of the two bodies. Suppose, upon an impeachment, the senators should be on one side, and the judges on the other; suppose a minority composed of all the judges, and a considerable number of the senators; or suppose a majority made by the co-operation of all the judges; in these, and many other cases, there might be no inconsiderable difficulty in satisfying the public mind, as to the result of the impeachment. Judicial opinion might go urgently one way, and political character and opinion, as urgently another way. Such a state of things would have little tendency to add weight, or dignity to the court, in the opinion of the community. And perhaps a lurking suspicion might pervade many minds, that one body, or the other, had possessed an undue preponderance of influence in the actual decision. Even jealousies and discontents might grow up in the bosoms of the component bodies themselves, from their own difference of structure, and habits, and occupations, and duties. The practice of governments has not hitherto established any great value, as attached to the intermixture of different bodies for single occasions, or temporary objects.
§ 769. A third scheme might be, to entrust the trial of impeachments to a special tribunal, constituted for

that sole purpose. But whatever arguments may be found in favour of such a plan, there will be found to be correspondent objections and difficulties. It would tend to increase the complexity of the political machine, and add a new spring to the operations of the government, the utility of which would be at least questionable, and might clog, its just movements.1 A court of this nature would be attended with heavy expenses; and might, in practice, be subject to many casualties and inconveniences. It must consist either of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends; or of national officers, called to the duties for the occasion, though previously designated by office, or rank; or of officers of the state governments, selected when the impeachment was actually depending.2 Now, either of these alternatives would be found full of embarrassment and intricacy, when an attempt should be made to give it a definite form and organization. The court, in order to be efficient and independent, ought to be numerous. It ought to possess talents, experience, dignity, and weight of character, in order to obtain, or to hold, the confidence of the nation. What national officers, not belonging to either of the great departments of the government, legislative, executive, or judicial, could be found, embracing all these requisite qualifications? And if they could be, what compensation is to be made to them, in order to maintain their characters and importance, and to secure their services? If the court is to be selected from the state functionaries, in what manner is this to be accomplished? How can their acceptance, or performance of the duties, be

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1 The Federalist, No. 64.

2 Id. No. 65.

either secured, or compelled? Does it not at once submit the whole power of impeachment to the control of the state governments, and thus surrender into their hands all the means of making it efficient and satisfactory? In political contests it cannot be supposed, that either the states, or the state functionaries, will not become partisans, and deeply interested in the success, or defeat of measures, in the triumph; or the ruin of rivals, or opponents. Parties will naturally desire to screen a friend, or overwhelm an adversary; to secure the predominance of a local policy, or a state party; and if so, what guarantee is there for any extraordinary fidelity, independence, or impartiality, in a tribunal so composed, beyond all others? Descending from such general inquiries to more practical considerations, it may be asked, how shall such a tribunal be composed" Shall it be composed of state executives, or state legislators, or state judges, or of a mixture of all, or a selection from all? If the body is very large, it will become unwieldy, and feeble from its own weight. If it be a mixture of all, it will possess too many elements of discord and diversities of judgment, and local and professional opinion. If it be homogeneous in its character, as if it consist altogether of one class of men, as of the executives of all the states, or the judges of the Supreme Courts of all the states, can it be supposed, (even if an equality in all other respects could be certainly obtained,) that persons, selected mainly by the states for local and peculiar objects, could best administer the highest and most difficult functions of the national government?

§ 770. The Federalist has spoken with unusual freedom and directness on this subject. "The first scheme," (that is, of vesting the power in some per-

manent national officers,) "will be reprobated by every man, who can compare the extent of the public wants with the means of supplying them. The second," (that is, of vesting it in state officers,) "will be espoused with caution by those, who will seriously consider the difficulties of collecting men dispersed over the whole Union; the injury to the innocent from the procrastinated determination of the charges, which might be brought against them; the advantage to the guilty from the opportunities, which delay would afford for intrigue and corruption; and in some cases the detriment to the state from the prolonged inaction of men, whose firm and faithful execution of their duty might have exposed them to the persecution of an intemperate or designing majority in the house of representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified; yet it ought not to be forgotten, that the demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men." And the subject is concluded with the following reflection. "If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard ofperfection, society would soon become a general scene of anarchy, and the world a desert."1

§ 771. A scheme somewhat different from either of the foregoing has been recommended by a learned commentator,2 drawn from the Virginia constitution, by which, in that state, all impeachments are to be tried in the courts of law, "according to the laws of the land;" and by the state laws the facts, as in other cases, are to be tried by a jury. But the objections to this course

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1 The Federalist, No. 65.

2 1 Tucker's Black. Comm. App. 337, 338.

would be very serious, not only from the considerations already urged, but from the difficulty of impanneling a suitable jury for such purposes. From what state or states is such a jury to be drawn? How is it to be selected, or composed? What are to be the qualifications of the jurors? Would it be safe to entrust the political interests of a whole people to a common panel? Would any jury in times of party excitement by found sufficiently firm to give a true verdict, unaffected by the popularity or odium of the measure, when the nation was the accuser?1 These questions are more easily put, than they can be satisfactorily answered. And, indeed, the very circumstance, that the example of Virginia has found little favour in other states, furnishes decisive proof, that it is not deemed better than others, to which the national constitution bears the closest analogy.

§ 772 When the subject was before the state conventions, although here and there an objection was started against the plan, three states only formally proposed any amendment. Virginia and North-Carolina recommended, "that some tribunal, other than the senate, be provided for trying impeachments of senators," 1 leaving, the provision in all other respects, as it stood. New-York alone recommended an amendment, that the senate, the judges of the Supreme Court, and the first or senior judge of the highest state court of general or ordinary common law jurisdiction in each state should constitute a court for the trial of impeachments.2 This recommendation does not

change the posture of a single objection. It received no support elsewhere; and the subject has since silently slept without any effort to revive it.

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1 Journ. of Convention, Supp. 425, 448.

2 Id. 437.

§ 773. The conclusion, to which, upon a large survey of the whole subject, our judgments are naturally led, is, that the power has been wisely deposited with the senate.1 In the language of a learned commentator, it may be said, that of all the departments of the government, "none will be found more suitable to exercise this peculiar jurisdiction, than the senate. Although, like their accusers, they are representatives of the people; yet they are by a degree more removed, and hold their stations for a longer term. They are, therefore, more independent of the people, and being chosen with the knowledge, that they may, while in office, be called upon to exercise this high function, they bring with them the confidence of their constituents, that they will faithfully execute it, and the implied compact on their own part, that it shall be honestly discharged. Precluded from ever becoming accusers themselves, it is their duty not to lend themselves to the animosities of party, or the prejudices against individuals, which may sometimes unconsciously induce the house of representatives to the acts of accusation. Habituated to comprehensive views of the great political relations of the country, they are naturally the best qualified to decide on those charges, which may have any connexion with transactions abroad, or great political interests at home. And although we cannot say, that, like the English house of lords, they form a distinct body, wholly uninfluenced by the passions, and remote from the interests, of the people; yet we can discover in no other division of the government a greater probability of impartiality and independence."2

§ 774. The remaining parts of the clause of the constitution now under consideration will not require an

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1 The Federalist, No. 65.

2 Rawle on the Contst. ch. 22, p. 212, 213.

elaborate commentary. The first is, that the senate, when sitting as a court of impeachment, "shall be on oath or affirmation;" a provision, which, as it appeals to the conscience and integrity of the members by the same sanctions, which apply to judges and jurors, who sit in other trials, will commend itself to all persons, who deem the highest trusts, rights, and duties, worthy of the same protection and security, at least, as those of the humblest order. It would, indeed, be a monstrous anomaly, that the highest officers might be convicted of the worst crimes, without any sanction being interposed against the exercise of the most vindictive passions; while the humblest individual has a right to demand an oath of fidelity from those, who are his peers, and his triors. In England, however, upon the trial of impeachments, the house of lords are not under oath; but only make a declaration upon their honour.1 This is a strange anomaly, as in all civil and criminal trials by a jury, the jurors are under oath; and there seems no reason, why a sanction equally obligatory upon the consciences of the triors should not exist in trials for capital or other offences before every other tribunal. What is there in the honour of a peer, which necessarily raises it above the honour of a commoner? The anomaly is rendered still more glaring by the fact, that a peer cannot give testimony, as a witness, except on oath; for, here, his honour is not trusted. The maxim of the law, in such a case, is in judicio non creditur, nisi juratis.2 Why should the obligation of a judge be less solemn, than the obligation of a witness? The truth is, that it is a privilege of power, conceded in barbarous limes, and founded on feudal sovereignty, more than on justice, or principle.

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1 1 Black. Comm. 402; 4 Inst. 49; 3 Elliot's Debates, 53.

2 1 Black. Comm. 402.

§ 775. The next provision is: "When the president of the United States is tried, the chief justice shall preside." The reason of this clause has been already adverted to. It was to preclude the vice president, who might be supposed to have a natural desire to succeed to the office, from being instrumental in procuring the conviction of the chief magistrate.1 Under such circumstances, who could be deemed more suitable to preside, than the highest judicial magistrate of the Union. His impartiality and independence could be as little suspected, as those of any person in the country. And the dignity of his station might well be deemed an adequate pledge for the possession of the highest accomplishments.

§ 776. It is added, "And no person shall be convicted, without the concurrence of two thirds of the members present." Although very numerous objections were taken to the constitution, none seems to have presented itself

against this particular quorum required for a conviction; and yet it might have been fairly thought to be open to attack on various sides from its supposed theoretical inconvenience and incongruity. It might have been said with some plausibility, that it deserted the general principles even of courts of justice, where a mere majority make the decision; and, of all legislative bodies, where a similar rule is adopted; and, that the requisition of two thirds would reduce the power of impeachment to a mere nullity. Besides; upon the trial of impeachments in the house of lords the conviction or acquittal is by a mere majority;2 so that there is a failure of any analogy to support the precedent.

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1 Rawle on Const. ch. 22, p. 216.

2 Com. Dig. Parliament, L. 16, 17; 2 Woodeson Lect. 40, p. 612.

§ 777. It does not appear from any authentic memorials, what were the precise grounds, upon which this limitation was interposed. But it may well be conjectured, that the real grounds were, to secure an impartial trial, and to guard public men from being sacrificed to the immediate impulses of popular resentment or party predominance. In England, the house of lords, from its very structure and hereditary independence, furnishes a sufficient barrier against such oppression and injustice. Mr. Justice Blackstone has remarked, with manifest satisfaction, that the nobility "have neither the same interests, nor the same passions, as popular assemblies; and, that "it is proper, that the nobility should judge, to insure justice to the accused; as it is proper, that the people should accuse, to insure justice to the commonwealth."1 Our senate is, from the very theory of the constitution, founded upon a more popular basis; and it was desirable to prevent any combination of a mere majority of the states to displace, or to destroy a meritorious public officer. If a mere majority were sufficient to convict, there would be danger, in times of high popular commotion or party spirit, that the influence of the house of representatives would be found irresistible. The only practicable check seemed to be, the introduction of the clause of two thirds, which would thus require an union of opinion and interest, rare, except in cases where guilt was manifest, and innocence scarcely presumable. Nor could the limitation be justly complained of; for, in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable. Here, an intermediate scale is adopted between unanimity, and a mere majority. And if the

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1 4 Black. Comm. 261.

guilt of a public officer cannot be established to the satisfaction of two thirds of a body of high talents and acquirements, which sympathizes with the people, and represents the states, after a full investigation of the facts, it must be, that the evidence is too infirm, and too loose to justify a conviction. Under such circumstances, it would be far more consonant to the notions of justice in a republic, that a guilty person should escape, than that an innocent person should become the victim of injustice from popular odium, or party combinations.

§ 778. At the distance of forty years, we may look back upon this reasoning with entire satisfaction. The senate has been found a safe and effective depositary of the trial of impeachments. During that period but four cases have occurred, requiring, this high remedy. In three there have been acquittals; and in one a conviction. Whatever may have been the opinions of zealous partisans at the times of their occurrence, the sober judgment of the nation sanctioned these results, at least, on the side of the acquittals, as soon as they became matters of history, removed from the immediate influences of the prosecutions. The unanimity of the awards of public opinion, in its final action on these controversies, has been as great, and as satisfactory, as can be attributed to any, which involve real doubt, or enlist warm prejudices and predilections on either side.1 No reproach has ever reached he senate for its unfaithful discharge of these high functions; and the voice of a

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1 The trials, here alluded to, were of William Blount in 1799, of Samuel Chase in 1805, of John Pickering in 1803, and of James H. Peck in 1831. The three former are alluded to in Rawle on the Const. ch. 22, p. 215. See also 4 Tuck. Black. Comm. 261, note; Id. App. 57, and Senate Journals of the respective years. Rawle on Const. ch. 22, p. 215; Scrjeant on Constitutional Law, ch. 29, p. 363, 364.

state has rarely, if ever, displaced a single senator for his vote on such an occasion. What more could be asked in the progress of any government? What more could experience produce to justify confidence in the institution?

§ 779. The next clause is, that "Judgment in cases of impeachment shall not extend further, than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

§ 780. It is obvious, that, upon trials on impeachments, one of two courses must be adopted in case of a conviction; either for the court to proceed to pronounce a full and complete sentence of punishment for the offence according to the law of the land in like cases, pending in the common tribunals of justice, superadding the removal from office, and the consequent disabilities; or, to confine its sentence to the removal from office and other disabilities. If the former duty be a part of the constitutional functions of the court, then, in case of an acquittal, there cannot be another trial of the party for the same offence in the common tribunals of justice, because it is repugnant to the whole theory of the common law, that a man should be brought into jeopardy of life or limb more than once for the same offence.1 A plea of acquittal is, therefore, an absolute bar against any second prosecution for the same offence. If the court of impeachments is merely to pronounce a sentence of removal from office and the other disabilities; then it is indispensable, that provision should be made, that the common tribunals of jus-

1 4 Black. Comm. 335, 361; Hawk. P. C., B. 2, ch. 35.

tice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting the common punishment applicable to unofficial offenders. Otherwise, it might be matter of extreme doubt, whether, consistently with the great maxim above mentioned, established for the security of the life and limbs and liberty of the citizen, a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments. And if no such second trial could be had, then the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment.

§ 781. The constitution, then, having provided, that judgment upon impeachments shall not extend further, than to removal from office, and disqualification to hold office, (which, however afflictive to an ambitious and elevated mind, would be scarcely felt, as a punishment, by the profligate and the base,) has wisely subjected the party to trial in the common criminal tribunals, for the purpose of receiving such punishment, as ordinarily belongs to the offence. Thus, for instance, treason, which by our laws is a capital offence, may receive its appropriate punishment; and bribery in high officers, which otherwise would be a mere disqualification from office, may have the measure of its infamy dealt out to it with the same unsparing severity, which attends upon other and humbler offenders.

§ 782. In England, the judgment upon impeachments is not confined to mere removal from office; but extends to the whole punishment attached by law to the offence. The house of lords, therefore, upon a conviction, may, by its sentence, inflict capital punishment; or perpetual banishment; or forfeiture of goods

and lands; or fine and ransom; or imprisonment; as well as removal from office, and incapacity to hold office, according to the nature and aggravation of the offence.1

§ 783. As the offences, to which the remedy of impeachment has been, and will continue to be principally applied, are of a political nature,2 it is natural to suppose, that they will be often exaggerated by party spirit, and the prosecutions be sometimes dictated by party resentments, as well as by a sense of the public good. There is danger, therefore, that in cases of conviction the punishment may be wholly out of proportion to the offence, and pressed as much by popular odium, as by aggravated crime. From the nature of such offences, it is impossible to fix any exact grade, or measure, either in the offences, or the punishments; and a very large discretion must unavoidably be vested in the court of impeachments, as to both. Any attempt to define the offences, or to affix to every grade of distinction its appropriate measure of punishment, would probably tend to more injustice and inconvenience, than it would correct; and perhaps would render the power at once inefficient and unwieldy. The discretion, then, if confided at all, being peculiarly subject to abuse, and connecting itself with state parties, and state contentions, and state animosities, it was deemed most advisable by the convention, that the power of the senate to inflict punishment should merely reach the right and qualifications to office; and thus take away the temptation in factious times to sacrifice good and great men upon the altar of party. History

1 Com. Dig. Parliament, L. 44; 2 Woodeson, Lect. 40, p. 611, to 614.

2 2 Woodeson, Lect. 40, p. 601, 604.

had sufficiently admonished them, that the power of impeachment had been thus mischievously and inordinately applied in other ages; and it was not safe to disregard those lessons, which it had left for our instruction, written not unfrequently in blood. Lord Strafford, in the reign of Charles the First, and Lord Stafford, in the reign of Charles the Second, were both convicted, and punished capitally by the house of lords; and both have been supposed to have been rather victims to the spirit of the times, than offenders meriting such high punishments.1 And other cases have

occurred, in which whatever may have been the demerits of the accused, his final overthrow has been the result of political resentments and hatreds, far more than of any desire to promote public justice.2

§ 784. There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, at least so far, as the jurisdiction and trial are concerned, into its proper elements, bringing the political part under the power of the political department of the government, and retaining the civil part for presentment and trial in the ordinary forum. A jury might well be entrusted with the latter; while the former should meet its appropriate trial and punishment before the senate. If it should be asked, why separate trials should thus be successively had; and why, if a conviction should take place in a court of law, that court might not be entrusted with the power to pronounce a removal from office, and the disqualification to office, as a part of its sentence, the answer has been already given in the

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1 Rawle on the Constitution, ch. 22, p. 217; 2 Woodeson, Lect. 40, p. 608, 609.

2 Com. Dig. Parliament, L. 28 to 30; 2 Woodeson, Lect. 40, p. 619, 620.

reasoning against vesting any court of law with merely political functions. In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part of its regular judgment. If it results at all, it results as a consequence, and not as a part of the sentence. But it may be properly urged, that the vesting of such a high and delicate power, to be exercised by a court of law at its discretion, would, in relation to the distinguished functionaries of the government, be peculiarly unfit and inexpedient. What could be more embarrassing, than for a court of law to pronounce for a removal upon the mere ground of political usurpation, or malversation in office, admitting of endless varieties, from the slightest guilt up to the most flagrant corruption? Ought a president to be removed from office at the mere will of a court for political misdemeanours? Is not a political body, like the senate, from its superior information in regard to executive functions, far better qualified to judge, how far the public weal might be promoted by such a punishment in a given case, than a mere juridical tribunal? Suppose the senate should still deem the judgment irregular, or unjustifiable, how is the removal to take effect, and how is it to be enforced? A separation of the removing power altogether from the appointing power might create many practical difficulties, which ought not, except upon the most urgent reasons, to be introduced into matters of government. Without attempting to maintain, that the difficulties would be insuperable, it is sufficient to show, that they might be highly inconvenient in practice.

§ 785. It does not appear from the Journal of the Convention, that the provision thus limiting the sentence upon impeachments to removal and disqualifica-

tion from office, attracted much attention, until a late period of its deliberations.1 The adoption of it was not, however, without some difference of opinion; for it passed only by the vote of seven states against three.2 The reasons, on which this opposition was founded, do not appear; and in the state conventions no doubt of the propriety of the provision seems to have been seriously entertained.

§ 786. In order to complete our review of the constitutional provisions on the subject of impeachments, it is necessary to ascertain, who are the persons liable to be impeached; and what are impeachable offences. By some strange inadvertence, this part of the constitution has been taken from its natural connexion, and with no great propriety arranged under that head, which embraces the organization, and rights, and duties of the executive department. To prevent the necessity of again recurring to this subject, the general method prescribed in these commentaries will, in this instance, be departed from, and the only remaining provision on impeachments be here introduced.

§ 787. The fourth section of the second article is as follows: "The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours."3 **§ 788.** From this clause it appears, that the remedy

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1 Journal of the Convention, p. 227, 302, 353.

2 Journal of the Convention, p. 227, 303. See 3 Elliot's Debates, 43 to 46; Id. 53 to 57; Id. 107, 108.

3 In the convention, the clause, making the president liable to removal from office on impeachment and conviction, was not unanimously agreed to; but passed by a vote of eight states against two.*

*** Journal of Convention, p. 94, 194, 211.**

by impeachment is strictly confined to civil officers of the United States, including the president and vicepresident. In this respect, it differs materially from the law and practice of Great-Britain. In that kingdom, all the king's subjects, whether peers or commoners, are impeachable in parliament; though it is asserted, that commoners cannot

now be impeached for capital offences, but for misdemeanours only.1 Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution in parliament.2 There seems a peculiar propriety, in a republican government at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal, and ought to have the same security of a trial by jury for all crimes and offences laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties, by exposing them against their wills to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is in civil cases, its value, as a protection against the resentment and violence of rulers and factions in criminal prosecutions, makes it inestimable. It is there, and there only, that a citizen, in the sympathy, the impartiality, the intelligence, and incorruptible integrity of his fellows, impanelled to try the accusation, may indulge a well-founded confidence to sustain and cheer him. If he should choose

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1 4 Black. Comm. 200, and Christian's note; 2 Woodeson, Lect. 40, p. 601, &c.; Com. Dig. Parliament, L. 28 to 40.

2 2 Woodeson, Lect. 40, p. 601, 602.

to accept office, he would voluntarily incur all the additional responsibility growing out of it. If impeached for his conduct, while in office, he could not justly complain, since he was placed in that predicament by his own choice; and in accepting office he submitted to all the consequences. Indeed, the moment it was decided, that the judgment upon impeachments should be limited to removal and disqualification from office, it followed, as a natural result, that it ought not to reach any but officers of the United States. It seems to have been the original object of the friends of the national government to confine it to these limits; for in the original resolutions proposed to the convention, and in all the subsequent proceedings, the power was expressly limited to national officers.1

§ 789. Who are "civil officers," within the meaning of this constitutional provision, is an inquiry, which naturally presents itself; and the answer cannot, perhaps, be deemed settled by any solemn adjudication. The term "civil" has various significations. It is sometimes used in contradistinction to barbarous, or savage, to indicate a state of society reduced to order and regular government. Thus, we speak of civil life, civil society, civil government, and civil liberty; in which it is nearly equivalent in meaning to political.2 It is sometimes used in contradistinction to criminal, to indicate the private rights and remedies of men, as members of the community, in contrast to those, which are public, and relate to the government. Thus, we speak of civil process and criminal process, civil jurisdiction and

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1 Journal of Convention, 69, 121, 137, 226.

2 Johnson's Dictionary, Civil; 1 Black, Comm. 6, 125, 251; Montesq. Spirit of Laws, B. 1, ch. 3; Rutherforth's Inst. B. 2, ch. 2, p. 23; Id. ch. 3, p. 52; Id. ch. 8, p. 359; Heince. Elem. Juris. Nat. B. 2, ch. 6.

criminal jurisdiction. It is sometimes used in contradistinction to military or ecclesiastical, to natural or foreign. Thus, we speak of a civil station, as opposed to a military or ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war. The sense, in which the term is used in the constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government. It is in this sense, that Blackstone speaks of the laity in England, as divided into three distinct states; the civil, the military, and the maritime; the two latter embracing the land and naval forces of the government.1 And in the same sense the expenses of the civil list of officers are spoken of, in contradistinction to those of the army and navy.2

§ 790. All officers of the United States, therefore, who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.3 The reason for excepting military and naval officers is, that they are subject to trial and punishment according to a peculiar military code, the laws, rules, and usages of war. The very nature and efficiency of military duties and discipline require this summary and exclusive jurisdiction; and the promptitude of its operations are not only better suited to the notions of military men;

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1 1 Black. Comm. 396, 408, 417; De Lolme, B. 2, ch. 17, p. 446.

2 1 Black. Comm. 332.

3 Rawle on the Constitution, ch. 22, p. 213.

but they deem their honour and their reputation more safe in the hands of their brother officers, than in any merely civil tribunal. Indeed, in military and naval affairs it is quite clear, that the senate could scarcely possess competent knowledge or experience to decide upon the acts of military men; so much are these acts to be governed by mere usage, and custom, by military discipline, and military discretion, that the constitution has wisely committed the whole trust to the decision of courts-martial.

§ 791. A question arose upon an impeachment before the senate in 1799, whether a senator was a civil officer of the United States, within the purview of the constitution; and it was decided by the senate, that he was not;1 and the like principle must apply to the members of the house of representatives. This decision, upon which the senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators.2 The reasoning, by which it was sustained in the senate, does not appear, their deliberations having been private. But it was probably held, that "civil officers of the United States" meant such, as derived their appointment from, and under the national government, and not those persons, who, though members of the government, derived their appointment from the states, or the people of the states. In this view, the enumeration of the president and vice president, as impeachable officers, was indispensable; for they derive, or may derive, their

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1 The decision was made by a vote of 14 against 11, See Senate Journal, 10 January, 1799; 4 Tuck. Black. Comm. App. 57, 58; Rawle on Const. ch. 22, p. 213, 214.

2 4 Tuck. Black. Comm. App. 57, 58; Rawle on the Const. ch. 22, p. 213, 214, 218, 219.

office from a source paramount to the national government. And the clause of the constitution, now under consideration, does not even affect to consider them officers of the United States. It says, "the president, vice-president, and all civil officers (not all other civil officers) shall be removed," &c. The language of the clause, therefore, would rather lead to the conclusion, that they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States. Other clauses of the constitution would seem to favour the same result; particularly the clause, respecting appointment of officers of the United States by the executive, who is to "commission all the officers of the United States;" and the 6th section of the first article, which declares, that "no person, holding any office under the United States, shall be a member of either house during his continuance in office;" and the first section of the second article, which declares, that "no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."1 It is far from being certain, that the convention itself ever contemplated, that senators or representatives should be subjected to impeachment;2 and it is very far from being clear, that such a subjection would have been either politic or desirable.

§ 792. The reasoning of the Federalist on this subject, in answer to some objections to vesting the trial of impeachments in the senate, does not lead to the conclusion, that the learned author thought the senators liable to impeachment. Some parts of it would rather

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1 See Blount's Trial, p. 34, 35; Id. 49, 50, 51, 52.

2 But see South-Carolina Debates on the Constitution, January, 1788, (printed in Charleston, 1831,) p. 11, 12, 13.

incline the other way. "The convention might with propriety," it is said, "have meditated the punishment of the executive for a deviation from the instructions of the senate, or a want of integrity in the conduct of the negotiations committed to him. They might also have had in view the punishment of a few leading individuals in the senate, who should have prostituted their influence in that body, as the mercenary instruments of foreign corruption. But they could not with more, or with equal propriety, have contemplated the impeachment and punishment of two-thirds of the senate, consenting to an improper treaty, than of a majority of that, or of the other branch of the legislature, consenting to a pernicious or unconstitutional law; a principle, which I believe has never been admitted into any government," &c. "And yet, what reason is there, that a majority of the house of representatives, sacrificing the interests of the society by an unjust and tyrannical act of legislation, should escape with impunity, more than two-thirds of the senate sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases, it is essential to the freedom, and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the

society must depend on the care, which is taken, to confide the trust to proper hands; to make it their interest to execute it with fidelity; and to make it as difficult, as possible, for them to combine in any interest, opposite to that of the public good."1 And it is certain, that in some of the state conventions the members of congress were admitted by the friends of

1 The Federalist, No. 66.

the constitution, not to be objects of the impeaching power.1

§ 793. It may be admitted, that a breach of duty is as reprehensible in a legislator, as in an executive, or judicial officer; but it does not follow, that the same remedy should be applied in each case; or that a remedy applicable to the one may not be unfit, or inconvenient in the other. Senators and representatives are at short periods made responsible to the people, and may be rejected by them. And for personal offences, not purely political, they are responsible to the common tribunals of justice, and the laws of the land. If a member of congress were liable to be impeached for conduct in his legislative capacity, at the will of a majority, it might furnish many pretexts for an irritated and predominant faction to destroy the character, and intercept the influence of the wisest and most exalted patriots, who were resisting their oppressions, or developing their profligacy. It is, therefore, with great reason urged, that a legislator should be above all fear and influence of this sort in his public conduct. The impeachment of a legislator, for his official acts, has hitherto been unacknowledged, as matter of right, in the annals of England and America. A silence of this sort is conclusive, as to the state of public opinion in relation to the impolicy and danger of conferring the power.2

§ 794. The next inquiry is, what are impeachable offences? They are "treason, bribery, or other high crimes and misdemeanours." For the definition of treason,

1 3 Elliot's Debates, 43, 44, 45, 46, 56, 57.

2 The arguments of counsel, for and against a senator's being an impeachable officer, will be found at large, in the printed trial of William Blount, on his impeachment. (Philad. 1799.)

resort may be had to the constitution itself; but for the definition of bribery, resort is naturally and necessarily had to the common law; for that, as the common basis of our jurisprudence, can alone furnish the proper exposition of the nature and limits of this offence. The only practical question is, what are to be deemed high crimes and misdemeanours? Now, neither the constitution, nor any statute of the United States has in any manner defined any crimes, except treason and bribery, to be high crimes and misdemeanours, and as such impeachable. In what manner, then, are they to be ascertained? Is the silence of the statute book to be deemed conclusive in favour of the party, until congress have made a legislative declaration and enumeration of the offences, which shall be deemed high crimes and misdemeanours? If so, then, as has been truly remarked,1 the power of impeachment, except as to the two expressed cases, is a complete nullity; and the party is wholly dispunishable, however enormous may be his corruption or criminality.2 It will not be sufficient to say, that in the cases, where any offence is punished by any statute of the United States, it may, and ought to be, deemed an impeachable offence. It is not every

1 1 Rawle on the Constitution, ch. p. 273.

2 Upon the trial of Mr. Justice Chase, in 1805, it was contended in his answer and defence, that no civil officer was impeachable, but "for treason, bribery, corruption, or some high crime or misdemeanour, consisting in some act done or omitted, in violation of law, forbidding or commanding it." "Hence it clearly results, that in civil officer of the United States can be impeached, except for some offence, for which he may be indicted at law; and that no evidence can be received on an impeachment, except such, as, on an indictment at law for the same offence, would be admissible."* The same doctrine was insisted on by his counsel.#

*** 1 Chase's Trial, p. 47, 48.**

 # 2 Chase's Trial, p. 9 to 18; 4 Elliot's Debates, 262.

offence, that by the constitution is so impeachable. It must not only be an offence, but a high crime and misdemeanour. Besides; there are many most flagrant offences, which, by the statutes of the United States, are punishable only, when committed in special places, and within peculiar jurisdictions, as, for instance, on the high seas, or in forts, navy yards, and arsenals ceded to the United States. Suppose the offence is committed in some other, than these privileged places, or under circumstances not reached by any statute of the United States, would it be impeachable?

§ 795. Again; there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it. What, for instance, could positive legislation do in cases of impeachment like the charges against Warren Hastings, in 1788? Resort, then, must be had either to parliamentary practice, and the common law, in order to ascertain, what are high crimes and misdemeanours; or the whole subject must be left to the arbitrary discretion of the senate, for the time being. The latter is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time, or in one person, which would be deemed innocent at another time, or in another person. The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties

And however much it may fall in with the political theories of certain statesmen and jurists, to deny the existence of a common law belonging to, and applicable to the nation in ordinary cases, no one has as yet been bold enough to assert, that the power of impeachment is limited to offences positively defined in the statute book of the Union, as impeachable high crimes and misdemeanours.

§ 796. The doctrine, indeed, would be truly alarming, that the common law did not regulate, interpret, and control the powers and duties of the court of impeachment. What, otherwise, would become of the rules of evidence, the legal notions of crimes, and the applicationof principles of public or municipal jurisprudence to the charges against the accused? It would be a most extraordinary anomaly, that while every citizen of every state, originally composing the Union, would be entitled to the common law, as his birth-right, and at once his protector and guide; as a citizen of the Union, or an officer of the Union, he would be subjected to no law, to no principles, to no rules of evidence. It is the boast of English jurisprudence, and without it the power of impeachment would be an intolerable grievance, that in trials by impeachment the law differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevail. For impeachments are not framed to alter the law; but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of the alleged crimes.1 Those, who

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1 2 Woodeson, Lect. 40, p. 611, 612; 4 Black. Comm. 261, Christian's note, (2.)

believe, that the common law, so far as it is applicable, constitutes a part of the law of the United States in their sovereign character, as a nation, not as a source of jurisdiction, but as a guide, and check, and expositor in the administration of the rights, duties, and jurisdiction conferred by the constitution and laws, will find no difficulty in affirming the same doctrines to be applicable to the senate, as a court of impeachments. Those, who denounce the common law, as having any application or existence in regard to the national government, must be necessarily driven to maintain, that the power of impeachment is, until congress shall legislate, a mere nullity, or that it is despotic, both in its reach, and in its proceedings.1 It is remarkable, that the first congress, assembled in October, 1774, in their famous declaration of the rights of the colonies, asserted, "that the respective colonies are entitled to the common law of England;" and "that they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several local and other circumstances."2 It would be singular enough, if, in framing a national government, that common law, so justly dear to the colonies, as their guide and protection, should cease to have any exist-

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1 It is not my design in this place to enter upon the discussion of the much controverted question, whether the common law constitutes a part of the national jurisprudence, on contradistinction to that of the states. The learned reader will find the subject amply discussed in the works, to which he has been already referred, viz. 1 Tuck. Black. Comm. App. Note E. p. 378, &c.; in the Report of the Virginia Legislature of 1799, 1800; in Rawle on the Constit. ch. 30, p. 258, &c., and in Duponceau on Jurisdiction, and the authorities there cited. 1 Kent. Comm. Lect. 16, p. 311 et esq.; North American Review, July, 1825; Mr. Bayard's Speech, Debate on the Judiciary in 1802, p. 372.

2 1 Journal of Congress, Oct. 1774, p. 29.

ence, as applicable to the powers, rights, and privileges of the people, or the obligations, and duties, and powers of the departments of the national government. If the common law has no existence, as to the Union, as a rule or guide,

the whole proceedings are completely at the arbitrary pleasure of the government, and its functionaries in all its departments.

§ 797. Congress have unhesitatingly adopted the conclusion, that no previous statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment, which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanours.1 It seems, then, to be the settled doctrine of the high court of impeachment, that though the common law cannot be a foundation of a jurisdiction not given by the constitution, or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that, what are, and what are not high crimes and misdemeanours, is to be ascertained by a recurrence to that great basis of American jurisprudence.2 The reasoning, by which the

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1 It may be supposed, that the first charge in the articles of impeachment against William Blount was a statutable offence; but on an accurate examination of the act of congress, of 1794, it will be found not to have been so.

2 See Jefferson's Manual, §53, title, Impeachment; Blount's Trial on Impeachment, p. 29 to 31; Id. 75 to 80, (Philadelphia, 1799.) But see Id. p. 42 to 46. -- In another clause of the constitution power is given to the president to grant reprieves and pardons for offences against the United States, except in cases of impeachment; thus showing, that impeachable offences are deemed offences against the United Sates. If the senate may then declare, what are offences against the United

power of the house of representatives to punish for contempts, (which are breaches of privileges, and offences not defined by any positive laws,) has been upheld by the Supreme Court, stands upon similar grounds; for if the house had no jurisdiction to punish for contempts, until the acts had been previously defined, and ascertained by positive law, it is clear, that the process of arrest would be illegal.1

§ 798. In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office; but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power.2 So, where a lord chancellor has been thought to have put the great seal to an ignominious treaty; a lord admiral to have neglected the safe-guard of the sea; an ambassador to have betrayed his trust; a privy counsellor to have propounded, or supported pernicious and dishonourable measures; or a confidential adviser of his sovereign to have obtained exorbitant grants, or incompatible employments; -- these have been all deemed impeachable

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States by recurrence to the common law, why may not the courts of the United States, under the express delegation of jurisdiction over "all crimes and offences cognizable under the authority of the United States," by the act of 1789, ch. 20, §11, act in the same manner? 1 Dunn v. Anderson, 6 Wheat. R. 204; Rawle on Constit. ch. 29, p. 271, 272.

2 2 Woodeson, Lect. 40, p. 602; Com. Dig. title Parliament, L. 28 to 40.

offences.1 Some of the offences, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favouritism, and court intrigue. Thus, persons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the advice of parliament; purchasing offices; giving medicine to the king without advice of physicians; preventing other persons from giving counsel to the king, except in their presence; and procuring exorbitant personal grants from the king.2 But others, again, were founded in the most salutary public justice; such as impeachments for malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad.3 One cannot but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offences; and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding, and reforming, and scrutinizing the polity of the state,4 and of sufficient dignity to maintain the independence and reputation of worthy public officers.

§ 799. Another inquiry, growing out of this subject, is, whether, under the constitution, any acts are impeachable, except such, as are committed under colour of office; and whether the party can be impeached

1 2 Woodeson, Lect. 40, p. 602; Com. Dig. Parliament, L. 28 to 40.

2 Com. Dig. Parliament, L. 28 to 40.

3 Com. Dig. Parliament, L. 28 to 40.

4 2 Woodeson, Lect. 40, p. 602.

therefor, after he has ceased to hold office. A learned commentator seems to have taken it for granted, that the liability to impeachment extends to all, who have been, as well as to all, who are in public office.1 Upon the other point his language is as follows: "The legitimate causes of impeachment have been already briefly noticed. They can have reference only to public character, and official duty. The words of the text are, 'treason, bribery, and other high crimes and misdemeanours.' The treason contemplated must be against the United States. In general, those offences, which may be committed equally by a private person, as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offences not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding; and neither house can regularly inquire into them, except for the purpose of expelling a member."2

§ 800. It does not appear, that either of these points has been judicially settled by the court having, properly, cognizance of them. In the case of William Blount, the plea of the defendant expressly put both of them, as exceptions to the jurisdiction, alleging, that, at the time of the impeachment, he, Blount, was not a senator, (though he was at the time of the charges laid against him,) and that he was not charged by the articles of impeachment with having committed any crime, or misdemeanour, in the execution of any civil office held under the United States; nor with any malconduct in a civil office, or abuse of any public trust in the

2 Rawle on the Constitution, ch. 22, p. 215.

execution thereof.1 The decision, however, turned upon another point, viz., that a senator was not an impeachable officer.2

§ 801. As it is declared in one clause of the constitution, that "judgment, in cases of impeachment, shall not extend further, than a removal from office, and disqualification to hold any office of honour, trust, or profit, under the United States;" and in another clause, that "the president, vice president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or misdemeanours;" it would seem to follow, that the senate, on the conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification.3 If, then, there must be a judgment of removal from office, it would seem to follow, that the constitution contemplated, that the party was still in office at the time of the impeachment. If he was not, his offence was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most important object, for which the remedy was given, was no longer necessary, or attainable. And although a judgment of disqualification might still be pronounced, the language of the constitution

1 See Senate Journal, 14th Jan. 1799; 4 Tucker's Black. Comm. App. 57, 58.

2 Sergeant on Const. Law, ch. 29, p. 363.

3 Upon the impeachment and conviction of John Pickering (12th of March, 1804,) the only punishment awarded by the senate was a removal from office. See also Blount's Trial, 64 to 66; Id. 79, 82, 83, (Philad. 1799; Sergeant on Const. Law, ch. 29, p. 364.

may create some doubt, whether it can be pronounced without being coupled with a removal from office.1 There is also much force in the remark, that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity.2

§ 802. The other point is one of more difficulty. In the argument upon Blount's impeachment, it was pressed with great earnestness, that there is not a syllable in the constitution, which confines impeachments to official acts, and it is against the plainest dictates of common sense, that such restraint should be imposed upon it. Suppose a judge should countenance, or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act; and yet it ought certainly to be impeachable. He may be called upon to try the very persons, whom he has aided.3 Suppose a judge or other officer to receive a bribe not connected with his judicial office; could he be

entitled to any public confidence? Would not these reasons for his removal be just as strong, as if it were a case of an official bribe? The argument on the other side was, that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied, that it must be limited to malconduct in office.4

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1 See Blount's Trial, 47, 48; Id. 64 to 68, (Philad. 1799;) Id. 82.

2 Mr. Bayard. Blount's Trial, 28, (Philad. 1799.) See Id. 80, 81.

3 Blount's Trial 39, 40, (Phila. 1799;) Id. 80.

4 Blount's Trial, 46 to 49; Id. 62, 64 to 68, (Philadelphia, 1799.) -- William Blount was expelled from the senate a few day before this impeachment, (being then a member,) and on that occasion he was, by a resolution of the senate,* declared to be "guilty of a high misde-

*** Yeas, 25; Nay, 1.**

§ 803. It is not intended to express any opinion in these commentaries, as to which is the true exposition of the constitution on the points above stated. They are brought before the learned reader, as matters still sub judice, the final decision of which may be reason ably left to the high tribunal, constituting the court of impeachment, when the occasion shall arise;

§ 804. This subject may be concluded by a summary statement of the mode of proceeding in the institution and trial of impeachments, as it is of rare occurrence, and not governed by the formalities of the ordinary prosecutions in courts at law.

§ 805. When, then, an officer is known or suspected to be guilty of malversation in office, some member of the house of representatives usually brings forward a resolution to accuse the party, or for the appointment of a committee, to consider and report upon the charges laid against him. The latter is the ordinary course; and the report of the committee usually contains, if adverse to the party, a statement of the charges, and recommends a resolution, that he be impeached) therefor. If the resolution is adopted by the house, a committee is then appointed to impeach the party at the bar of the senate, and to state, that the articles against him will be exhibited in due time, and made good before the senate; and to demand, that the senate take order for the appearance of the party to answer to the impeach-

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meanor entirely inconsistent with his public trust and duty, as a Senator. The offence charged was not defined by any statute of the United States. It was for a attempt to seduce an United States' Indian interpreter from his duty, and to alienate the affections and confidence of the Indians from the public officers residing among them, &c. Journ. of Senate, 8th July. 1797; Sergeant on Const. Law, ch. 28, p. 286, 287.

1 Com. Dig. Parliament, L. 20; 2 Woodeson, Lect. 40, p. 603, 604; Jefferson's Manual, sect. 53.

ment.1 This being accordingly done, the senate signify their willingness to take such order; and articles are then prepared by a committee, under the direction of the house of representatives, which, when reported to, and approved by the house, are then presented in the like manner to the senate; and a committee of managers are appointed to conduct the impeachment.2 As soon as the articles are thus presented, the senate issue a process, summoning the party to appear at a given day before them, to answer the articles.3 The process is served by the sergeant-at-arms of the senate, and due return is made thereof under oath.

§ 806. The articles thus exhibited need not, and indeed do not, pursue the strict form and accuracy of an indictment.4 They are sometimes quite general in the form of the allegations; but always contain, or ought to contain, so much certainty, as to enable the party to put himself upon the proper defence, and also, in case of an acquittal, to avail himself of it, as a bar to another impeachment. Additional articles may be exhibited, perhaps, at any stage of the prosecution.5

§ 807. When the return day of the process for appearance has arrived, the senate resolve themselves into a court of impeachment, and the senators are at that time, or before, solemnly sworn, or affirmed, to do impartial justice upon the impeachment, according to the constitution and laws of the United States. The

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1 Com. Dig. Parliament, L. 20; 2 Woodeson, Lect. 40, p. 603, 604; Jefferson's Manual sect. 53.

2 Com. Dig. Parliament, L. 21; Jefferson's Manual sect. 53.

3 Com. Dig. Parliament, L. 14, 18, 19, 20; Jefferson's Manual, sect. 53.

4 2 Woodeson, Lect. 40, p. 605, 606; Com. Dig. Parliament, L. 21; Foster on Crown Law, 389, 390.

5 Rawle on Const. ch. 22, p. 216.

person impeached is then called to appear and answer the articles. If he does not appear in person, or by attorney, his default is recorded, and the senate may proceed ex parte to the trial of the impeachment. If he does appear in person, or by attorney, his appearance is recorded. Counsel for the parties are admitted to appear, and to be heard upon an impeachment.1

§ 808. When the party appears, he is entitled to be furnished with a copy of the articles of impeachment, and time is allowed him to prepare his answer thereto. The answer, like the articles, is exempted from the necessity of observing great strictness of form. The party may plead, that he is not guilty, as to part, and make a further defence, as to the residue; or he may, in a few words, saving all exceptions, deny the whole charge or charges;2 or he may plead specially, in justification or excuse of the supposed offences, all the circumstance attendant upon the case. And he is also indulged with the liberty of offering argumentative reasons, as well as facts, against the charges in support, and as part, of his answer, to repel them. It is usual to give a full and particular answer separately to each article of the accusation.3

§ 809. When the answer is prepared and given in, the next regular proceeding is, for the house of representatives to file a replication to the answer in writing, in substance denying the truth and validity of the defence stated in the answer, and averring the truth and sufficiency of the charges, and the readiness of the house to prove them at such convenient time and place,

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1 Jefferson's Manual, sect. 53.

2 Woodeson, Lect. 40, p. 606, 607; Com. Dig. Parliament, L. 23.

3 Woodeson, Lect. 40, p. 607; Jefferson's Manual sect. 53.

as shall be appointed for that purpose by the senate.1 A time is then assigned for the trial; and the senate, at that period or before, adjust the preliminaries and other proceedings proper to be had, before and at the trial, by fixed regulations; which are made known to the house of representatives, and to the party accused.2 On the day appointed for the trial, the house of representatives appear at the bar of the senate, either in a body, or by the managers selected for that purpose, to proceed with the trial.3 Process to compel the attendance of witnesses is previously issued at the request of either party, by order of the senate; and at the time and place appointed, they are bound to appear and give testimony. On the day of trial, the parties being ready, the managers to conduct the prosecution open it on behalf of the house of representatives, one or more of them delivering an explanatory speech, either of the whole charges, or of one or more of them. The proceedings are then conducted substantially, as they are upon common judicial trials, as to the admission or rejection of testimony, the examination and cross-examination of witnesses, the rules of evidence, and the legal doctrines, as to crimes and misdemeanours.4 When the whole evidence has been gone through, and the parties on each side have been fully heard, the senate then proceed to the consideration of the case. If any debates arise, they are conducted in secret; if none arise, or after they are ended, a day is assigned for a final public decision by yeas and nays upon each separate charge in the articles of impeachment. When the court is assembled for this purpose, the question is

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1 See 2 Woodeson, Lect. 40, p. 607; Com. Dig. Parliament, L. 24.

2 See 2 Woodeson, Lect. 40, p. 610.

3 Jefferson's Manual, sect. 53.

4 2 Woodeson, Lect. 611; Jefferson's Manual, sect. 53.

propounded to each member of the senate by name, by the president of the senate, in the following manner, upon each article, the same being first read by the secretary of the senate. "Mr. -- , how say you, is the respondent guilty, or not guilty of a high crime and misdemeanour, as charged in the article of impeachment?" Whereupon the member rises in his place, and answers guilty, or not guilty, as his opinion is. If upon no one article two thirds of the senate decide, that the party is guilty, he is then entitled to an acquittal, and is declared accordingly to be acquitted by the president of the senate. If he is convicted of all, or any of the articles, the senate then proceed to fix, and declare the proper punishment.1 The pardoning power of the president does not, as will be presently seen, extend to judgments upon impeachment; and hence, when once pronounced, they become absolute and irreversible.2

§ 810. Having thus gone through the whole subject of impeachments, it only remains to observe, that a close survey of the system, unless we are egregiously deceived, will completely demonstrate the wisdom of the arrangements made in every part of it. The jurisdiction to impeach is placed, where it should be, in the possession and power of

the immediate representatives of the people. The trial is before a body of great dignity, and ability, and independence, possessing the requisite knowledge and firmness to act with vigour,

1 This summary, when no other authority is cited, has been drawn up from the practice, in the cases of impeachment already tried by the senate of the United States, viz. of William Blount, in 1798; of John Pickering, in 1804; of Samuel Chase, in 1804; and of Janes H. Peck, in 1831. See the Senate Journals of those Trials. See also Jefferson's Manual, Sect. 202.

2 Art. 2, clause, 1.

and to decide with impartiality upon the charges. The persons subjected to the trial are officers of the national government; and the offences are such, as may affect the rights, duties, and relations of the party accused to the public in his political or official character, either directly or remotely. The general rules of law and evidence, applicable to common trials, are interposed, to protect the party against the exercise of wanton oppression, and arbitrary power. And the final judgment is confined to a removal from, and disqualification for, office; thus limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries. In other respects the offence is left to be disposed of by the common tribunals of justice, according to the laws of the land, upon an indictment found by a grand jury, and a trial by a jury of peers, before whom the party is to stand for his final deliverance, like his fellow citizens.

§ 811. In respect to the impeachment of the president, and vice president, it may be remarked, that they are, upon motives of high state policy, made liable to impeachment, while they yet remain in office. In England the constitutional maxim is, that the king can do no wrong. His ministers and advisers may be impeached and punished; but he is, by his prerogative, placed above all personal amenability to the laws for his acts.1 In some of the state constitutions, no explicit provision is made for the impeachment of the chief magistrate; and in Delaware and Virginia, he was not (under their old constitutions) impeachable, until he was out of office.2 So that no immediate remedy in

1 1 Black. Comm. 246, 247.

2 The Federalist, No. 39.

those states was provided for gross malversations and corruptions in office; and the only redress lay in the elective power, followed up by prosecutions after the party had ceased to hold his office. Yet cases may be imagined, where a momentary delusion might induce a majority of the people to re-elect a corrupt chief magistrate; and thus the remedy would be at once distant and uncertain. The provision in the constitution of the United States, on the other hand, holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the laws.

§ 812. THE first clause of the fourth section of the first article is as follows: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof. But the congress may, at any time, by law, make or alter such regulations except as to the place of choosing senators."

§ 813. This clause does not appear to have attached much attention, or to have encountered much opposition in the convention, at least so far as can be gathered from the journal of that body.1 But it was afterwards assailed by the opponents of the constitution, both in and out of the state conventions, with uncommon zeal and virulence. The objection was not to that part of the clause, which vests in the state legislatures the power of prescribing the times, places, and manner of holding elections; for, so far, it was a surrender of power to the state governments. But it was, to the superintending power of congress to make, or alter such regulations. It was said, that such a superintending power would be dangerous to the liberties of the people, and to a just exercise of their privileges in elections. Congress might prescribe the times of election so unreasonably, as to prevent the attendance of the electors; or the place at so inconvenient a distance from the body of the electors, as to prevent a due exercise of the right of choice. And congress might contrive the manner of holding elections, so as to exclude all but their own

1 Journal of Congress 218, 240; Id. 354, 374.

favourites from office. They might modify the right of election, as they please; they might regulate the number of votes by the quantity of properly, without involving any repugnancy to the constitution.1 These, and other suggestions of a similar nature, calculated to spread terror and alarm among the people, were dwelt on with peculiar emphasis.

§ 814. In answer to all such reasoning, it was urged, that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain in itself the means of its own preservation.2 If, in the constitution, there were some departures from this principle, (as it might be admitted there were,) they were matters of regret, and dictated by a controlling moral or political necessity; and they ought not to be extended. It was obviously impracticable to frame, and insert in the constitution an election law, which would be applicable to all possible changes in the situation of the country, and convenient for all the states. A discretionary power over elections must be vested somewhere. There seemed but three ways, in which it could be reasonably organized. It might be lodged either wholly in the national legislature; or wholly in the state legislatures; or primarily in the latter, and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted, in the first instance, to the local governments, which, in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily

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1 1 Elliot's Debates, 43 to 50; Id. 53 to 68; 2 Elliot's Debates, 38, 39, 72, 149, 150; 3 Elliot's Debates, 57 to 74; 2 American Museum, 438; Id. 435; Id. 545; 3 American Museum, 432; 2 Elliot's Debates, 277.

2 The Federalist, No. 59; 2 Elliot's Debates, 276, 277.

be by them exercised. But, in extraordinary circumstances, the power is reserved to the national government; so that it may not be abused, and thus hazard the safety and permanence of the Union.1 Nor let it be thought, that such an occurrence is wholly imaginary. It is a known fact, that, under the confederation, Rhode-Island, at a very critical period, withdrew her delegates from congress; and thus prevented some important measures from being carried.2

§ 815. Nothing can be more evident, than that an exclusive power in the state legislatures to regulate elections for the national government would leave the existence of the Union entirely at their mercy. They could, at any time, annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is no sufficient answer, that such an abuse of power is not probable. Its possibility is, in a constitutional view, decisive against taking such a risk; and there is no reason for taking it. The constitution ought to be safe against fears of this sort; and against temptations to undertake such a project. It is true, that the state legislatures may, by refusing to choose senators, interrupt the operations of the national government, and thus involve the country in general ruin. But, because, with a view to the establishment of the constitution, this risk was necessarily taken, when the appointment of senators was vested in the state legislatures; still it did not follow, that a power so dangerous ought to be conceded in cases, where the same necessity did not exist. On the contrary, it became the duty of the convention, on this very account, not to multiply the chances of mischievous attempts of this sort. The risk, too, would be

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1 The Federalist, No. 59; 2 Elliot's Debates, 38, 39; Id. 276, 277.

2 1 Elliot's Debates, 41, 45; The Federalist, No. 22.

much greater in regard to an exclusive power over the elections of representatives, than over the appointment of senators. The latter are chosen for six years; the representatives for two years. There is a gradual rotation of office in the senate, every two years, of one third of the body; and a quorum is to consist of a mere majority. The result of these circumstances would naturally be, that a combination of a few states, for a short period, to intermit the appointment of senators would not interrupt the operations or annihilate the existence of that body. And it is not against permanent, but against temporary combinations of the states, that there is any necessity to provide. A temporary combination might proceed altogether from the sinister designs and intrigues of a few leading members of the state legislatures. A permanent combination could only arise from the deep-rooted disaffection of a great majority of the people; and, under such circumstances, the existence of such a national government would neither be desirable, nor practicable.1 The very shortness of the period of the elections of the house of representatives might, on the other hand, furnish means and motives to temporary combinations to destroy the national government; and every returning election might produce a delicate crisis in our national affairs, subversive of the public tranquillity, and encouraging to every sort of faction.2

§ 816. There is a great distinction between the objects and interests of the people, and the political objects and interests of their rulers. The people may be warmly attached to the Union, and its powers, and its operations; while their representatives, stimulated by the natural rivalship of power, and the hopes of personal

1 The Federalist, No. 59.
2 Id.

aggrandizement, may be in a very opposite temper, and artfully using all their influence to cripple, or destroy the national government.1 Their motives and objects may not, at first, be clearly discerned; but time and reflection will enable the people to understand their own true interests, and to guard themselves against insidious factions. Besides; there will be occasions, in which the people will be excited to undue resentments against the national government. With so effectual a weapon in their hands, as the exclusive power of regulating elections for the national government, the combination of a few men in some of the large states might, by seizing the opportunity of some casual disaffection among the people, accomplish the destruction of the Union. And it ought not to be overlooked, that as a solid government will make us more and more an object of jealousy to the nations of Europe, so there will be a perpetual temptation, on their part, to generate intrigues of this sort for the purpose of subverting It.2

§ 817. There is, too, in the nature of such a provision, something incongruous, if not absurd What would be said of a clause introduced into the national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments.3 It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of

1 The Federalist, No. 59; 1 Elliot's Debates, 43 to 55; Id. 67, 68; 3 Elliot's Debates, 65.
2 The Federalist, No. 59.
3 Id.

the pleasure of the national government. Why does not the same reasoning apply to the national government? What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?

§ 818. If, then, there is no peculiar fitness in delegating such a power to the state legislatures; if it might be hazardous and inconvenient; let us see, whether there are any solid dangers from confiding the superintending and ultimate power over elections to the national government. There is no pretence to say, that the power in the national government can be used, so as to exclude any state from its share in the representation in congress. Nor can it be said, with correctness, that congress can, in any way, alter the rights, or qualifications of voters. The most, that can be urged, with any show of argument, is, that the power might, in a given case, be employed in such a manner, as to promote the election of some favourite candidate, or favourite class of men, in exclusion of others, by confining the places of election to particular districts, and rendering it impracticable for the citizens at large to partake in the choice. The whole argument proceeds upon a supposition the most chimerical. There are no rational calculations, on which it can rest, and every probability is against it. Who are to pass the laws for regulating elections? The congress of the United States, composed of a senate chosen by the state legislatures, and of representatives chosen by the people of the states. Can it be imagined, that these persons will combine to defraud their constituents of their rights, or to overthrow the state authorities, or the state influence? The very attempt would rouse universal indignation, and produce an immediate revolt among the great mass of the peo-

ple, headed and directed by the state governments.1 And what motive could there be, in congress, to produce such results? The very dissimilarity in the ingredients, composing the national government, forbid even the supposition of any effectual. combination for such a purpose. The interests, the habits, the institutions, the local employments, the state of property, the genius, and the manners, of the people of the different states, are so various, and even opposite, that it would be impossible to bring a majority of either house to agree upon any plan of elections, which should favour any particular man, or class of men, in any state. In some states, commerce is, or may be, the predominant interest; in others, manufactures; in others, agriculture. Physical, as well as moral causes will necessarily nourish, in different states, different inclinations and propensities on all subjects of this sort. If there is any class, which is likely to have a predominant influence, it must be either the commercial, or the landed class. If either of these could acquire such an influence, it is infinitely more probable, that it would be acquired in the state, than in the national, councils.2 In the latter, there will be such a mixture of all interests, that it will be impracticable to adopt any rule for all the states, giving any preference to classes or interests, founded upon sectional or personal considerations. What might suit a few states well, would find a general resistance from all the other states.

§ 819. If it is said, that the elections might be so managed, as to give a predominant influence to the wealthy, and the well-born, (as they are insidiously called,) the supposition is not less visionary. What possible mode is there to accomplish such a purpose?

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1 The Federalist, No. 60.

2 Id.

The wealthy and the well-born are not confined to any particular spots in any state; nor are their interests permanently fixed any where. Their property may consist of stock, or other personal property, as well as of land; of manufactories on great streams, or on narrow rivulets, or in sequestered dells. Their wealth may consist of large plantations in the bosom of the country, or farms on the borders of the ocean. How vain must it be, to legislate upon the regulation of elections with reference to circumstances so infinitely varied, and so infinitely variable. The very suggestion is preposterous. No possible method of regulating the time, mode, or place of elections, could give to the rich, or elevated, a general, orpermanent advantage in the elections. The only practical mode of accomplishing it, (that of a property qualification of voters, or candidates,) is excluded in the scheme of the national government.1 And if it were possible, that such a design could be accomplished to the injury of the people at a single election, it is certain, that the unpopularity of the measure would immediately drive the members from office, who aided in it; and they would be succeeded by others, who would more justly represent the public will and the public interests. A cunning, so shallow, would be easily detected; and would be as contemptible from its folly, as it would be difficult in its operations.

§ 820. Other considerations are entitled to great weight. The constitution gives to the state legislatures the power to regulate the time, place, and manner of holding elections; and this will be so desirable a boon in their possession, on account of their ability to adapt the regulation, from time to time, to the peculiar local, or political convenience of the states, that its represen-

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1 The Federalist, No. 60.

tatives in congress will not be brought to assent to any general system by congress, unless from an extreme necessity, or a very urgent exigency. Indeed, the danger rather is, that when such necessity or exigency actually arises, the measure will be postponed, and perhaps defeated, by the unpopularity of the exercise of the power. All the states will, under common circumstances, have a local interest, and local pride, in preventing any interference by congress; and it is incredible, that this influence should not be felt, as well in the senate, as in the house. It is not too much, therefore, to presume, that it will not be resorted to by congress, until there has been some extraordinary abuse, or danger in leaving it to the discretion of the states respectively. And it is no small recommendation of this supervising power, that it will naturally operate, as a check upon undue state legislation; since the latter might precipitate the very evil, which the popular opinion would be most solicitous to avoid. A preventive of this sort, addressed a priori to state jealousy, and state interest, would become a most salutary remedy, not from its actual application, but from its moral influence.

§ 821. It was said, that the constitution might have provided, that the elections should be in counties. This was true; but it would, as a general rule, afford very little relief against a possible abuse; for counties differ greatly in size, in roads, and in accommodations for elections; and the argument, from possible abuse, is just as strong, even after such a provision should be made, as before. If an elector were compellable to go thirty, or fifty miles, it would discourage his vote, as much, as if it were one hundred, or five hundred miles.1

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1 The Federalist, No. 61. -- The full force of this reasoning will not be perceived, without adverting to the fact, that though in New-England

The truth is, that congress could never resort to a measure of this sort for purposes of oppression, or party triumph, until that body had ceased to represent the will of the states and the people; and if, under such circumstances, the members could still hold office, it would be, because a general and irremediable corruption, or indifference pervaded the whole community. No republican constitution could pretend to afford any remedy for such a state of things.1

§ 822. But why did not a similar objection occur against the state constitutions? The subject of elections, the time, place, and manner of holding them, is in many cases left entirely to legislative discretion. In New-York, the senators are chosen from four districts of great territorial extent, each comprehending several counties; and it is not defined,

where the elections shall be had. Suppose the legislature should compel all the electors to come to one spot in the district, as, for instance, to Albany, the evil would be great; but the measure would not be unconstitutional.2 Yet no one practically entertains the slightest dread of such legislation. In truth, all reasoning from such extreme possible cases is ill adapted to convince the judgment, though it may alarm our prejudices. Such a legislative discretion is not deemed an infirmity in the delegation of constitutional power. It is deemed safe, because it can never be used oppressively for any length of time,

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the voters generally give their votes in the townships, where they reside. In the southern and western states, there are few towns, and the elections are held in the counties, where the population is sparse, and spread over large plantation districts.*

1 2 Elliot's Debates, 38, 39.

2 The Federalist, No. 61.

*** 1 Elliot's Debates, 68.**

unless the people themselves choose to aid in their own degradation.

§ 823. The objections, then, to the provision are not sound, or tenable. The reasons in its favour are, on the other hand, of great force and importance. In the first place, the power may be applied by congress to correct any negligence in a state in regard to elections, as well as to prevent a dissolution of the government by designing and refractory states, urged on by some temporary excitements. In the next place, it will operate as a check in favour of the people against any designs of a federal senate, and their constituents, to deprive the people of the state of their right to choose representatives. In the next place, it provides a remedy for the evil, if any state, by reason of invasion, or other cause, cannot have it in its power to appoint a place, where the citizens can safely meet to choose representatives.1 In the last place, (as the plan is but an experiment,) it may hereafter become important, with a view to the regular operations of the general government, that there should be a uniformity in the time and manner of electing representatives and senators, so as to prevent vacancies, when there may be calls for extraordinary sessions of congress. If such a time should occur, or such a uniformity be hereafter desirable, congress is the only body possessing the means to produce it.2

§ 824. Such were the objections, and such was the reasoning, by which they were met, at the time of the adoption of the constitution. A period of forty years has since passed by, without any attempt by congress

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1 See 1 Elliot's Debates, 44, 47, 48, 49; Id. 55; Id. 67.

2 The Federalist, No. 61; 2 Elliot's Debates, 38, 39.

to make any regulations, or interfere in the slightest degree with the elections of members of congress. If, therefore, experience can demonstrate any thing, it is the entire safety of the power in congress, which it is scarcely possible (reasoning from the past) should be exerted, unless upon very urgent occasions. The states now regulate the time, the place, and the manner of elections, in a practical sense, exclusively. The manner is very various; and perhaps the power has been exerted, in some instances, under the influence of local or party feelings, to an extent, which is indefensible in principle and policy. There is no uniformity in the choice, or in the mode of election. In some states the representatives are chosen by a general ticket for the whole state; in others they are chosen singly in districts; in others they are chosen in districts composed of a population sufficient to elect two or three representatives; and in others the districts are sometimes single, and sometimes united in the choice. In some states the; candidate must have a majority of all the votes to entitle him to be deemed elected; in others (as it is in England) it is sufficient, if he has a plurality of votes. In some of the states the choice is by the voters viva voce, (as it is in England;) in others it is by ballot.1 The times of the elections are quite as various; sometimes before, and sometimes after the regular period, at which the office becomes vacant. That this want of uniformity, as to the time and mode of election, has been productive of some inconveniences to the public service, cannot be doubted; for it has sometimes occurred, that at an extra session a whole state has been deprived of its vote; and at the regular ses-

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1 1 Tucker's Black. Comm. App. 192.

sions some districts have failed of being represented upon questions vital to their interests. Still, so strong, has been the sense of congress of the importance of leaving these matters to state regulation, that no effort has been hitherto made to cure these evils; and public opinion has almost irresistibly settled down in favour of the existing system.1

§ 825. Several of the states, at the time of adopting the constitution, proposed amendments on this subject; but none were ever subsequently proposed by congress to the people; so that the public mind ultimately acquiesced in the reasonableness of the existing provision. It is remarkable, however, that none of the amendments proposed in the state conventions purported to take away entirely the superintending power of congress; but only restricted it to cases, where a state neglected, refused, or was disabled to exercise the power of regulating elections.2

§ 826. It remains only to notice an exception to the power of congress in this clause. It is, that congress cannot alter, or make regulations, "as to the place of choosing senators." This exception is highly reasonable. The choice is to be made by the state legislature; and it would not be either necessary, or becoming in congress to prescribe the place, where it should sit. This exception was not in the revised draft of the constitution; and was adopted almost at the close of the convention; not, however, without some opposition, for nine states were in its favour, one against it, and one was divided.3

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1 Tucker's Black. Comm. App. 191, 192.

2 See Journal of Convention, Supplement, p. 402, 411, 418, 425, 433, 447, 454.

3 Journal of Convention, 351, 374.

§ 827. The second clause of the fourth section of the first article is as follows "The congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day." This clause, for the first time, made its appearance in the revised draft of the constitution near the close of the convention; and was silently adopted, and, so far as can be perceived, without opposition. Annual parliaments had been long a favourite opinion and practice with the people of England; and in America, under the colonial governments, they were justly deemed a great security to public liberty. The present provision could hardly be overlooked by a free people, jealous of their rights; and therefore the constitution fixed a constitutional period, at which congress should assemble in every year, unless some other day was specially prescribed. Thus, the legislative discretion was necessarily bounded; and annual sessions were placed equally beyond the power of faction, and of party, of power, and of corruption. In two of the states a more frequent assemblage of the legislature was known to exist. But it was obvious, that from the nature of their duties, and the distance of their abodes, the members of congress ought not to be brought together at shorter periods, unless upon the most pressing exigencies. A provision, so universally acceptable, requires no vindication, or commentary.1

§ 828. Under the British constitution, the king has the sole right to convene, and prorogue, and dissolve parliament. And although it is now usual for parliament to assemble annually, the power of prorogation may be applied at the king's pleasure, so as to prevent

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1 The Federalist, No. 52.

any business from being done. And it is usual for the king, when he means, that parliament should assemble to do business, to give notice by proclamation accordingly; otherwise a prorogation is of course on the first day of the session.1

§ 829. The fifth section of the first article embraces provisions principally applicable to the powers, rights, and duties of each house in its separate corporate character. These will not require much illustration or commentary, as they are such, as are usually delegated to all legislative bodies in free governments; and were in practice in Great-Britain at the time of the emigration of our ancestors; and were exercised under the colonial governments, and have been secured and recognised in the present state constitutions.

§ 830. The first clause declares, that "each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide."

§ 831. It is obvious, that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty, as to who were legitimately chosen members, and any intruder, or usurper, might claim a seat, and thus trample upon the rights, and privileges, and liberties of the people. Indeed, elections would become, under such

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1 1 Black. Comm. 187, 188, and Christian's Note; 2 Wilson's Law Lect. 151, 155.

circumstances, a mere mockery; and legislation the exercise of sovereignty by any self-constituted body. The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America.1

§ 832. The propriety of establishing a rule for a quorum for the dispatch of business is equally clear; since otherwise the concerns of the nation might be decided by a very small number of the members of each body. In England, where the house of commons consists of nearly six hundred members, the number of forty-five constitutes a quorum to do business.2 In some of the state constitutions a particular number of the members constitutes a quorum to do business; in others, a majority is required. The constitution of the United States has wisely adopted the latter course; and thus, by requiring a majority for a quorum, has secured the public from any hazard of passing laws by surprise, or against the deliberate opinion of a majority of the representative body.

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1 1 Black. Comm. 163, 178, 179; Rawle on the Constitution, ch. 4, p. 46; 1 Kent. Comm. 220; 2 Wilson's Law Lect. 153, 154.

2 1 Tucker's Black. Comm. App. 201, 202, 203, 229. -- I have not been able to find in any books within my reach, whether any particular quorum is required in the house of lords.

§ 833. It may seem strange, but it is only one of many proofs of the extreme jealousy, with which every provision in the constitution of the United States was watched and scanned, that though the ordinary quorum in the state legislatures is sometimes less, and rarely more, than a majority; yet it was said, that in the congress of the United States more than a major ity ought to have been required; and in particular cases, if not in all, more than a majority of a quorum should be necessary for a decision. Traces of this opinion, though very obscure, may perhaps be found in the convention itself.1 To require such an extraordinary quorum for the decision of questions would, in effect, be to give the rule to the minority, instead of the majority; and thus to subvert the fundamental principle of a republican government. If such a course were generally allowed, it might be extremely prejudicial to the public interests in cases, which required new laws to be passed, or old ones modified, to preserve the general, in contradistinction to local, or special interests. If it were even confined to particular cases, the privilege might enable an interested minority to screen themselves from equitable sacrifices to the general weal; or, in particular cases, to extort undue indulgences. It would also have a tendency to foster and facilitate the baneful practice of secession, a practice, which has shown itself even in states, where a majority only is required, which is subversive of all the principles of order and regular government, and which leads directly to public convulsions, and the ruin of republican institutions.2

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1 The Federalist, No. 58; Journal of Convention, 218, 242.

2 The Federalist, No. 22, 58.

§ 834. But, as a danger of an opposite sort required equally to be guarded against, a smaller number is authorized to adjourn from day to day, thus to prevent a legal dissolution of the body, and also to compel the attendance of absent members.1 Thus, the interests of the nation, and the despatch of business, are not subject to the caprice, or perversity, or negligence of the minority. It was a defect in the articles of confederation, sometimes productive of great public mischief, that no vote, except for an adjournment, could be determined, unless by the votes of a majority of the states;2 and no power of compelling the attendance of the requisite number existed.

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1 Journal of Convention, 218, 242; 4 Instit. 43, 49.

2 Confederation, art.9; 1 Elliot's Debates, 44, 45; The Federalist, No. 22.

§ 835. THE next Clause is, "each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two thirds, expel a member." No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it

would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behaviour, or disobedience to those rules. And as a member might be so lost to all sense of dignity and duty, as to disgrace the house by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamour, the power to expel for very aggravated misconduct was also indispensable, not as a common, but as an ultimate redress for the grievance. But such a power, so summary, and at the same time so subversive of the rights of the people, it was foreseen, might be exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction, that there shall be a concurrence of two thirds of the members, to justify

an expulsion.1 This clause, requiring A concurrence of two thirds, was not in the original draft of the constitution, but it was inserted by a vote of ten states, one being divided.2 A like generalauthority to expel, exists in the British house of commons; and in the legislative bodies of many of the states composing the Union.

§ 836. What must be the disorderly behaviour, which the house may punish, and what punishment, other than expulsion, may be inflicted, do not appear to have been settled by any authoritative adjudication of either house of congress. A learned commentator supposes, that members can only be punished for misbehaviour committed during the session of congress, either within, or without the walls of the house; though he is also of opinion, that expulsion may be inflicted for criminal conduct committed in any place.3 He does not say, whether it must be committed during the session of congress or otherwise. In July, 1797, William Blount was expelled from the senate, for "a high misdemeanour, entirely inconsistent with his public trust and duty as a senator." The offence charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British government among the Indians. It was not a statuteable offence; nor was it committed in his official character; nor was it committed during the session of congress; nor at the seat of government.

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1 Mr. J. Q. Adams's Report to the senate in the case of John Smith, 31 Dec. 1807; 1 Hall's Law Journ. 459; Sergeant on Const. Law, ch. 28, p. 287, 288.

2 Journal of Convention. 218, 243.

3 Rawle on the Constitution, ch, 4, p. 47

Yet by an almost unanimous vote1 he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges.2 It seems, therefore, to be settled by the senate upon full deliberation, that expulsion may be for any misdemeanour, which, though not punishable by any statute, is inconsistent with the trust and duty of a senator. In the case of John Smith (a senator) in April, 1808, the charge against him was for participation in the supposed treasonable conspiracy of Colonel Burr. But the motion to expel him was lost by a want of the constitution majority of two thirds of the members of the senate.3 The precise ground of the failure of the motion does not appear; but it may be gathered from the arguments of his counsel that it did not turn upon any doubt, that the power of the senate extended to cases of misdemeanour, not done in the presence or view of the body; but most probably it was decided upon some doubt as to the facts.4 It may be thought difficult to draw a clear line of distinction between the right to inflict the punishment of expulsion, and any other punishment upon a member, founded on the time, place, or nature of the offence. The power to expel a member is not in the British house of commons confined to offences committed by the party as a member, or during the session of parliament; but it extends to all cases,

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1 Yeas 25, nays 1.

2 See Journal of Senate, 8 July, 1797; Sergeant's Const. Law, ch. 28, p. 286; 1 Hall's Law Journ. 459, 471.

3 Yeas 19, nays 10.

4 1 Hall's Law Journ. 459, 471; Journ. of Senate, 9 April, 1808; Sergeant's Const. Law, ch. 28, p. 287, 288. See also proceedings of the senate in the case of Humphrey Marshall, 22 March, 1796; Sergeant's Const. Law, ch. 28, p. 285.

where the offence is such, as, in the judgment of the house, unfits him for parliamentary duties.1

§ 837. The next clause is, "each house shall keep a journal of its proceedings, and from time to time publish the same, except such parts, as may in their judgment require secrecy. And the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal."
§ 838. This clause in its actual form did not pass in the convention without some struggle and some propositions of amendment. The first part finally passed by an unanimous vote; the exception was carried by a close vote of six states against four, one being divided; and the remaining clause, after an ineffectual effort to strike out "one filth," and insert in its stead, "if every member present," was finally adopted by an unanimous vote.2 The object of the whole clause is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy.3 The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. Mr. Justice Blackstone seems, indeed, to suppose, that

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1 1 Black. Comm. 163, and Christian's note; Id. 167 and note. See also Rex v. Wilkes, 2 Wilson's R. 251; Com. Dig. Parliament, G. 5. See 1 Hall's Law Term, 459, 466.
2 Journal of the Convention, p. 219, 243, 244, 245, 354, 373.
3 1 Tucker's Black. Comm. App. 204, 205; 2 Wilson's Lect. 157, 158;

votes openly and publicly given are more liable to intrigue and combination, than those given privately and by ballot. "This latter method," says he, "may be serviceable to prevent intrigues and unconstitutional combinations. But it is impossible to be practised with us, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection."1
§ 839. The history of public assemblies, or of private votes, does not seem to confirm the former suggestion of the learned author. Intrigue and combination are more commonly found connected with secret sessions, than with public debates, with the workings of the ballot box, than with the manliness of viva voce votes. At least, it may be questioned, if the vote by ballot has, in the opinion of a majority of the American people, obtained any decisive preference over vica voce voting, even at elections. The practice in New England is one way, and at the South another way. And as to the votes of representatives and senators in congress, no man has yet been bold enough to vindicate a secret or ballot vote, as either more safe, or more wise, more promotive of independence in the members, or more beneficial to their constituents. So long as known and open responsibility is valuable as a check, or an incentive among the representatives of a free people, so long a journal of their proceedings, and their votes, published in the face of the world, will continue to enjoy public favour, and be demanded by public opinion. When the people become indifferent to the acts of their representatives, they will have ceased to take much interest in the preservation of their liberties.

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1 1 Black. Comm. 181, 182.

When the journals shall excite no public interest, it will not be matter of surprise, if the constitution itself is silently forgotten, or deliberately violated.
§ 840. The restriction of calls of the yeas and nays to one fifth is founded upon the necessity of preventing too frequent a recurrence to this mode of ascertaining the votes, at the mere caprice of an individual. A call consumes a great deal of time, and often embarrasses the just progress of beneficial measures. It is said to have been often used to excess in the congress under the confederation;1 and even under the present constitution it is notoriously used, as an occasional annoyance, by a dissatisfied minority, to retard the passage of measures, which are sanctioned by the approbation of a strong majority. The check, therefore, is not merely theoretical; and experience shows, that it has been resorted to, at once to admonish, and to control members, in this abuse of the public patience and the public indulgence.
§ 841. The next clause is, "neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place, than that, in which the two houses shall be sitting."2 It is observable, that the duration of each session of congress, (subject to the constitutional termination of their official agency,) depends solely upon their own will and pleasure, with the single exception, as will be presently seen, of cases, in which the two houses disagree in respect to the time of adjournment. In no other case is the president allowed to interfere with the time and extent of their deliberations. And thus their independence is effectually guarded

1 1 Tuck. Black. Comm. App. 205, 206.

2 See Journ. of Convention, 219, 246. See also 2 Elliot's Debates, 276, 277.

against any encroachment on the part of the executive.1 Very different is the situation of parliament under the British constitution; for the king may, at any time, put an end to a session by a prorogation of parliament, or terminate the existence of parliament by a dissolution, and a call of a new parliament. It is true, that each house has authority to adjourn itself separately; and this is commonly done from day to day, and sometimes for a week or a month together, as at Christmas and Easter, or upon other particular occasions. But the adjournment of one house is not the adjournment of the other. And it is usual, when the king signifies his pleasure, that both, or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure, and adjourn accordingly; for otherwise a prorogation would certainly follow.2

§ 842. Under the colonial governments, the undue exercise of the same power by the royal governors constituted a great public grievance, and was one of the numerous cases of misrule, upon which the declaration of independence strenuously relied. It was there solemnly charged against the king, that he had called together legislative [colonial] bodies at places, unusual, uncomfortable, and distant from the repository of the public records; that he had dissolved representative bodies, for opposing his invasions of the rights of the people; and after such dissolutions, he had refused to reassemble them for a long period of time. It was natural, therefore, that the people of the United States should entertain a strong jealousy on this subject, and should interpose a constitutional barrier against any such abuse

1 Tucker's Black. Comm. App. 206, 207.

2 1 Black. Comm. 185 to 190; 2 Wilson's Law Lect. 154, 155; Com. Dig. Parliament, L M. N. O. P.

by the prerogative of the executive. The state constitutions generally contain some provision on the same subject, as a security to the independence of the legislature.

§ 842. These are all the powers and privileges, which are expressly vested in each house of congress by the constitution. What further powers and privileges they incidentally possess has been a question much discussed, and may hereafter be open, as new cases arise, to still further discussion. It is remarkable, that no power is conferred to punish for any contempts committed against either house; and yet it is obvious, that, unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions. For instance, how is either house to conduct its own deliberations, if it may not keep out, or expel intruders? If it may not require and enforce upon strangers silence and decorum in its presence? If it may not enable its own members to have free ingress, egress, and regress to its own hall of legislation? And if the power exists, by implication, to require the duty, it is wholly nugatory, unless it draws after it the incidental authority to compel obedience, and to punish violations of it. It has been suggested by a learned commentator, quoting, the language of Lord Bacon,1 that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated; and hence he deduces the conclusion, that, as the power to punish contempts is not among those enumerated, as belonging to either house, it does not exist.2 Now, however wise or correct the maxim of Lord Bacon is in a general sense,

1 Advancement of Learning; 1 Tuck. Black. App. 200, note.

2 1 Tucker's Black. 200.

as a means of interpretation, it is not the sole rule. It is no more true, than another maxim of a directly opposite character, that where the end is required, the means are, by implication, given. Congress are required to exercise the powers of legislation and deliberation. The safety of the rights of the nation require this; and yet, because it is not expressly said, that congress shall possess the appropriate means to accomplish this end, the means are denied, and the end may be defeated. Does not this show, that rules of interpretation, however correct in a general sense, must admit of many qualifications and modifications in their application to the actual business of human life and human laws? Men do not frame constitutions of government to suspend its vital interests, and powers, and duties, upon metaphysical doubts, or ingenious refinements. Such instruments must be construed reasonably, and fairly, according to the scope of their purposes, and to give them effect and operation, not to cripple and destroy them. They must be construed according to the common sense applied to instruments of a like nature; and in furtherance

of the fundamental objects proposed to be attained, and according to the known practice and incidents of bodies of a like nature.

§ 843. We may resort to the common law to aid us in interpreting such instruments, and their powers; for that law is the common rule, by which all our legislation is interpreted. It is known, and acted upon, and revered by the people. It furnishes principles equally for civil and criminal justice, for public privileges, and private rights. Now, by the common law, the power to punish contempts of this nature belongs incidentally to courts of justice, and to each house of parliament. No man ever doubted, or denied its existence, as to our

colonial assemblies in general, whatever may have been thought, as to particular exercises of it.1 Nor is this power to be viewed in an unfavourable light. It is a privilege, not of the members of either house; but, like all other privileges of congress, mainly intended as a privilege of the people, and for their benefit.2 Mr. Justice Blackstone has, with great force, said, that "laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, &c., results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."3 And the same reasoning has been applied, with equal force, by another learned commentator to legislative bodies. "It would," says he, "be inconsistent with the nature of such a body to deny it the power of protecting itself from injury, or insult. If its deliberations are not perfectly free, its constituents are eventually injured. This power has never been denied in any country, and is incidental to the nature of all legislative bodies. If it possesses such a power in the case of an immediate insult or disturbance, preventing the exercise of its ordinary functions, it is impossible to deny it in other cases, which, although less immediate or violent, partake of the same character, by having a tendency to impair the firm and honest discharge of public duties."4

§ 844. This subject has of late undergone a great deal of discussion both in England and America; and

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1 4 Black. Comm. 283, 284, 285, 286; 1 Black. Comm. 164, 165; Com. Dig. Parliament, G. 2, 5; Burdett v. Abbott, 14 East R. I; Burtett v. Colman, 14 East R. 163; S. C. 5 Dow. Parl. Cases, 165, 199.

2 Christian's note, 1 Black. Comm. 164.

3 4 Black. Comm. 286.

4 Rawle on the Constitution, ch. 4, p. 48; 1 Kent's Comm. (2d edit.) Lect. 11, p. 221, 235.

has finally received the adjudication of the highest judicial tribunals in each country. In each country upon the fullest consideration the result was the same, viz. that the power did exist, and that the legislative body was the proper and exclusive forum to decide, when the contempt existed, and when there was a breach of its privileges; and, that the power to punish followed, as a necessary incident to the power to take cognizance of the offence.1 The judgment of the

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1 The learned reader is referred to Burdett v. Abbott, 14 East R. 1; Barderr v. Colaman, 14 East R. 163; 8. C. 5 Dow. Parl. R. 165, 199; and Anderson v. Dunn, 6 Wheat. R. 204. The question is also much discussed in JefFerson's Manual, § 3, and 1 Tuck. Black. Comm. App. note, p. 200 to 205. See also 1 Black. Comm. 164, 165. Mr. Jefferson, in his Manual, (§ 3,) in commenting on the case of William Duane for a political libel, has summed up the reasoning on each side with a manifest leaning against the power. It presents the strength of the argument on that side, and, on that account, deserves to be cited at large. "In debating the legality of this order, it was insisted, in support of it, that every man, by the law of nature, and every body of men, possesses the right of self-defence; that all public functionaries are essentially invested with the powers of self-preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British parliament exercise the right of punishing contempts; all the state legislatures exercise the same power; and every court does the same; that, if we have it not, we sit at the mercy of every intruder, who may enter our doors, or gallery, and, by noise and tumult, reader proceeding in business impracticable; that if our tranquillity is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we must therefore have a power to punish these disturbers of our peace and proceedings. To this it was answered, that the parliament and courts of England have cognizance of contempts by the express provisions of their law; that the state legislatures have equal authority, because their powers are plenary;

they represent their constituents completely, and possess all their powers, except such, as their constitutions have expressly denied them; that the courts of the several states have the same powers by the laws of their states, and those of the federal government by the same state laws

Supreme Court of the United States, in the case alluded to, contains so elaborate and exact a consideration of the whole argument on each side, that it wilt be far more satisfactory to give it in a note, as it stands in the printed opinion, than to hazard, by any abridgment, impairing the just force of the reasoning.1

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adopted in each state, by a law of congress; that none of these bodies, therefore, derive those powers from natural or necessary right, but from express law; that congress have no such natural or necessary power, or any powers, but such as are given them by the constitution; that that has given them, directly, exemption from personal arrest, exemption from question elsewhere, for what is said in their house, and power over their own members and proceedings; for these no further law is necessary, the constitution being the law; that, moreover, by that article of the constitution, which authorizes them to make all laws necessary and proper for carrying into execution the powers vested by the constitution in them, they may provide by law for an undisturbed exercise of their functions, for example, for the punishment of contempts, of affrays or tumult in their presence, &c; but, till the law be made, it does not exist, and does not exist, from their own neglect; that, in the mean time, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances or defamations; and even their own sergeant, who may appoint deputies ad libitun to aid him, in equal to small disturbances; that in requiring a previous law, the constitution had regard to the inviolability of the citizen, as well as of the member; as, should one house in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the president; and also as, the law being promulgated, the citizen will know how to avoid offence. But if one branch may assume its own privileges without control; if it may do it on the spur of the occasion, conceal the law in its own breast, and, after the fact committed, makes its sentence both the law and the judgment on that fact; if the offence is to be kept undefined, and to be declared only ex re nata, and, according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen willbe perilous indeed."

The reasoning of Lord Chief Justice De Grey in Rex v. Brass Crosby, (3 Wilson's R. 188,) and of Lord Ellenborough in Burdett v. Abbott, (14 East R. 1,) is exceedingly cogent and striking against that favoured by Mr. Jefferson. It deserves, and will requite an attentive perusal. See also Burdett v. Abbott, 4 Taunt. B. 401; 4 Dow's Parl. Rap. 165.

1 It is necessary to premise, that the suit was brought for/else imprisonment by a party, who had been arrested under a warrant of the

§ 845. This is not the only case, in which the house or representatives hag exerted the power to arrest, and punish fox a contempt committed within the walls or the

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speaker of the house of representatives, by the sergeant-at-arms, for an alleged contempt of the house, (an attempt to bribe a member,) and tile cause was decided upon a demurrer to the justification set up by tile officer. After a preliminary remark upon the range of the argument by the counsel, Mr. Justice Johnson, in delivering the opinion of the Court proceeded as follows: "The pleadings have narrowed them down to the simple inquiry, whether the house of representatives can take cognizance of contempts committed against themselves, under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it cannot be denied, that the power to institute a prosecution must be dependent upon tile power to punish. If the house of representatives possessed no authority to punish for contempt, the initiating process issued in tile assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

"It is certainly true, that there is no power given by the constitution to either house to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one co-ordinate branch of the government. Shall we, therefore, decide, that no such power exists?

"It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government, which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers, which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

"The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public' functionaries, at short intervals, deposite it at the feet of the people, to be resumed again only at their will, individual fears may he alarmed by the monsters of imagination, but individual liberty can be in little danger.

house. The power was exerted1 in the case of Robert Randall, in December, 1795, for an attempt to corrupt a member;2 in 1796, in the case of ---, a chal-

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"No one is so visionary, as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable, as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more, than the exercise of a sound discretion, applied to the exigencies of the state, as they arise. It is the science of experiment.

"But if there is one maxim, which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers, which the people have intrusted to them. The interests and dignity of those, who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate, which awaits him; and yet iris no less certain, that the laws, under which he suffers, were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbour's rights.

"That 'the safety of the people is the supreme law,' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach of insults or pollution.

"It is true, that the courts of justice in the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend. On the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered

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1 By a vote of 78 yeas against 17 nays.

2 1 Tuck. Black. Comm. App. 200 to 205, note; Jefferson's Manual, §3.

lenge given to a member, which was held a breach of privilege;1 and in May, 1832, in the case of Samuel Houston, for an assault upon a member for words spoken

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either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempts shall not extend beyond its known and acknowledged limits of fine and imprisonment.

"But it is contended, that if this power in the house of representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

"This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

"But what is the alternative? The argument obviously leads to the total annihilation of the power of the house of representatives to guard itself from contempts; and leaves it exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument, from which it is derived. That a deliberate assembly clothed with the majesty of the people, and charged with the care of all, that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity, which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And accordingly to avoid the pressure of these considerations, it has been argued, that the right of the respective houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to congress within this district, enables them to provide by law against all other insults, against which there is any necessity for providing.

"It is to be observed, that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favour; for, non constat, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the house.

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1 Jefferson's Manual, § 3.

in his place, and afterwards printed, reflecting on the character of Houston.1 In the former case, the house punished the offence by imprisonment; in the

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"Nor is it immaterial to notice, what difficulties the negation of this right in the house of representatives draws after it, when it is considered, that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit: the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the house be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more, than without them? If the analogy with individual right and power be resorted to, it will reach no farther, than to exclusion; and it requires no exuberance of imagination to exhibit the ridiculous consequences, which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

"Nor would their situation be materially relieved by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes indispensable to the security and dignity of the general government; but there are purposes of a more grave and general character, than the offences, which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations, which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases, to which the epithet contempt might be reasonably applied.

"But although the offence be held undefinable, it is justly contended, that the punishment need not be indefinite. Nor is it so. "We are not now considering the extent, to which the punishing power of congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the constitution.

"The present question is, what is the extent of the punishing power, which the deliberative assemblies of the Union may assume, and exercise on the principle of self-preservation?

"Analogy, and the nature of the case, furnish the answer the---'the least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative, where the individual proves

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1 See the Speeches of Mr. Doddridge and Mr. Burges on this occasion.

latter, by a reprimand by the speaker. So in 1800, in the case of William Duane, for a printed libel against the senate, the party was held guilty of a contempt, and

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contumacious. And even to the duration of imprisonment a period is imposed by the nature of things; since the existence of the power, that imprisons, is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

"This view of the subject necessarily sets bounds to the exercise of a caprice, which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own.

"But the American legislative bodies have never possessed, or pretended to, the omnipotence, which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under rite specious appearance of merited resentment.

"If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the house of representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporeal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? The reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things, as they are, to suppose, that any deliberative assembly, constituted under it, would ever assert any other rights and powers, than those, which had been established by long practice and conceded by public opinion. Melancholy, also, would be that state of distrust, which rests not a hope upon a moral influence. The most absolute tyranny could not subsist, where men could not be trusted with power, because they might abuse it, much less a government, which has no other basis, than the sound morals, moderation, and good sense of those, who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

"But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the house

punished by imprisonment.1 Nor is there any thing peculiar in the claim under the constitution of the United States. The same power has been claimed, and

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of representatives; that the express grant of power to punish their members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other, than their own members.

"This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress. To enforce its laws upon any subject, without the sanction of punishment, is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only; and all the punishing power exercised by congress in any cases, except those, which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

"The truth is, that the exercise of the powers given over their own members was of such a delicate nature, that a constitutional provision became necessary to assert, or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honour or interests of the state, which sent him.

"In reply to the suggestion, that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent, would support the assertion of such powers in any other, than a legislative or judicial body. Even corruption any where else

would not contaminate the source of political life. In the retirement of the cabinet, it is not expected, that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions, which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.
"As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record, from which it can appear, on what evidence this warrant was issued. And we are not to presume, that the house of representatives would have issued it without duly establishing the fact charged on the individual. And, as to

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1 Journ. of Senate, 27th March, 1800; Jefferson's Manual, § 3. See also Burdett v. Abbott, 14 East, 1.

exercised repeatedly, under the state governments, independent of any, special constitutional provision, upon the broad ground stated, by Mr. Chief Justice Shippen, that the members of the legislature are legally, and inherently possessed of all such privileges, as are necessary to enable them, with freedom and safety, to execute the great trust reposed in them by the body of the people, who elected them.1

§ 846. The power to punish for contempts, thus asserted both in England and America, is confined to punishment during the session of the legislative body, and cannot be extended beyond it.2 It seems, that the power of congress to punish cannot, in its utmost extent, proceed beyond imprisonment; and then it terminates with the adjournment, or dissolution of that body.3 Whether a fine may not be imposed, has been recently4 made a question in a case of contempt

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the distance, to which the process might reach, it is very clear, that there exists no reason for confining its operation to the limits of the District of Columbia. After passing those limits, we know no bounds, that can be prescribed to its range, but those of the United States. And why should it he restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana of Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant 'of any other section of the Union. If the inconvenience be urged, the reply is obvious: there is no difficulty in observing that respectful deportment, which will render all apprehension chimerical."

See also Rex v. Brass Crosby, 3 Wilson R. 188. -- In the convention a proposition was made and referred to the select committee appointed to draft the constitution giving authority to punish for contempts, and enumerating them. The committee made no report on the subject. Journ. of Convention, 2Oth Aug. 263, 264.

1 Bolton v. Martin, 1 Dall. R. 296. See also House of Delegates in 1784, the case of John Warden, 1 Elliot's Debates, 69; Coffin v. Coffin, 4 Mass. R. 1, 34, 35.

2 Dunn v. Anderson, 6 Wheat. R. 204, 230, 231.

3 Dunn v. Anderson, 6 Wheat. R. 204, 230, 231; 1 Kent's Comm. Lect. 11, p. 221.

4 In 1831.

before the house of lords; upon which occasion Lord Chancellor Brougham expressed himself in the negative, and the other law lords, Eldon and Tenterden, in the affirmative; but the point was not then solemnly decided.1 It had, however, been previously affirmed by the house of lords in the case of Rex v. Flower, (8 T.R. 314,) in case of a libel upon one of the Bishops. Lord Kenyon then said, that in ascertaining and punishing for a contempt of its privileges, the house acted in a judicial capacity.2

§ 847. The sixth section of the first article contains an enumeration of the rights, privileges, and disabilities of the members of each house in their personal and individual characters, as contradistinguished from the rights, privileges, and disabilities of the body, of which they are members. It may here, again, be remarked, that these rights and privileges are, in truth, the rights and privileges of their constituents, and for their benefit and security, rather than the rights and privileges of the member for his own benefit and security.3 In like manner, the disabilities imposed are founded upon the same comprehensive policy; to guard the powers of the representative from abuse, and to secure a wise, impartial, and uncorrupt administration of his duties.

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1 See learned article on this subject in the English Law Magazine for July. 1831, p. 1, &c. Parliamentary Debates, 1831.

2 In Yates v. Lansing, (9 Johns. R. 417,) Mr. Justice Platt said, that "the right of punishing for contempts

by summary conviction is inherent in all courts of justice and legislative assemblies, and is essential to their protection and existence. It is a branch of the common law adopted and sanctioned by our state constitution. The decision involved in this power is in a great measure arbitrary and undefinable; and yet the experience of ages has demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice."

3 Corn. Dig. Parliament, D. 17.

§ 848. The first clause is as follows: "The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from, the same. And for any speech or debate in either house they shall not be questioned in any other place."

§ 849. In respect, to compensation, there is, at present, a marked distinction between the members of the British parliament, and the members of congress; the former not being, at present, entitled to any pay. Formerly, indeed, the members of the house of commons were entitled to receive wages from their constituents; but the last known case is that of Andrew Marvell, who was a member from Hull, in the first parliament after the restoration of Charles the Second. Four shillings sterling a day used to be allowed for a knight of the shire; and two shillings a day for a member of a city or borough; and this rate was established in the reign of Edward the Third. And we are told, that two shillings a day, the allowance to a burgess, was so considerable a sum, in these ancient times, that there are many instances, where boroughs petitioned to be excused from sending members to parliament, representing, that they were engaged in building bridges or other public works, and therefore, unable to bear so extraordinary an expense.1 It is believed, that the practice in America during its colonial state was, if not universally, at least generally, to allow a

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1 1 Black. Comm. 174, and Christian's note, 34; Id. Prynne on 4 Inst. 32; Com. Dig. Parliament, D. 16.

compensation to be paid to members; and the practice is believed to be absolutely universal, under the state constitutions. The members are not, however, always paid out of the public treasury; but the practice still exists, constitutionally, or by usage, in some of the states, to charge the amount of the compensation fixed by the legislature upon the constituents, and levy it in the state tax. That has certainly been the general course in the state of Massachusetts; and it was probably adopted from the ancient practice in England.

§ 850. Whether it is, on the whole, best to allow to members of legislative bodies a compensation for their services, or whether their services should be considered merely honorary, is a question admitting of much argument on each state; and it has accordingly found strenuous advocates, and opponents, not only in speculation, but in practice. It has been already seen, that in England none is now allowed, or claimed; and there can be little doubt, that public opinion is altogether in favour of their present course. On the other hand, in America an opposite opinion prevails among those, whose influence is most impressive with the people on such subjects. It is not surprising, that under such circumstances, there should have been a considerable diversity of opinion manifested in the convention itself. The proposition to allow compensation out of the public treasury, to members of the house of representatives, was originally carried by a vote of eight states against three;1 and to the senators by a vote of seven states against three, one being divided.2 At a subsequent period, a motion to strike out the payment out of the public treasury was lost by a vote of four states in

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1 Journal of Convention, 67, 116, 117.

2 Id. 119.

the affirmative, and five in the negative, two being divided;1 and the whole proposition, as to representatives, was (as amended) lost by a vote of five states for it, and five against it, one being divided.2 And as to senators, a motion was made, that they should be paid by their respective states, which was lost, five states voting for it, and six against it; and then the proposition to pay them out of the public treasury was lost by a similar vote.3 At a subsequent period a proposition was reported, that the compensation of the members of both houses should be made by the state, in which they were chosen;4 and ultimately the present plan was agreed to by a vote of nine states against two.5 Such a fluctuation of opinion exhibits in a strong light the embarrassing considerations, which surrounded the subject.6

§ 851. The principal reasons in favour of a compensation may be presumed to have been the following. In the first place, the advantage, it secured, or commanding the first talents of the nation in the public councils, by removing a virtual disqualification, that of poverty, from that large class of men, who, though favoured by nature, might not be favoured by fortune. It could hardly be expected, that such men would make the necessary sacrifices in order to gratify their ambition for a public station; and if they did, there was a corresponding danger, that they might be compelled by their necessities, or tempted by their wants, to yield up their independence, and perhaps their integrity, to the allurements of the corrupt, or the opulent.7 In the

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1 Journ. of Convention, 142.
2 Id. 144.
3 Id. 150, 151.
4 Id. 219, §10.
5 Id. 251.
6 See Yates's Minutes, 4 Elliot's Deb. 92 to 99.
7 See 2 Elliot's Debates, 279, 280; Yates's Minutes, 4 Elliot's Deb. 92 to 99.

next place, it would, in a proportionate degree, gratify the popular feeling by enlarging the circle of candidates, from which members might be chosen, and bringing the office within the reach of persons in the middle ranks of society, although they might not possess shining talents; a course best suited to the equality found, and promulgated in a republic. In the next place, it would make a seat in the national councils, as attractive, and perhaps more so, than in those of the state, by the superior emoluments of office. And in the last place, it would be in conformity to a long and well settled practice, which embodied public sentiment, and had been sanctioned by public approbation.1

§ 852. On the other hand, it might be, and it was, probably, urged against it, that the practice of allowing compensation was calculated to make the office rather more a matter of bargain and speculation, than of high political ambition. It would operate, as an inducement to vulgar and groveling demagogues, of little talent, and narrow means, to defeat the claims of higher candidates, than themselves; and with a view to the compensation alone to engage in all sorts of corrupt intrigues to procure their own election. It would thus degrade these high trusts from being deemed the reward of distinguished merit, and strictly honorary, to a mere traffic for political office, which would first corrupt the people at the polls, and then subject their liberties to be bartered by their venal candidate. Men of talents in this way would be compelled to degradation, in order to acquire office, or would be excluded by more unworthy, or more cunning candidates, who would feel, that the labourer was worthy of his hire. There is no

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1 See Rawle on the constitution, ch. 18, p. 181.

danger, that the want of compensation would deter men of suitable talents and virtues, even in the humbler walks of life, from becoming members; since it could scarcely be presumed, that the public gratitude would not, by other means, aid them in their private business, and increase their just patronage. And if, in a few cases, it should be otherwise, it should not be forgotten, that one of the most wholesome lessons to be taught in republics was, that men should learn suitable economy and prudence in their private affairs; and that profusion and poverty were with a few splendid exceptions, equally unsafe to be entrusted with the public rights and interests, since, if they did not betray, they would hardly be presumed willing to protect them. The practice of England abundantly showed, that compensation was not necessary to bring into public life the best talents and virtues of the nation. In looking over her list of distinguished statesmen, of equal purity and patriotism, it would be found, that comparatively few had possessed opulence; and many had struggled through life with the painful pressure of narrow resources, the res augustae domi.1

§ 853. It does not become the commentator to say, whether experience has as yet given more weight to the former, than to the latter reasons. Certain it is, that the convention, in adopting the rule of allowing a compensation, had principally in view the importance of securing the highest dignity and independence in the discharge of legislative functions, and the justice, as well as duty of a free people, possessing adequate means, to indemnify those, who were employed in their service, against all the sacrifices incident to their

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1 See Yates's Minutes, 4 Elliot's Debates, 92 to 99.

station. It has been justly observed, that the principle of compensation to those, who render services to the public, runs through the whole constitution.1

§ 854. If it be proper to allow a compensation for services to the members of congress, there seems the utmost propriety in its being paid out of the public treasury of the United States. The labour is for the benefit of the nation, and it should properly be remunerated by the nation. Besides; if the compensation were to be allowed by the states, or by the constituents of the members, if left to their discretion, it might keep the latter in a state of slavish dependence, and might introduce great inequalities in the allowance. And if it were to be ascertained by congress, and paid by the constituents, there would always be danger, that the rule would be fixed to suit those, who were the least enlightened, and the most parsimonious, rather than those, who acted upon a high sense of the dignity and the duties of the station. Fortunately, it is left for the decision of congress. The compensation is "to be ascertained by law;" and never addresses itself to the pride, or the parsimony, the local prejudices, or local habits of and part of the Union. It is fixed with a liberal view to the national duties, and is paid from the national purse. If the compensation had been left, to be fixed by the state legislature, the general government would have become dependent upon the governments of the states; and the latter could almost, at their pleasure, have dissolved it.2 Serious evils were felt from this source under the confederation, by which each state was to maintain its own delegates in congress;3 for it was found, that the

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1 Rawle on the Constitution, ch. 18, p. 179.

2 Elliot's Debates, 279.

3 Articles of Confederation, art. 5.

states too often were operated upon by local considerations, as contradistinguished from general and national interests.1

§ 855. The only practical question, which seems to have been farther open upon this head, is, whether the compensation should have been ascertained by the constitution itself, or left, (as it now is,) to be ascertained from time to time by congress. If fixed by the constitution, it might, from the change of the value of money, and the modes of life, have become too low, and utterly inadequate. Or it might have become too high in consequence of serious changes in the prosperity of the nation.2 It is wisest, therefore, to have it left, where it is, to be decided by congress from time to time, according to their own sense of justice, and a large view of the national resources. There is no danger, that it will ever become excessive, without exciting, general discontent, and then it will soon be changed from the reaction of public opinion. The danger rather is, that public opinion will become too sensitive upon this subject; and refuse to allow any addition to what may be at the time a very moderate allowance. In the actual practice of the government, this subject has rarely been stirred without producing violent excitements at the elections. This alone is sufficient to establish the safety of the actual exercise of the power by the bodies, with which it is lodged, both in the state and national legislatures.3 It is proper, however, to add, that the omission to provide some constitutional mode of fixing the pay of members of congress, without leaving the subject to their discretion, formed in some minds a strong objection to the constitution.4

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1 2 Elliot's Debates, 279; 1 Elliot's Debates, 70, 71.

2 2 Elliot's Debates, 279, 280, 281, 282.

3 1 Elliot's Debates, 70, 71.

4 See Gov. Randolph's Letter; 3 Amer. Mus. 62, 70.

§ 856. The next part of the clause regards the privilege of the members from arrest, except for crimes, during their attendance at the sessions of congress, and their going to, and returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange, indeed, if it were denied to the highest functionaries of the state in the discharge of their public duties. It belongs to congress in common with all other legislative bodies, which exist, or have existed in America, since its first settlement, under every variety of government; and it has immemorially constituted a privilege of both houses of the British parliament.1 It seems absolutely indispensable for the just exercise of the legislative power in every nation, purporting to possess a free constitution of government; and it cannot be surrendered without endangering the public liberties, as well as the private independence of the members.2

§ 857. This privilege from arrest, privileges them of course against all process, the disobedience to which is punishable by attachment of the person, such as a subpaena ad respondendum, aut testificandum, ora summons to serve on a jury; and (as has been justly observed) with reason, because a member has superiour duties to perform in

another place. When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no com-

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1 1 Black. Comm. 164, 165; Com. Dig. Parliament, D. 17; Jefferson's Manual. §3, Privilege; Benyon v. Evelyn, Sir O. Bridg. R. 334.

2 1 Kent Comm Lect. 11, p. 221; Bolton v. Martin, 1 Dall. R. 296; Coffin v. Coffin, 4 Mass R. 1.

parison.1 The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record.2

§ 858. The privilege of the peers of the British parliament to be free from arrest, in civil cases, is for ever sacred and inviolable. For other purposes, (as for common process,) it seems, that their privilege did not extend, but from the teste of the summons to parliament, and for twenty days before and after the session. But that period has now, as to all common process but arrest, been taken away by statute.3 The privilege of the members of the house of commons from arrest is for forty days after every prorogation, and for forty days before the next appointed meeting, which in effect is as long, as the parliament lasts, it seldom being prorogued for more than four score days, at a time.4 In case of a dissolution of parliament, it does not appear, that the privilege is confined to any precise time; the rule being, that the party is entitled to it for a convenient time, redeundo.5 **§ 859.** The privilege of members of parliament formerly extended also to their servants and goods, so that they could not be arrested. But so far, as it went to obstruct the ordinary course of justice in the British courts, it has since been restrained.6 In the mem-

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1 Jefferson's Manual, §3.

2 Id. §3.

3 Com. Dig. Parliament, D. 17; 1 Black. Comm. 165, 166.

4 1 Black. Comm. 165; Com. Dig. Parliament, D. 17.

5 Holiday v. Pitt, 2 Str. R. 985; S. C. Cas. Temp. Hard. 28; 1 Black. Comm. 165; Christian's note, 21; Barnard v. Mordaunt, 1 Kenyon R. 125.

6 Com. Dig. Parliament, D. 17; 1 Black. Comm. 165; Jefferson's Manual, §3.

bers of congress, the privilege is strictly personal, and does not extend to their servants or property. It is also, in all cases confined to a reasonable time, eundo, morando, et redeundo, instead of being limited by a precise number of days. It was probably from a survey of the abuses of privilege, which for a long time defeated in England the purposes of justice, that the constitution has thus marked its boundary with a sedulous caution.1

§ 860. The effect of this privilege is, that the arrest of the member is unlawful, and a trespass ab initio, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice, or upon a writ of habeas corpus;2 and the arrest may also be punished, as a contempt of the house.3

§ 861. In respect to the time of going and returning, the law is not so strict in point of time, as to require the party to set out immediately on his return; but allows him time to settle his private affairs, and to prepare for his journey. Nor does it nicely scan his road, nor is his protection forfeited, by a little deviation from that, which is most direct; for it is supposed. that some superior convenience or necessity directed it.4 The privilege from arrest takes place by force of the election, and before the member has taken his seat, or is sworn.5

§ 862. The exception to the privilege is, that it shall not extend to "treason, felony, or breach of the peace."

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1 Jefferson's Manual, §3.

2 Id. §3; 2 Str. 990; 2 Wilson's R. 151; Cas. Temp. Hard. 28

3 1 Black. Comm. 164, 165, 166; Com. Dig. Parliament, D. 17; Jefferson's Manual, §3.

4 Jefferson's Manual, §3; 2 Str. R. 986, 987.

5 Jefferson's Manual, §3; but see Com Dig. Parliament, D. 17.

These words are the same as those, in which the exception to the privilege of parliament is usually expressed at the common law, and was doubtless borrowed from that source.1 Now, as all crimes are offences against the peace, the phrase "breach of the peace" would seem to extend to all indictable offence, as well those, which are, in fact,

attended with force and violence, as those, which are only constructive breaches of the peace of the government, inasmuch as they violate its good order.2 And so in truth it was decided in parliament, in the case of a seditious libel, published by a member, (Mr. Wilkes,) against the opinion of Lord Camden and the other judges of the Court of Common Pleas;3 and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense, and in furtherance of public justice.4 It would be monstrous, that any member should protect himself from arrest, or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest, for the pettiest assault, or the most insignificant breach of the peace.

§ 863. The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant, or ineffectual.5 This privilege also is derived from the practice of the British parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every state in the Union, as matter of constitutional right. In the British parliament it is a claim of immemorial right, and is now farther fortified by an act

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1 4 Inst. 25; 1 Black. Comm. 165; Com. Dig. Parliament, D. 17.

2 1 Black. Comm. 166.

3 Rex v. Wilkes, 2 Wilson's R. 151.

4 See 1 Black. Comm. 166, 167.

5 See 2 Wilson's Law Lect. 156.

of parliament; and it is always particularly demanded of the king in person by the speaker of the house of commons, at the opening of every new parliament.1 But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.2 Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting, it elsewhere; yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel.3 And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat. If it were otherwise, a man's character might be taken away without the possibility of redress, either by the malice, or indiscretion, or overweaning self-conceit of a member of congress.4 It is proper, however, to apprise the learned reader, that it has been recently denied in congress by very distinguished lawyers, that the privilege of speech and debate in con-

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1 1 Black. Comm. 164, 165.

2 Jefferson's Manual, §3.

3 The King v. Creevy, 1 Maule & Selw. 273.

4 See the reasoning in Coffin v. Coffin, 4 Mass. R. 1.

gress does not extend to publication of his speech. And they ground themselves upon an important distinction arising from the actual differences between English and American legislation. In the former, the publication of the debates is not strictly lawful, except by license of the house. In the latter, it is a common right, exercised and supported by the direct encouragement of the body. This reasoning deserves a very attentive examination.1

§ 864. The next clause reads the disqualifications of members of congress; and is as follows: "No senator or representative shall, during the time, for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time. And no person, holding any office under the United States, shall be a member of either house of congress during his continuance in office." This clause does not appear to have met with any opposition in the convention, as to the propriety of some provision on the subject, the principal question being, as to the best mode of expressing the disqualifications.2 It has been deemed by one commentator an admirable provision against venality, though not perhaps sufficiently guarded to prevent evasion.3 And it has been elaborately vindicated by another with uncommon earnestness.4 The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments,

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1 Mr. Doddridge's Speech in the case of Houston, in May, 1832; Mr. Burges's speech, Ibid.
2 Journ. of Convention, 214, 319, 320, 322, 333.
3 1 Tuck. Black. Comm. App. 198, 214, 215, 375.
4 Rawle on the Const. ch. 19, p. 184, &c.; 1 Wilson's Law Lect. 446 to 419.

are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only "during the time, for which he was elected;" thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination. It has sometimes been matter of regret, that the disqualification had not been made co-extensive with the supposed mischief; and thus have for ever excluded members from the possession of offices created, or rendered more lucrative by themselves.1 Perhaps there is quite as much wisdom in leaving the provision, where it now is.

§ 865. It is not easy, by any constitutional or legislative enactments, to shut out all, or even many of the avenues of undue or corrupt influence upon the human mind. The great securities for society -- those, on which it must for ever rest in a free government -- are responsibility to the people through elections, and personal character, and purity of principle. Where these are wanting, there never can be any solid confidence, or any deep sense of duty. Where these exist, they become a sufficient guaranty against all sinister influences, as well as all gross offences. It has been remarked with equal profoundness and sagacity, that, as there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust; so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of

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1 Rawle on the Constitution, ch. 19. See 1 Tuck. Black. Comm. App. 375.

these qualities in a higher form, than any other.1 It might well be deemed harsh to disqualify an individual from any office, clearly required by the exigencies of the country, simply because he had done his duty.2 And, on the other hand, the disqualification might operate upon many persons, who might find their way into the national councils, as a strong inducement to postpone the creation of necessary offices, lest they should become victims of their high discharge of duty. The chances of receiving an appointment to a new office are not so many, or so enticing, as to bewilder many minds; and if they are, the aberrations from duty are so easily traced, that they rarely, or never escape the public reproaches. And if influence is to be exerted by the executive for improper purposes, it will be quite as easy, and in its operation less seen, and less suspected, to give the stipulated patronage in another form, either of office, or of profitable employment, already existing. And even a general disqualification might be evaded by suffering the like patronage silently to fall into the hands of a confidential friend, or a favourite child or relative. A dishonourable traffic in votes, if it should ever become the engine of party or of power in our country, would never be restrained by the slight network of any constitutional provisions of this sort. It would seek, and it would find its due rewards in the general patronage of the government, or in the possession of the offices conferred by the people, which would bring emolument, as well as influence, and secure power by gratifying favourites. The history of our state governments (to go no farther) will scarcely be thought by any ingenuous mind to afford any proofs, that the ab-

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1 The Federalist, No. 55.
2 Elliot's Debates, 279.

sence of such a disqualification has rendered state legislation less pure, or less intelligent; or, that the existence of such a disqualification would have retarded one rash measure, or introduced one salutary scruple into the elements of popular or party strife. History, which teaches us by examples, establishes the truth beyond all reasonable question, that genuine patriotism is too lofty in its honour, and too enlightened in its object, to need such checks; and that weakness and vice, the turbulence of faction, and the meanness of avarice, are easily bought, notwithstanding all the efforts to fetter, or ensnare them.

§ 866. The other part of the clause, which disqualifies persons holding any office under the United States from being members of either house during their continuance in office, has been still more universally applauded; and has been vindicated upon the highest grounds of public policy. It is doubtless founded in a deference to state jealousy, and a sincere desire to obviate the fears, real or imaginary, that the general government would obtain an undue preference over the state governments.1 It has also the strong recommendation, that it prevents any undue influence

from office, either upon the party himself, or those, with whom he is associated in legislative deliberations. The universal exclusion of all persons holding office is (it must be admitted) attended with some inconveniences. The heads of the departments are, in fact, thus precluded from proposing, or vindicating their own measures in the face of the nation in the course of debate; and are compelled to submit them to other men, who are either imperfectly acquainted with the measures, or are indif-

1 See Rawle on the Constitution, ch. 19; The Federalist, No. 56.

ferent to their success or failure. Thus, that open and public responsibility for measures, which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to secret and unseen influence, to private interviews, and private arrangements, to accomplish its own appropriate purposes; instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives. One consequence of this state of things is, that there never can be traced home to the executive any responsibility for the measures, which are planned, and carried at its suggestion. Another consequence will be, (if it has not yet been,) that measures will be adopted, or defeated by private intrigues, political combinations, irresponsible recommendations, and all the blandishments of office, and all the deadening weight of silent patronage. The executive will never be compelled to avow, or to support any opinions. His ministers may conceal, or evade any expression of their opinions. He will seem to follow, when in fact he directs the opinions of congress. He will assume the air of a dependent instrument, ready to adopt the acts of the legislature, when in fact his spirit and his wishes pervade the whole system of legislation. If corruption ever eats its way silently into the vitals of this republic, it will be, because the people are unable to bring responsibility home to the executive through his chosen ministers. They will be betrayed, when their suspicions are most lulled by the executive, under the disguise of an obedience to the will of congress. If it would not hare been safe to trust the heads of departments, as representatives, to the choice of the peo-

ple, as their constituents, it would have been at least some gain to have allowed them a seat, like territorial delegates, in the house of representatives, where they might freely debate without a title to vote. In such an event, their influence, whatever it would be, would be seen, and felt, and understood, and on that account would hare involved little danger, and more searching jealousy and opposition; whereas, it is now secret and silent, and from that very cause may become overwhelming.

§ 867. One other reason in favour of such a right is, that it would compel the executive to make appointments for the high departments of government, not from personal or party favourites, but from statesmen of high public character, talents, experience, and elevated services; from statesmen, who had earned public favour, and could command public confidence. At present, gross incapacity may be concealed under official forms, and ignorance silently escape by shining the labours upon more intelligent subordinates in office. The nation would be, on the other plan, better served; and the executive sustained by more masculine eloquence, as well as more liberal learning.

§ 868. In the British parliament no restrictions of the former sort exist, and few of the latter, except such as have been created by statute.1 It is true, that an acceptance of any office under the crown is a vacation of a seat in parliament. This is wise; and secures the people from being betrayed by those, who hold office, and whom they do not choose to trust. But generally, they are re-eligible; and are entitled, if the people so choose, again to hold a seat in the house of commons,

1 See Black. Comm. 175, 176.

notwithstanding their official character.1 The consequence is, that the ministers of the crown assume an open public responsibility; and if the representation of the people in the house of commons were, as it is under the national government, founded upon a uniform rule, by which the people might obtain their full share of the government, it would be impossible for the ministry to exercise a controlling influence, or escape (as in America they may) a direct palpable responsibility. There can be no danger, that a free people will not be sufficiently watchful over their rulers, and their acts, and opinions, when they are known and avowed; or, that they will not find representatives in congress ready to oppose improper measures, or sound the alarm upon arbitrary encroachments. The real danger is, when the influence of the rulers is at work in secret, and assumes no definite shape; when it guides with a silent and irresistible sway, and yet covers itself under the forms of popular opinion, or independent legislation; when it does nothing, and yet accomplishes every thing.

§ 869. Such is the reasoning, by which many enlightened statesmen have not only been led to doubt, but even to deny the value of this constitutional disqualification. And even the most strenuous advocates of it are compelled so

far to admit its force, as to concede, that the measures of the executive government, so far as they fall within the immediate department of a particular officer, might be more (directly and fully explained on the floor of the house.2 Still, however, the reasoning from the British practice has not been deemed satisfactory by the public; and the guard in-

1 1 Black. Comm. 175, 176, Christian's note, 39.
2 Rawle on the Constitution, ch. 19. p. 187.

terposed by the constitution has been received with general approbation, and has been thought to have worked well during our experience under the national government.1 Indeed, the strongly marked parties in the British parliament, and their consequent dissensions have been ascribed to the non-existence of any such restraints; and the progress of the influence of the crown, and the supposed corruptions of legislation, have been by some writers traced back to the same original blemish.2 Whether these inferences are borne out by historical facts, is a matter, upon which different judgments may arrive at different conclusions; and a work, like the present, is not the proper place to discuss them.

1 Mr. Rawle's remarks in his Treatise on Constitutional Law, (ch. 19,) are as full on this point, as can probably be found. See also The Federalist, No. 55; 1 Tucker's Black. Comm. App. 198, 214, 215; 2 Elliot's Debates. 278, 279, 280, 281, 282; 1 Wilson's Law Lect. 446 to 449.
2 1 Wilson's Law Lect. 446 to 449.

CHAPTER XIII.

MODE OF PASSING LAWS. PRESIDENT'S NEGATIVE.

§ 870. THE seventh section of the first article treats of two important subjects, the right of originating revenue bills, and the nature and extent of the president's negative upon the passing of laws.

§ 871. The first clause declares -- "All bills for raising revenue shall originate in the house of representatives; but the senate may propose, or concur with amendments, as on other bills." This provision, so far as it regards the right to originate what are technically called "money bills," is, beyond all question, borrowed from the British house of commons, of which it is the ancient and indisputable privilege and right, that all grants of subsidies and parliamentary aids shall begin in their house, and are first bestowed by them, although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature.1 The general reason given for this privilege of the house of commons is, that the supplies are raised upon the body of the people; and therefore it is proper, that they alone should have the right of taxing themselves. And Mr. Justice Blackstone has very correctly remarked, that this reason would be unanswerable, if the commons taxed none but themselves. But it is notorious, that a very large share of property is in possession of the lords; that this property is equally taxed, as the property of the com-

1 1 Black. Comm. 169.

mons; and therefore the commons, not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply. The true reason seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced, more likely to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would, therefore, be extremely dangerous to give thelords any power of framing new taxes for the subject. It is sufficient, that they have a power of rejecting, if they think the commons too lavish or improvident in their grants.1

§ 872. This seems a very just account of the matter, with reference to the spirit of the British constitution; though a different explanation has been deduced from a historical review of the power. It has been asserted to have arisen from the instructions from time to time given by the constituents of the commons, (whether county, city, or borough,) as to the rates and assessments, which they were respectively willing to bear and assent to; and from the aggregate it was easy for the commons to ascertain the whole amount, which the commonalty of the whole kingdom were willing to grant to the king.2 Be this as it may, so jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power, but that of rejecting. They will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; and under

1 1 Black. Comm. 169; De Lolme on Constitution, ch. 4, 8, p. 66, 84 85, and note.

2 2 Wilson's Law Lect. 161, 162, 163, citing Millar on Constitution 398. But see 1 Wilson's Law Lect. 444, 445.

this appellation are included all bills, by which money is directed to be raised upon the subject for any purpose, or in any shape whatsoever, either for the exigencies of the government, and collected from the kingdom in general, as the land tax, or for private benefit, and collected in any particular district, as turnpikes, parish rates, and the like.1 It is obvious, that this power might be capable of great abuse, if other bills were tacked to such money bills; and accordingly it was found, that money bills were sometimes tacked to favourite measures of the commons, with a view to ensure their passage by the lords. This extraordinary use, or rather perversion of the power, would, if suffered to grow into a common practice, have completely destroyed the equilibrium of the British constitution, and subjected both the lords and the king to the power of the commons. Resistance was made from time to time to this unconstitutional encroachment; and at length the lords, with a view to give permanent effect to their own rights, hare made it a standing order to reject upon sight all bills, that are tacked to money bills.2 Thus, the privilege is maintained on one side, and guarded against undue abuse on the other.

§ 873. It will be at once perceived, that the same reasons do not exist in the same extent, for the same exclusive right in our house of representatives in regard to money bills, as exist for such right in the British house of commons. It may be fit, that it should possess the exclusive right to originate money bills; since it may be presumed to possess more ample means of local information, and it more directly represents the opinions, feelings, and wishes of the people; and, being

1 1 Black. Comm. 170, and Christian's Note, (26).

2 De Lolme on Constitution, ch. 17, p. 381, 382.

directly dependent upon them for support, it will be more watchful and cautious in the imposition of taxes, than a body, which emanates exclusively from the states in their sovereign political capacity.1 But, as the senators are in a just sense equally representatives of the people, and do not hold their offices by a permanent or hereditary title, but periodically return to the common mass of citizens;2 and above all, as direct taxes are, and must be, apportioned among the states according to their federal population; and as all the states hare a distinct local interest, both as to the amount and nature of all taxes of every sort, which are to be levied, there seems a peculiar fitness in giving to the senate a power to alter and amend, as well as to concur with, or reject all money bills. The due influence of all the states is thus preserved; for otherwise it might happen, from the overwhelming representation of some of the large states, that taxes might be levied, which would bear with peculiar severity upon the interests, either agricultural, commercial, or manufacturing, of others being the minor states; and thus the equilibrium intended by the constitution, as well of power, as of interest, and influence, might be practically subverted.

§ 874 There would also be no small inconvenience in excluding the senate from the exercise of this power of amendment and alteration; since if any, the slightest modification were required in such a bill to make it either palatable or just, the senate would be compelled to reject it, although an amendment of a single line

1 2 Wilson's Law Lect. 163, 164; Rawle on Constitution, ch 6; 4 Elliot's Debates, 141

2 1 Tucker's Black. Comm. App. 215; 2 Wilson's Law Lect. 163, 164; Rawle on Constitution, ch 6; 4 Elliot's Debates, 141.

might make it entirely acceptable to both houses.1 Such a practical obstruction to the legislation of a free government would far outweigh any supposed theoretical advantages from the possession or exercise of an exclusive power by the house of representatives. Infinite perplexities, and misunderstandings, and delays would clog the most wholesome legislation. Even the annual appropriation bills might be in danger of a miscarriage on these accounts; and the most painful dissensions might be introduced.

§ 875. Indeed, of so little importance has the exclusive possession of such a power been thought in the state governments, that some of the state constitutions make no difference, as to the power of each branch of the legislature to originate money bills. Most of them contain a provision similar to that in the constitution of the United States; and in those states, where the exclusive power formerly existed, as, for instance, in Virginia and South-Carolina, it was a constant source of difficulties and contentions.2 In the revised constitution of South-Carolina, (in 1790,) the provision was altered, so as to conform to the clause in the constitution of the United States.

§ 876. The clause seems to have met with no serious opposition in any of the state conventions; and indeed could scarcely be expected to meet with any opposition, except in Virginia; since the other states were well satisfied with the principle adopted in their own state constitutions; and in Virginia the clause created but little debate.3
§ 877. What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter

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1 2 Elliot's Debates, 283, 284.
2 Id.
3 Id.

of some discussion. A learned commentator supposes, that every bill, which indirectly or consequentially may raise revenue, is, within the sense of the constitution, a revenue bill. He therefore thinks, that the bills for establishing the post-office, and the mint, and regulating, the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did) in the senate.1 But the practical construction of the constitution has been against his opinion. And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue.2 No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring, revenue into the treasury.
§ 878. The next clause respects the power of the president to approve, and negative laws. In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws. The principal points of discussion seem to have been, whether the negative should be absolute, or qualified; and if the latter, by what number of each house the bill should be subsequently passed, in order to become a law; and

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1 Tucker's Black. Comm. App. 261, and note.
2 See 2 Elliot's Debates, 283, 284.

whether the negative should in either case be exclusively vested in the president alone, or in him jointly with some other department of the government. The proposition of a qualified negative seems to have obtained general, but not universal support, having been carried by the vote of eight states against two.1 This being settled, the question, as to the number, was at first unanimously carried in the affirmative in favour of two thirds of each house; at a subsequent period it was altered to three fourths by a vote of six states against four, one being divided; and it was ultimately restored to the two thirds, without any apparent struggle.2 An effort was also made to unite the supreme national judiciary with the executive in revising the laws, and exercising the negative. But it was constantly resisted, being at first overruled by a vote of four states against three, two being divided, and finally rejected by the vote of eight states against three.3
§ 879. Two points may properly arise upon this subject. First, the propriety of vesting the power in the president; and secondly, the extent of the legislative check, to prevent an undue exercise of it. The former also admits of a double aspect, viz. whether the negative should be absolute, or should be qualified. An absolute negative on the legislature appears, at first, to be the natural defence, with which the executive magistrate should be armed. But in a free government, it seems not altogether safe, nor of itself a sufficient defence. On ordinary occasions, it may not be exerted with the requisite firmness; and on extraordinary-occasions, it may be perfidiously abused. It

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1 Journal of the Convention, 97.
2 Journal of the Convention, 195, 253, 254, 355.
3 Journal of the Convention, 69, 96, 195, 253.

is true, that the defect of such an absolute negative has a tendency to weaken the executive department. But this may be obviated, or at least counterpoised, by other arrangements in the government; such as a qualified connexion with the senate in making treaties and appointments, by which the latter, being a stronger department, may be led to support the constitutional rights of the former, without being too much detached from its own legislative functions.1 And the patronage of the executive has also some tendency to create a counteracting influence in aid of his independence. It is true, that in England an absolute negative is vested in the king, as a branch of the legislative

power; and he possesses the absolute power of rejecting, rather than of resolving. And this is thought by Mr. Justice Blackstone and others, to be a most important, and indeed indispensable part of the royal prerogative, to guard against the usurpations of the legislative authority.2 Yet in point of fact this negative of the king has not been once exercised since the year 1692;3 a fact, which can only be accounted for upon one of two suppositions, either that the influence of the crown has prevented the passage of objectionable measures, or that the exercise of the prerogative has become so odious, that it has not been deemed safe to exercise it, except upon the most pressing emergencies.4 Probably both

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1 The Federalist, No. 51.

2 1 Black. Comm. 154

3 De Lolme on Constitution, ch. 17, p 390, 391; 1 Kent's Comm. Lect. 11, p. 226.

4 1 Wilson's Law Lect. 448, 4149; The Federalist, No 73; Id No 69; 1 Kent's Comm. Lect. 11, p 226 -- Mr. Burke, in his letter to the sheriffs of Brisol,* has treated this subject with his usual masterly power. "The king's negative to bills," says he, "is one of the most undisputed of the royal prerogatives; and it extends to all cases whatsoever. I am

*** In 1777.**

motives have alternately prevailed in regard to bills, which were disagreeable to the crown;1 though, for the last half century, the latter has had the most uniform and decisive operation. As the house of commons becomes more and more the representative of the popular opinion, the crown will have less and less inducement to hazard its own influence by a rejection of any favourite measure of the people. It will be more likely to take the lead, and thus guide and moderate, instead of resisting the commons. And, practically speaking, it is quite problematical, whether a qualified negative may not hereafter in England become a more efficient protection of the crown, than an absolute negative, which makes no appeal to the other legislative bodies, and consequently compels the crown to bear the exclusive odium of a rejection.2 Be this as it may, the example of England furnishes, on this point, no sufficient authority for America. The whole structure of our government is so entirely different, and the elements, of which it is composed, are so dissimilar from that of England, that no argument can be drawn from the practice of the latter, to assist us in a just arrangement of the executive authority.

§ 880. It has been observed by Mr. Chancellor Kent, with pithy elegance, that the peremptory veto of the Roman Tribunes, who were placed at the door of the Roman senate, would not be reconcileable with the

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far from certain, that if several laws, which I know, had fallen under the stroke of that sceptre, that the public would have had a very heavy loss. But it is not the propriety of the exercise, which is in question The exercise itself is wisely forborne. Its repose may be the preservation of its existence; and its existence may be the means of saving the constitution itself, on an occasion worthy of bringing it forth." 1 1 Tuck. Black. Comm. App. 255, 256; 1 Kent's Comm. Lect. 11, p 226.

2 See the reasoning in The Federalist, No 73; Id. No 51; 1 Wilson's Law Lect. 448, 449.

spirit of deliberation and independence, which distinguishes the councils of modern times. The French constitution of 1791, a laboured and costly fabric, on which the philosophers and statesmen of France exhausted all their ingenuity, and which was prostrated in the dust in the course of one year from its existence, gave to the king a negative upon the acts of the legislature, with some feeble limitations. Every bill was to be presented to the king, who might refuse his assent; but if the two following legislatures should successively present the same bill in the same terms, it was then to become a law. The constitutional negative, given to the president of the United States, appears to be more wisely digested, than any of the examples, which have been mentioned.1

§ 881. The reasons, why the president should possess a qualified negative, if they are not quite obvious, are, at least, when fairly expounded, entirely satisfactory. In the first place, there is a natural tendency in the legislative department to intrude upon the rights, and to absorb the powers of the other departments of government.2 A mere parchment delineation of the boundaries of each is wholly insufficient for the protection of the weaker branch, as the executive unquestionably is; and hence there arises a constitutional necessity of arming it with powers for its own defence. If the executive did not possess this qualified negative, he would gradually be stripped of all his authority, and become, what it is well known the governors of some states are, a mere pageant and shadow of magistracy.3

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1 1 Kent's Comm. Lect. 11, p. 226, 227.
2 1 Kent's Comm. Lect. 11, p. 225, 226; The Federalist, No 73; Id. No. 51.
3 The Federalist, No 51, 73; 1 Tuck. Black. Comm. App. 225, 329; 1 Wilson's Law Lect. 448, 449; 1 Kent's Comm. Lect. 11, p, 225, 226.

§ 882. In the next place, the power is important, as an additional security against the enactment of rash, immature, and improper laws. It establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.1 It may, indeed, be said, that a single man, even though he be president, cannot be presumed to possess more wisdom, or virtue, or experience, than what belongs to a number of men. But this furnishes no answer to the reasoning. The question is not, how much wisdom, or virtue, or experience, is possessed by either branch of the government, (though the executive magistrate may well be presumed to be eminently distinguished in all these respects, and therefore the choice of the people;) but whether the legislature may not be misled by a love of power, a spirit of faction, a political impulse, or a persuasive influence, local or sectional, which, at the same time, may not, from the difference in the election and duties of the executive, reach him at all, or not reach him in the same degree. He will always have a primary inducement to defend his own powers; the legislature may well be presumed to have no desire to favour them. He will have an opportunity soberly to examine the acts and resolutions passed by the legislature, not having partaken of the feelings or combinations, which have procured their passage, and thus correct, what shall sometimes be wrong from haste and inadvertence, as well as design.2 His view of them, if not more wise, or more elevated, will, at least, be

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1 The Federalist, No. 73; 1 Wilson's Law Lect. 448, 449, 450.
2 The Federalist, No. 73.

independent, and under an entirely different responsibility to the nation, from what belongs to them. He is the representative of the whole nation in the aggregate; they are the representatives only of distinct parts; and sometimes of little more than sectional or local interests.

§ 883. Nor is there any solid objection to this qualified power.1 If it should be objected, that it may sometimes prevent the passage of good laws, as well as of bad laws, the objection is entitled to but little weight. In the first place, it can never be effectually exercised, if two thirds of both houses are in favour of the law; and if they are not, it is not so easily demonstrable, that the law is either wise or salutary. The presumption would rather be the other way; or, at least, that the utility of it was not unquestionable, or it would receive the requisite support. In the next place, the great evil of all free governments is a tendency to over legislation, and the mischief of inconstancy and mutability in the laws forms a great blemish in the character and genius of all free governments.2 The injury, which may possibly arise from the postponement of a salutary law, is far less, than from the passage of a mischievous one, or from a redundant and vacillating legislation.3 In the next place, there is no practical danger, that this power would be much, if any, abused by the president. The superior weight and influence of the legislative body in a free government, and the hazard to the weight and influence of the executive in a trial of strength, afford a satisfactory security, that the power will generally be employed with great caution; and that there will be more often room for a charge of

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1 Tuck. Black. Comm. 225, 324; 1 Kent's Comm. Lect. 11, p. 225, 226.
2 The Federalist, No. 73.
3 Id.

timidity, than of rashness in its exercise.1 It has been already seen, that the British king, with all his sovereign attributes, has rarely interposed this high prerogative, and that more than a century has elapsed since its actual application. If from the offensive nature of the power a royal hereditary executive thus indulges serious scruples in its actual exercise, surely a republican president, chosen for four years, may be presumed to be still more unwilling to exert it.2

§ 884. The truth is, as has been already hinted, that the real danger is, that the executive will use the power too rarely. He will do it only on extraordinary occasions, when a just regard to the public safety, or public interests, or a constitutional obligation, or a necessity of maintaining the appropriate rights and prerogatives of his office compels him to the step;3 and then it will be a solemn appeal to the people themselves from their own representatives. Even within these narrow limits the power is highly valuable; and it will silently operate as a preventive check, by

discouraging attempts to overawe, or to control the executive. Indeed, one of the greatest benefits of such a power is, that its influence is felt, not so much in its actual exercise, as in its silent and secret energy as a preventive. It checks the intention to usurp, before it has ripened into an act.

§ 885. It has this additional recommendation, as a qualified negative, that it does not, like an absolute negative, present a categorical and harsh resistance to the legislative will, which is so apt to engender strife, and nourish hostility. It assumes the character of a mere appeal to the legislature itself, and asks a revision

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1 The Federalist, No. 73.
2 Id.
3 Id.

of its own judgment.1 It is in the nature, then, merely of a rehearing, or a reconsideration, and involves nothing to provoke resentment, or rouse pride. A president, who might hesitate to defeat a law by an absolute veto, might feel little scruple to return it for reconsideration upon reasons and arguments suggested on the return. If these were satisfactory to the legislature, he would have the cheering support of a respectable portion of the body in justification of his conduct. If, on the other hand, they should not be satisfactory, the concurrence of two thirds would secure the ultimate passage of the law, without exposing him to undue censure or reproach. Even in such cases his opposition would not be without some benefit. His observations would be calculated to excite public attention and discussion, to lay bare the grounds, and policy, and constitutionality of measures;2 and to create a continued watchfulness, as to the practical effects of the laws thus passed, so as that it might be ascertained by experience, whether his sagacity and judgment were safer, than that of the legislature.3 Nothing but a gross abuse of the power upon frivolous, or party pretences, to secure a petty triumph, or to defeat a wholesome restraint, would bring it into contempt, or odium; and then, it would soon be followed by that remedial justice from the people, in the exercise of the right of election, which, first or last, will be found to follow with reproof, or cheer with applause, the acts of their rulers, when passion and prejudice have removed the temporary bandages, which have blinded their judgment. Looking back upon the history of the government for the last forty years, it will be

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1 The Federalist, No. 73.
2 Rawle on Constitution, ch. 6, p. 61, 62.
3 1 Wilson's Lect. 449, 450; The Federalist, No. 73.

found, that the president's negative has been rarely exerted; and whenever it has been, no instance (it is believed) has occurred, in which the act has been concurred in by two thirds of both houses. If the public opinion has not, in all cases, sustained this exercise of the veto, it may be affirmed, that it has rarely been found that the disapprobation has been violent, or unqualified.

§ 886. The proposition to unite the Supreme Court with the executive in the revision and qualified rejection of laws, failed, as has been seen, in the convention.1 Two reasons seem to have led to this result, and probably were felt by the people also, as of decisive weight. The one was, that the judges, who, are the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisory capacity. The other was, that the judges, by being often associated with the executive, might be induced to embark too far in the political views of that magistrate; and thus a dangerous combination might, by degress, be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from any other avocation, than that of expounding the laws; and it is peculiarly dangerous to place them in a situation to be either corrupted, or influenced by the executive.2 To these may be added another, which may almost be deemed a corollary from them, that it would have a tendency to take from the judges that public confidence in their impartiality, independence, and integrity, which seem indispensable to the due administration of public justice. Whatever has a tendency to create suspicion, or provoke jealousy, is mischievous to the judicial department.

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1 Journal of Convention, 195, 253.
2 The Federalist, No. 73.

Judges should not only be pure, but be believed to be so. The moral influence of their judgments is weakened, if not destroyed, whenever there is a general, even though it be an unfounded distrust, that they are guided by other motives in the discharge of their duties than the law and the testimony. A free people have no security for their liberties, when an appeal to the judicial department becomes either illusory, or questionable.1

§ 887. The other point of inquiry is, as to the extent of the legislative check upon the negative of the executive. It has been seen, that it was originally proposed, that a concurrence of two thirds of each house should be required; that this was subsequently altered to three fourths; and was finally brought back again to the original number.2 One reason against the three fourths seems to have been, that it would afford little security for any effectual exercise of the power. The larger the number required to overrule the executive negative, the more easy it would be for him to exert a silent and secret influence to detach the requisite number in order to carry his object. Another reason was, that even, supposing no such influence to be exerted, still, in a great variety of cases of a political nature, and especially such, as touched local or sectional interests, the pride or the power of states, it would be easy to defeat the most salutary measures, if a combination of a few states

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1 It is a remarkable circumstance in the history of Mr. Jefferson's opinions, that he would decidedly in favour of associating the judiciary with the executive in the exercise of the negative on law, or of investing it separately with a similar power.* At a subsequent period his opinion respecting the value and importance seems to have undergone extraordinary changes.

2 Journal of the Convention, p. 220, 253, 254, 256.

*** 2 Jefferson's Corresp. 274; 2 Pitk. 283.**

could produce such a result. And the executive himself might, from his local attachments or sectional feelings, partake of this common bias. In addition to this, the departure from the general rule, of the right of a majority to govern, ought not to be allowed but upon the most urgent occasions; and an expression of opinion by two thirds of both houses in favour of a measure certainly afforded all the just securities, which any wise, or prudent people ought to demand in the ordinary course of legislation; for all laws thus passed night, at any time, be repealed at the mere will of the majority. It was also no small recommendation of the lesser number, that it offered fewer inducements to improper combinations, either of the great states, or the small states, to accomplish particular objects. There could be but one of two rules adopted in all governments, either, that the majority should govern, or the minority should govern. The president might he chosen by a bare majority of electoral votes, and this majority might be by the combination of a few large states, and by a minority of the whole people. Under such circumstances, if a vote of three fourths were required to pass a law, the voice of two thirds of the states and two thirds of the people might be permanently disregarded during a whole administration. The case put may seem strong; but it is not stronger, than the supposition, that two thirds of both houses would be found ready to betray the solid interests of their constituents by the passage of injurious or unconstitutional laws. The provision, therefore, as it stands, affords all reasonable security; and pressed farther, it would endanger the very objects, for which it is introduced into the constitution.

§ 888. But the president might effectually defeat the wholesome restraint, thus intended, upon his qualified

negative, if he might silently decline to act after a bill was presented to him for approval or rejection. The constitution, therefore, has wisely provided, that "if any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law, in like manner, as if he had signed it."1 But if this clause stood alone, congress might, in like manner, defeat the due exercise of his qualified negative by a termination of the session, which would render it impossible for the president to return the bill. It is therefore added, "unless the congress, by their adjournment, prevent its return, in which case it shall not be a law."

§ 889. The remaining clause merely applies to orders, resolutions, and votes, to which the concurrence of both houses may be necessary; and as to these, with a single exception, the same rule is applied, as is by the preceding clause applied to bills. If this provision had not been made, congress, by adopting the form of an order or resolution, instead of a bill, might hare effectually defeated the president's qualified negative in all the most important portions of legislation.2

§ 890. It has been remarked by De Lolme, that in most of the ancient free states, the share of the people in the business of legislation was to approve or reject the propositions, which were made to them, and to give the final sanction to the laws. The functions of those persons, or in general, those bodies, who were entrusted with the executive power, was to prepare and frame

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1 The original proposition in the convention was, that the bill should he returned by the president in seven days. It was subsequently altered to ten days by a vote of nine states against two.

2 Journal of Convention, p. 220, 255.

*** Journal of Convention, 290, 224, 225.**

the laws, and then to propose them to the people. In a word, they possessed that branch of the legislative power, which may be called the initiative, that is, the prerogative of putting that power into action. In the first times of the Roman republic, this initiative power was constantly exercised by the Roman senate. Laws were made populi jussu, ex authoritate senati; and, even in elections, the candidates were subject to the previous approbation of the senate. In modern times, in the republics of Venice, Berne, and Geneva, the same power is, in fact, exercised by a select assembly, before it can be acted upon by the larger assembly of the citizens, or their representatives.1 He has added, that this power is very useful, and perhaps even necessary, in states of a republican form, for giving a permanence to the laws, as well as for preventing political disorders and struggles for power. At the same time, he is compelled to admit, that this expedient is attended with inconveniences of little less magnitude, than the evils it is meant to remedy.2 The inconveniences are certainly great, but there are evils of a deeper character belonging to such a system. The natural, nay, necessary tendency of it is, ultimately to concentrate all power in the initiative body, and to leave to the approving body but the shadow of authority. It is in fact, though not in form, an oligarchy. And, so far from its being useful in a republic, it is the surest means of sapping all its best institutions, and overthrowing the public liberties, by corrupting the very fountains of legislation. De Lolme praises it as a peculiar excellence of the British monarchy. America, no less, vindicates it, as a fundamental principle in all her republican constitutions.

1 De Lolme, Eng. Const. B. 2, ch. 4, p. 224, and note.
2 Id.

§ 891. We have thus passed through all the clauses of the constitution respecting the structure and organization of the legislative department, and the rights, powers, and privileges of the component branches severally, as well as in the aggregate. The natural order of the constitution next leads us to the consideration of the POWERS, which are vested, by the constitution, in the legislative department. Before, however, entering upon this large and important inquiry, it may be useful to state, in a summary manner, the ordinary course of proceedings at each new session of congress, and the mode, in which laws are usually passed, according to the settled usages in congress, under the rules and orders of the two houses. In substance, it does not differ from the manner of conducting the like business in the British parliament.1
§ 892. On the day appointed for the assembling of a new congress, the members of each house meet in their separate apartments. The house of representatives then proceed to the choice of a speaker and clerk, and any one member is authorized then to administer the oath of office to the speaker, who then administers the like oath to the other members, and to the clerk. The like oath is administered by any member of the senate, to the president of the senate, who then administers a like oath to all the members, and the secretary of the senate; and this proceeding, is had, when, and as often as a new president of the senate, or member, or secretary, is chosen.2 As soon as these preliminaries are gone through, and a quorum of each house is present, notice is given thereof to the president, who signifies

1 1 Tuck. Black. Comm. App. 229, note; 1 Black. Comm. 181; Jefferson's Manual, passim; 2 Wilson's Law Lect. 171 to 176.
2 Act of 1789, ch. 1.

his intention to address them. This was formerly done by way of speech; but is now done by a written message, transmitted to each house, containing a general exposition of the affairs of the nation, and a recommendation of such measures, as the president may deem fit for the consideration of congress. When the habit was for the president to make a speech, it was in the presence of both houses, and a written answer was prepared by each house, which, when accepted, was presented by a committee. At present, no answer whatsoever is given to the contents of the message. And this change of proceeding has been thought, by many statesmen, to be a change for the worse, since the answer of each house enabled each party in the legislature to express its own views, as to the matters in the speech, and to propose, by way of amendment to the answer, whatever was deemed more correct and more expressive of public sentiment, than was contained in either. The consequence was, that the whole policy and conduct of the administration came under solemn review; and it was animadverted on, or defended, with equal zeal and independence, according to the different views of the speakers in the debate; and the final vote showed the exact state of public opinion on all leading measures. By the present practice of messages, this facile and concentrated opportunity of attack or defence is completely taken away; and the attack or defence of the administration is perpetually renewed at distant intervals, as an incidental topic in all other discussions, to which it

often bears very slight, and perhaps no relation. The result is, that a great deal of time is lost in collateral debates, and that the administration is driven to defend itself, in detail, on every leading motion, or measure of the session.1

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1 Under President Washington and President John Adams, the prac-

§ 893. A bill may be introduced by motion of a member, and leave of the house; or it may be introduced by order of the house, on the report of a committee; or it may be reported by a committee. In cases of a general nature, one day's notice is given of a motion to bring in a bill. The bill, however introduced, is drawn out on paper, with a multitude of blanks or void spaces, where any thing occurs, that is dubious, or necessary to be settled by the house; such, especially, as dates of times, sums of money, amount of penalties, and limitations of numbers. It is then read a first time for information; and if any opposition is made to it, the question is then put, whether it shall be rejected. If no opposition is made, or if the question to reject is negatived, the bill goes to a second reading without a question, and it is accordingly read a second time at some convenient distance of time. Every bill must receive three readings in the house previous to its passage; and these readings are on different days, unless upon a special order of the house to the contrary. Upon the second reading of a bill, the speaker states it, as ready for commitment, or engrossment. If committed, it is committed either to a select, or a standing committee, or to a committee of the whole house. If to the latter, the house determine on what day. If the bill is ordered to be engrossed, (that is, copied out in a fair, large, round hand,) the house then appoint the day, when it shall be read the third time. Most of the important bills are committed to a committee of the whole house; and every motion or proposition for a tax or charge upon the people, and for a variation in the sum

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tice was, to deliver speeches. President Jefferson discontinued this course, and substituted messages; and this practice has been since in variably followed.

or quantum of a tax or duty, and for an appropriation of money, is required first to be discussed in a committee of the whole house. The great object of referring any matter to a committee of the whole house is, to allow a greater freedom of discussion, and more times of speaking, than is generally allowed by the rules of the house. It seems, too, that the yeas and nays are not required to be taken upon votes in committee, as they may be in votes in the house.

§ 894. On going into a committee of the whole house, the speaker leaves the chair, and a chairman is appointed by the speaker to preside in committee. Amendments and other proceedings are had in committee much in the same way, as occur in the regular course of the business of the house. Select and standing committees regulate their own times and modes of proceeding according to their own discretion and pleasure, unless otherwise ordered by the house. They make their reports in the same way from lime to time to the house, and secure the directions of the latter. When a bill is committed to a committee, it is read in sections; paragraph after paragraph is debated; blanks are filled up; and alterations and amendments, both in form and substance, are proposed, and often made.

§ 895. After the committee have gone through with the whole bill, they report it, with all the alterations and amendments made in it, to the house. It is then, or at some suitable time afterwards, considered by the latter, and the question separately put upon every alteration, amendment, and clause. After commitment and report to the house, and at any time before its passage, any bill may be recommitted at the pleasure of the house. When a bill, either upon a report of a committee, or after full discussion and amendment in the house,

stands for the next stage of its progress, the question then is, whether it shall be engrossed and read a third time. And this is the proper time commonly chosen by those, who are fundamentally opposed to it, to make their attack upon it, it now being as perfect, as its friends can shape it, and as little exceptionable, as its enemies have been able to make it. Attempts are, indeed, sometimes made at previous stages to defeat it, but they are usually disjointed efforts; because many persons, who do not expect to be in favour of the bill ultimately, are willing to let it go on to its most perfect state, to take time to examine it for themselves, and to hear what can be said in its favour.

§ 896. The two last stages of the bill, viz. on the questions, whether it shall have a third reading, and whether it shall pass, are the strong points of resistance, and defence. The first is usually the most interesting contest, because the subject is more new and engaging, and the trial of strength has not been made; so that the struggle for victory is yet wholly doubtful, and the ardour of debate is proportionally warm and earnest. If the bill is ordered to be engrossed for a third reading, it is, when engrossed, put upon its final passage. Amendments are sometimes made to it at this stage, though reluctantly; and any new clause, thus added, is called a rider. If the vote is, that the bill shall pass, the title is then settled, though a title is always reported with the bill; and that being agreed to, the day of its passage is

noted at the foot of it by the clerk. It is then signed by the speaker, and transmitted to the other house for concurrence therein.

§ 897. The bill, when thus transmitted to the other house, goes through similar forms. It is either rejected, committed, or concurred in, with, or without amend-

ments. If a bill is amended by the house, to which it transmitted, it is then returned to the other house, in which it originated, for their assent to the amendment. If the amendment is agreed to, the fact is made known to the other house. If not agreed to, the disagreement is in like manner notified. And the like course is adopted, where the amendment is agreed to with an amendment. In either of these cases, the house proposing the amendment may recede from it; or may adopt it with the amendment proposed by the other house. If neither is done, the house then vote to insist on the amendment, or to adhere to it. A vote to insist keeps the question still open. But a vote to adhere requires the other house either to insist, or to recede; for if, on their part, there is a vote to adhere, the bill usually falls without farther effort. But, upon a disagreement between the two houses, a conference by a committee of each is usually asked; and in this manner the matters in controversy are generally adjusted by adopting the course recommended by the committees, or one of them. When a bill has passed both houses, the house last acting on it makes known its passage to the other, and it is delivered to the joint committee of enrolment, who see, that it is truly enrolled in parchment, and being signed by the speaker of the house, and the president of the senate, it is then sent to the president for his signature. If he approves it, he signs it; and it is then deposited among the rolls in the office of the department of state. If he disapproves of it, he returns it to the house, in which it originated, with his objections. Here they are entered at large on the journal, and afterwards the house proceed to a consideration of them.1

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1 This summary is abstracted from 1 Black. Comm. 181, 182; 1 Tucker's Black. Comm. App. 229, 230, note; 1 Kent. Comm. Lect. 11, p. 223, 224;

§ 898. This review of the forms and modes of proceeding in the passing of laws cannot fail to impress upon every mind the cautious steps, by which legislation is guarded, and the solicitude to conduct business without precipitancy, rashness, or irregularity. Frequent opportunities are afforded to each house to review their own proceedings; to amend their own errors; to correct their own inadvertencies; to recover from the results of any passionate excitement; and to reconsider the votes, to which persuasive eloquence, or party spirit has occasionally misled their judgments. Under such circumstances, if legislation be unwise, or loose, or inaccurate, it belongs to the infirmity of human nature in general, or to that personal carelessness and indifference, which is sometimes the foible of genius, as well as the accompaniment of ignorance and prejudice.

§ 899. The structure and organization of the several branches, composing the legislature, have also (unless my judgment has misled me) been shown by the past review to be admirably adapted to preserve a wholesome and upright exercise of their powers. All the checks, which human ingenuity has been able to devise, (at least, all which, with reference to our habits, institutions, and local interests, seemed practicable, or desirable,) to give perfect operation to the machinery of government; to adjust all its movements; to prevent its eccentricities; and to balance its forces;--all these have been introduced, with singular skill, ingenuity, and wisdom, into the structure of the constitution.

§ 900. Yet, after all, the fabric may fall; for the

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2 Wilson's Law Lect. 171, 172, 173; Rawle on Constitution, ch. 6, p. 60, &c.; and especially from the rules of both houses, and Jefferson's Manual, (edition at Washington, 1828.)

work of man is perishable, and must for ever have inherent elements of decay. Nay, it must perish, if there be not that vital spirit in the people, which alone can nourish, sustain, and direct all its movements. It is in vain, that statesmen shall form plans of government, in which the beauty and harmony of a republic shall be embodied in visible order, shall be built up on solid substructions, and adorned by every useful ornament, if the inhabitants suffer the silent power of time to dilapidate its walls, or crumble its massy supporters into dust; if the assaults from without are never resisted, and the rottenness and mining from within are never guarded against. Who can preserve the rights and liberties of the people, when they shall be abandoned by themselves? Who shall keep watch in the temple, when the watchmen sleep at their posts? Who shall call upon the people to redeem their possessions, and revive the republic, when their own hands have deliberately and corruptly surrendered them to the oppressor, and have built the prisons, or dug the graves of their own friends? Aristotle, in ancient times, upon a large survey of the

republics of former days, and of the facile manner, in which they had been made the instruments of their own destruction, felt himself compelled to the melancholy reflection, which has been painfully repeated by one of the greatest statesmen of modern times, that a democracy has many striking points of resemblance with a tyranny. "The ethical character," says he, "is the same; both exercise despotism over the better class of citizens; and the decrees are in the one, what ordinances and arrets are in the other. The demagogue, too, and the court favourite are not unfrequently the same identical men, and always bear a close analogy. And these have the principal power, each in their re-

spective governments, favourites with the absolute monarch, and demagogues with a people, such as I have described."1

§ 901. This dark picture, it is to be hoped, will never be applicable to the republic of America And yet it affords a warning, which, like all the lessons of past experience, we are not permitted to disregard. America, free, happy, and enlightened, as she is, must rest the preservation of her rights and liberties upon the virtue, independence, justice, and sagacity of the people. If either fail, the republic is gone. Its shadow may remain with all the pomp, and circumstance, and trickery of government, but its vital power will have departed. In America, the demagogue may arise, as well as elsewhere. He is the natural, though spurious growth of republics; and like the courtier he may, by his blandishments, delude the ears, and blind the eyes of the people to their own destruction. If ever the day shall arrive, in which the best talents and the best virtues shall be driven from office by intrigue or corruption, by the ostracism of the press, or the still more unrelenting persecution of party, legislation will cease to be national. It will be wise by accident, and bad by system.

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1 Burke on the French Revolution, note; Aristotle Polit. B. 4, ch. 4. See Montesquieu's spirit of Laws, B. 8, passim.

CHAPTER XIV.

POWERS OF CONGRESS.

§ 902. WE have now arrived, in the course of our inquiries, at the eighth section of the first article of the constitution, which contains an enumeration of the principal powers of legislation confided to congress. A consideration of this most important subject will detain our attention for a considerable time; as well, because of the variety of topics, which it embraces, as of the controversies, and discussions, to which it has given rise. It has been, in the past time, it is in the present time, and it will probably in all future time, continue to be the debateable ground of the constitution, signalized, at once, by the victories, and the defeats of the same parties. Here; the advocates of state rights, and the friends of the Union will meet in hostile array. And here, those, who have lost power, will maintain long and arduous struggles to regain the public confidence, and those, who have secured power, will dispute every position, which may be assumed for attack, either of their policy, or their principles. Nor ought it at all to surprise us, if that, which has been true in the political history of other nations, shall be true in regard to our own; that the opposing parties shall occasionally be found to maintain the same system, when in power, which they have obstinately resisted, when out of power. Without supposing any insincerity or departure from principle in such cases, it will be easily imagined, that a very different course of reasoning will force itself on the minds of those, who are responsible for the measures of government, from that, which the ardour

of opposition, and the jealousy of rivals, might well foster in those, who may desire to defeat, what they have no interest to approve.

§ 903. The first clause of the eighth section is in the following words: "The congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence, and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States."

§ 904. Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons, on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, "to lay and collect taxes, duties, imposts, and excises," constitute a distinct, substantial power; and the words, "to pay debts and provide for the common defence, and general welfare of the United States," constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? This has been a topic of political controversy; and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious, that under colour of the generality of the words to "provide for the common defence and general welfare," the government of

the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, "for the common defence and the general welfare."

§ 905. The former opinion has been maintained by some minds of great ingenuity, and liberality of views.1 The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. The reading, therefore, which will be maintained in these commentaries, is that, which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words, which are necessarily to be understood in this interpretation. They will then stand thus: "The congress shall have power to lay and collect taxes, duties, imposts, and excises, in order to pay the debts, and to provide for the common defence and general welfare of the United States;" that is, for the purpose of paying the public debts, and providing for the common defence and general welfare of the United States. In

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1 See 2 Elliot's Debates, 327, 328. See Dane's App. §41, p 48; see also 1 Elliot's Debates, 93; Id 293; Id 300; 2 Wilson's Law Lect, 178, 180, 181; 4 Elliot's Debates, 224; 2 U. S. Law Journal, April, 1826, p 251, 264, 270 to 282. This last work contains, in p 270 et seq. a very elaborate exposition of the doctrine -- Mr. Jefferson has, upon more than one occasion, insisted, that this was the federal doctrine, that is, the doctrine maintained by the federalists, as a party; and that the other doctrine was that of the republicans, as a party.* The assertion is incorrect; for the latter opinion was constantly maintained by some of the most strenuous federalists at the time of the adoption of the constitution, and has since been maintained by many of them.# It is remarkable, that Mr. George Mason, one of the most decided opponents of the constitution in the Virginia convention, held the opinion, that the clause, to provide for the common defence and general welfare, was a substantive power. He added, "That congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the constitution in respect to all powers, which are not granted, that they are retained by the states; otherwise the power of providing for the general welfare may be perverted to its destruction"+

*** 4 Jefferson Corresp. 306.**

 # 2 Elliot's Debates, 170, 183, 195; 3 Elliot's Debates, 262; 2 Amer. Museum, 434; 3 Amer. Museum, 338.

+ 2 Elliot's Debates, 327, 328.

this sense, congress has not an unlimited power of taxation; but it is limited to specific objects, -- the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority. In what manner this is to be ascertained, or decided, will be considered hereafter. At present, the interpretation of the words only is before us; and the reasoning, by which that already suggested has been vindicated, will now be reviewed.

§ 906. The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent, as will be presently seen, from the history of the proceedings of the convention, which framed it; and it has formed the admitted basis of all legislative and judicial reasoning upon it, ever since it was put into operation, by all, who have been its open friends and advocates, as well as by all, who have been its enemies and opponents. If the clause, "to pay the debts and provide for the common defence and general welfare of the United States," is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers; but it plainly extends far beyond them, and creates a general authority in congress to pass all laws, which they may deem for the common defence or general welfare.1 Under such circumstances, the constitution would practically create an unlimited national government. The enumerated pow-

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1 President Monroe's Message, 4th May, 1822, p. 32, 33.

ers would tend to embarrassment and confusion; since they would only give rise to doubts, as to the true extent of the general power, or of the enumerated powers.

§ 907. One of the most common maxims of interpretation is, (as has been already stated,) that, as an exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated. But, how could it be applied with success to the interpretation of the constitution of the United States, if the enumerated powers were neither exceptions from, nor additions to, the general power to provide for the common defence and general welfare? To give the enumeration of the specific powers any sensible place or operation in the constitution,

it is indispensable to construe them, as not wholly and necessarily embraced in the general power. The common principles of interpretation would seem to instruct us, that the different parts of the same instrument ought to be so expounded, as to give meaning to every part, which will bear it. Shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural or common, than first to use a general phrase, and then to qualify it by a recital of particulars. But the idea of an enumeration of particulars, which neither explain, nor qualify the general meaning, and can have no other effect, than to confound and mislead, is an absurdity, which no one ought to charge on the enlightened au-

thors of the constitution.1 It would be to charge them either with premeditated folly, or premeditated fraud.

§ 908. On the other hand, construing this clause in connexion with, and as a part of the preceding clause, giving the power to lay taxes, it becomes sensible and operative. It becomes a qualification of that clause, and limits the taxing power to objects for the common defence or general welfare. It then contains no grant of any power whatsoever; but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation.2

§ 909. An attempt has been sometimes made to treat this clause, as distinct and independent, and yet as having no real significancy per se, but (if it may be so said) as a mere prelude to the succeeding enumerated powers. It is not improbable, that this mode of explanation has been suggested by the fact, that in the revised draft of the constitution in the convention the clause was separated from the preceding exactly in the same manner, as every succeeding clause was, viz. by a semicolon, and a break in the paragraph; and that it now stands, in some copies, and it is said, that it stands in the official copy, with a semicolon interposed.3 But this circumstance will be found of very little weight, when the origin of the clause, and its progress to its

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1 The Federalist, No. 41.

2 See Debates on the Judiciary in 1802, p. 332; Dane's App. §41; President Monroe's Message on Internal Improvements, 4th May, 1822, p. 32, 33; 1 Turk. Black. App. 231.

3 Journ. of Convention, p. 356; Id. 494; 2 United States Law Journal, p. 264, April, 1826, New-York. -- In the Federalist, No. 41, the circumstances, that it is separated from the succeeding clauses by a semicolon is noticed. The printed Journal of the Convention gives the revised draft from Mr. Brearly's copy, as above stated. See Journal of Convention, p. 351, 356. See President Monroe's Message on Internal Improvements, 4th May, 1822, p. 16, 32, &c.

present state are traced in the proceedings of the convention. It will then appear, that it was first introduced as an appendage to the power to lay taxes.1 But there is a fundamental objection to the interpretation thus attempted to be maintained, which is, that it robs the clause of all efficacy and meaning. No person has a right to assume, that any part of the constitution is useless, or is without a meaning; and a fortiori no person has a right to rob any part of a meaning, natural and appropriate to the language in the connexion, in which it stands.2 Now, the words have such a natural and appropriate meaning, as a qualification of the preceding clause to lay taxes. Why, then, should such a meaning be rejected?

§ 910. It is no sufficient answer to say, that the clause ought to be regarded, merely as containing "general terms, explained and limited, by the subjoined specifications, and therefore requiring no critical attention, or studied precaution;"3 because it is assuming the very point in controversy, to assert, that the clause is connected with any subsequent specifications. It is not said, to "provide for the common defence, and general welfare, in manner following, viz.," which would be the natural expression, to indicate such an intention. But it stands entirely disconnected from every subsequent clause, both in sense and punctuation; and is no more a part of them, than they are of the power to lay taxes. Besides; what suitable application, in such a sense, would there be of the last clause in the enumeration, viz., the clause "to make all laws, necessary and proper for carrying into execution the fore-

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1 Journal of Convention, p. 323, 324, 326.

2 President Monroe's Message, 4 May, 1822, p. 32, 33.

3 President Madison's Letter to Mr. Stevenson, 27 Nov. 1830.

going powers, &c.?" Surely, this clause is as applicable to the power to lay taxes, as to any other; and no one would dream of its being a mere specification, under the power to provide for the common defence, and general welfare.

§ 911. It has been said in support of this construction, that in the articles of confederation (art; 8) it is provided, that "all charges of war, and all other expenses, that shall be incurred for the common defence, or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, &c;" and that "the similarity in the use of these same phrases in these two great federal charters may well be considered, as rendering their meaning less liable to misconstruction; because it will scarcely be said, that in the former they were ever understood to be either a general grant or power, or to authorize the requisition or application of money by the old congress to the common defence and [or]1 general welfare, except in the cases afterwards enumerated, which explained and limited their meaning; and if such was the limited meaning attached to these phrases in the very instrument revised and remodelled by the present constitution, it can never be supposed, that when copied into this constitution, a different meaning, ought to be attached to them."2 Without stopping to consider, whether the constitution can in any just and critical sense be deemed a revision and remodelling of the confederation,3 if the argument here stated be of any value, it plainly estab-

1 "Or" is the word in the article.

2 Virginia Report and Resolutions of 7 January, 1800. See also the Federalist, No. 41.

3 See the Federalist. No. 40.

lishes, that the words ought to be construed, as a qualification or limitation of the power to lay taxes. By the confederation, all expenses incurred for the common defence, or general welfare, are to be defrayed out of a common treasury, to be supplied by requisitions upon the states. Instead of requisitions, the constitution gives the right to the national government directly to lay taxes. So, that the only difference in this view between the two clauses is, as to the mode of obtaining the money, not as to the objects or purposes, to which it is to be applied. If then the constitution were to be construed according to the true bearing of this argument, it would read thus: congress shall have power to lay taxes for "all charges of war, and all other expenses, that shall be incurred for the common defence or general welfare." This plainly makes it a qualification of the taxing power; and not an independent provision, or a general index to the succeeding specifications of power. There is not, however, any solid ground, upon which it can be for a moment maintained, that the language of the constitution is to be enlarged, or restricted by the language of the confederation. That would be to make it speak, what its words do not import, and its objects do not justify. It would be to append it, as a codicil, to an instrument, which it was designed wholly to supercede and vacate.

§ 912. But the argument in its other branch rests on an assumed basis, which is not admitted. It supposes, that in the confederation no expenses, not strictly incurred under some of the subsequent specified powers given to the continental congress, could be properly payable out of the common treasury. Now, that is a proposition to be proved; and is not to be taken for

granted. The confederation was not finally ratified, so as to become a binding instrument on any of the states, until March, 1781. Until that period there could be no practice or construction under it; and it is not shown, that subsequently there was any exposition to the effect now insisted on. Indeed, after the peace of 1783, if there had been any such exposition, and it had been unfavourable to the broad exercise of the power, it would have been entitled to less weight, than usually belongs to the proceedings of public bodies in the administration of their powers; since the decline and fall of the confederation was so obvious, that it was of little use to exert them. The states notoriously disregarded the rights and prerogatives admitted to belong to the confederacy; and even the requisitions of congress, for objects most unquestionably within their constitutional authority, were openly denied, or silently evaded. Under such circumstances, congress would have little inclination to look closely to their powers; since, whether great or small, large or narrow, they were of little practical value, and of no practical cogency.

§ 913. But it does so happen, that in point of fact, no such unfavourable or restrictive interpretation or practice was ever adopted by the continental congress. On the contrary, they construed their power on the subject of requisitions and taxation, exactly as it is now contended for, as a power to make requisitions on the states for all expenses, which they might deem proper to incur for the common defence and general welfare; and to appropriate all monies in the treasury to the like purposes. This is admitted to be of such notoriety, as to require no proof.1 Surely, the practice of that body in ques-

1 Mr. Madison himself, in his Letter to Mr. Stevenson, Nov. 27, 1830,

tions of this nature must be of far higher value, than the mere private interpretation of any persons in the present times, however respectable. But the practice was conformable to the constitutional authority of congress under the confederation. The ninth article expressly delegates to congress the power "to ascertain the necessary sums to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses;" and then provides, that congress shall not "ascertain the

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admits the force of these remarks in their full extent. His language is, "If the practice of the revolutionary congress be pleaded in opposition to this view of the case," (i.e. his view, that the words have no distinct meaning,) "the plea is met by the notoriety, that, on several accounts, the practice of that body is not the expositor of the articles of the confederation. These articles were not in force, until they were finally ratified by Maryland, in 1781. Prior to that event, the power of congress was measured by the exigencies of the war; and derived its sanction from the acquiescence of the states. After that event, habit, and a continued expediency, amounting often to a real, or an apparent necessity, prolonged the exercise of an undefined authority, which was the more readily overlooked, as the members of that body held their seats during pleasure; as it acts, particularly after the failure of the bills of credit, depended for their efficacy on the will of the states, and as its general impotency became manifest. Examples of departure from the prescribed rule are too well known to require proof." So that it is admitted, that the practice, under the confederation, was notoriously such, as allowed appropriations by congress for any objects, which they deemed for the common defence and general welfare. And yet we are now called upon to take a new and modern gloss of that instrument, directly at variance with that practice. See also Mr. Wilson's pamphlet, on the constitutionality of the bank of North America, in 1785. The reason, why he does not allude to the terms "common defence and general welfare," in that argument, probably was, that there was no question respecting appropriations of money involved in that discussion. He strenuously contends, that congress had a right to charter the bank; and he alludes to the fifth article, which, for the convenient management of the general interests of the United States, provides for the appointment of delegates from the states. He deduces the power, from its being essentially national, and vitally important to the government. 3 Wilson's Law Lect. 397.

sums and expenses necessary for the defence and welfare of the United States, or any of them, &c. unless nine states assent to the same." So that here we have, in the eighth article, a declaration, that "all charges of war and all other expenses, that shall be incurred for the common defence or general welfare, &c. shall be defrayed out of a common treasury;" and in the ninth article, an express power to ascertain the necessary sums of money to be raised for the public service; and then, that the necessary sums for the defence and welfare of the United States, (and not of the United States alone, for the words are added,) or of any of them, shall be ascertained by the assent of nine states. Clearly therefore, upon the plain language of the articles, the words "common defence and general welfare," in one, and "defence and welfare," in another, and "public service," in another, were not idle words, but were descriptive of the very intent and objects of the power; and not confined even to the defence and welfare of all the states, but extending to the welfare and defence of any of them.1 The power then is, in this view, even larger, than that conferred by the constitution.

§ 914. But there is no ground whatsoever, which authorizes any resort to the confederation, to interpret the power of taxation, which is conferred on congress by the constitution. The clause has no reference whatsoever to the confederation; nor indeed to any other clause of the constitution. It is, on its face, a distinct, substantive, and independent power. Who, then, is at liberty to say, that it is to be limited by other clauses, rather than they to be enlarged by it; since

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1 2 Elliot's Deb. 195.

there is no avowed connexion, or reference from the one to the others? Interpretation would here desert its proper office, that, which requires, that "every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end."1

§ 915. It has been farther said, in support of the construction now under consideration, that "whether the phrases in question are construed to authorize every measure relating to the common defence and general welfare, as contended by some; or every measure only, in which there might be an application of money, as suggested by the caution of others; the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers, which follow these general phrases in the constitution. For it is evident, that there is not a

single power whatsoever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve, or admit an application of money. The government, therefore, which possesses power in either one, or the other of these extents, is a government without limitations, formed by a particular enumeration of powers; and consequently the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases." The conclusion de-

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1 The Federalist, No- 40. -- In the first draft, of Dr. Franklin, in 1775, the clause was as follows: "All charges of wars, and all other general expenses, to be incurred for the common welfare, shall be defrayed," &c. -- In Mr. Dickinson's draft, in July, 1776, the words were, "All charges of wars, and all other expenses, that Shall be incurred for the common defence, or general welfare," &c; and these words were subsequently retained. 1 Secret Jour. of Congress, (printed in 1821,) p. 285, 294, 307, 323 to 325, 354.

duced from these premises is, that under the confederation, and the constitution, "congress is authorized to provide money for the common defence and general welfare. In both is subjoined to this authority an enumeration of the cases, to which their powers shall extend. Money cannot be applied to the general welfare otherwise, than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities rested in the congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by the clause in the constitution, which declares, that no money shall be drawn from the treasury but in consequence of appropriations by law. An appropriation of money to the general welfare would be deemed rather a mockery, than an observance of this constitutional injunction."1

§ 916. Stripped of the ingenious texture, by which this argument is disguised, it is neither more nor less, than an attempt to obliterate from the constitution the whole clause, "to pay the debts, and provide for the common defence and general welfare of the United States," as entirely senseless, or inexpressive of any intention whatsoever.2 Strike them out, and the constitution is exactly what the argument contends for. It is, therefore, an argument, that the words ought not to

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1 Virginia Revolutions, of 8th January, 1800. The same reasoning is in President Madison's Veto message, of 3d of March, 1817. 4 Elliot's Deb. 280, 281.

2 4 Elliot's Deb. 236.

be in the constitution; because if they are, and have any meaning, they enlarge it beyond the scope of certain other enumerated powers, and this is both mischievous and dangerous. Being in the constitution, they are to be deemed, vox et preterea nihil, an empty sound and vain phraseology, a finger-board pointing to other powers, but having no use whatsoever, since these powers are sufficiently apparent without.1 Now, it is not too much to say, that in a constitution of government, framed and adopted by the people, it is a most unjustifiable latitude of interpretation to deny effect to any clause, if it is sensible in the language, in which it is expressed, and in the place, in which it stands. If words are inserted, we are bound to presume, that they have some definite object, and intent; and to reason them out of the constitution upon arguments ab inconvenienti, (which to one mind may appear wholly unfounded, and to another wholly satisfactory,) is to make a new constitution, not to construe the old one. It is to do the very thing, which is so often complained of, to make a constitution to suit our own notions and wishes, and not to administer, or construe that; which the people have given to the country.

§ 917. But what is the argument, when it is thoroughly sifted? It reasons upon a supposed dilemma, upon which it suspends the advocates of the two contrasted opinions. If the power to provide for the common defence and general welfare is an independent

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1 In a Debate of 7th of February, 1792. (4 Elliot's Deb. 236.) Mr. Madison puts them, (manifestly as his own construction,) "as a sort of caption, or general description of the specified powers, and as having no further meaning, and giving no further powers, than what is found in that specification." See also, Mr. Madison's Veto message, on the Bank Bonus Bill, 3d March, 1817. 4 Elliot's Deb. 0, 281.

power, then it is said, that the government is unlimited, and the subsequent enumeration of powers is unnecessary and useless. If it is a mere appendage or qualification of the power to lay taxes, still it involves a power of general

appropriation of the monies so raised, which indirectly produces the same result.1 Now, the former position may be safely admitted to be true by those, who do not deem it an independent power; but the latter position is not a just conclusion from the premises, which it states, that it is a qualified power. It is not a logical, or a practical sequence from the premises; it is a non sequitur.

§ 918. A dilemma, of a very different sort, might be fairly put to those, who contend for the doctrine, that the words are not a qualification of the power to lay taxes, and, indeed, have no meaning, or use per se. The words are found in the clause respecting taxation, and as a part of that clause. If the power to tax extends simply to the payment of the debts of the United States, then congress has no power to lay any taxes for any other purpose. If so, then congress could not appropriate the money raised to any other purposes; since the restriction is to taxes for payment of the debts of the United States, that is, of the debts then existing. This would be almost absurd. If, on the other hand, congress have a right to lay taxes, and appropriate the money to any other objects, it must be, because the words, "to provide for the common defence and general welfare," authorize it, by enlarging the power to those objects; for there are no other words, which belong to the clause. All the other powers are in distinct clauses, and do not touch taxation. No advocate for

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1 4 Elliot's Deb. 280, 281.

the doctrine of a restrictive power will contend, that the power to lay taxes to pay debts, authorizes the payment of all debts, which the United States may choose to incur, whether for national or constitutional objects, or not. The words, "to pay debts," are therefore, either antecedent debts, or debts to be incurred "for the common defence and general welfare," which will justify congress in incurring any debts for such purposes. But the language is not confined to the payment of debts for the common defence and general welfare. It is not "to pay the debts" merely; but "to provide for the common defence and general welfare." That is, congress may lay taxes to provide means for the common defence and general welfare. So that there is a difficulty in rejecting one part of the qualifying clause, without rejecting the whole, or enlarging the words for some purposes, and restricting them for others.

§ 919. A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous, (as for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its

heroes,) it would be wholly indefensible upon constitutional principles. The power, then, is, under such circumstances, necessarily a qualified power. If it is so, how then does it affect, or in the slightest degree trench upon the other enumerated powers? No one will pretend, that the power to lay taxes would, in general, have superseded, or rendered unnecessary all the other enumerated powers. It would neither enlarge, nor qualify them. A power to tax does not include them. Nor would they, (as unhappily the confederation too clearly demonstrated,)1 necessarily include a power to tax. Each has its appropriate office and objects; each may exist without necessarily interfering with, or annihilating the other. No one will pretend, that the power to lay a tax necessarily includes the power to declare war, to pass naturalization and bankrupt laws, to coin money, to establish post-offices, or to define piracies and felonies on the high seas. Nor would either of these be deemed necessarily to include the power to tax. It might be convenient; but it would not be absolutely indispensable.

§ 920. The whole of the elaborate reasoning upon the propriety of granting the power of taxation, pressed with so much ability and earnestness, both in and out of the convention,2 as vital to the operations of the national government, would have been useless, and almost absurd, if the power was included in the subsequently enumerated powers. If the power of taxing was to be granted, why should it not be qualified according to the intention of the framers of the constitution? But then, it is said, if congress may lay taxes for the common defence and general welfare, the money may be appro-

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1 See the Federalist, No. 21, 22, 30; 1 Elliot's Deb. 318.

2 See the Federalist, No. 30 to 37.

priated for those purposes, although not within the scope of the other enumerated powers. Certainly it may be so appropriated; for if congress is authorized to lay taxes for such purposes, it would be strange, if, when raised, the money could not be applied to them. That would be to give a power for a certain end, and then deny the end intended by the power. It is added, "that there is not a single power whatsoever, which may not have some reference to the common defence or general welfare; nor a power of any magnitude, which, in its exercise, does not involve, or admit an application of money." If by the former language is meant, that there is not any power belonging, or incident to any government, which has not somer eference to the common defence or general welfare, the proposition may be peremptorily denied. Many governments possess powers, which have no application to either of these objects in a just sense; and some possess powers repugnant to both. If it is meant, that there is no power belonging, or incident to a good government, and especially to a republican government, which may not have some reference to those objects, that proposition may, or may not be true; but it has nothing to do with the present inquiry. The only question is, whether a mere power to lay taxes, and appropriate money for the common defence and general welfare, does include all the other powers of government; or even does include the other enumerated powers (limited as they are) of the national government. No person can answer in the affirmative to either part of the inquiry, who has fully considered the subject. The power of taxation is but one of a multitude of powers belonging to governments; to the state governments, as well as the national government. Would a power to tax authorize a

state government to regulate the descent and distribution of estates; to prescribe the form of conveyances; to establish courts of justice for general purposes; to legislate respecting personal rights, or the general dominion of property; or to punish all offences against society? Would it confide to congress the power to grant patent rights for invention; to provide for counterfeiting the public securities and coin; to constitute judicial tribunals with the powers confided by the third article of the constitution; to declare war, and raise armies and navies, and make regulations for their government; to exercise exclusive legislation in the territories of the United States, or in other ceded places; or to make all laws necessary and proper to carry into effect all the powers given by the constitution? The constitution itself upon its face refutes any such notion. It gives the power to tax, as a substantive power; and gives others, as equally substantive and independent.

§ 921. That the same means may sometimes, or often, be resorted to, to carry into effect the different powers, furnishes no objection; for that is common to all governments. That an appropriation of money may be the usual, or best mode of carrying into effect some of these powers, furnishes no objection; for it is one of the purposes, for which, the argument itself admits, that the power of taxation is given. That it is indispensable for the due exercise of all the powers, may admit of some doubt. The only real question is, whether even admitting the power to lay taxes is appropriate for some of the purposes of other enumerated powers, (for no one will contend, that it will, of itself, reach, or provide for them all,) it is limited to such appropriations, as grow out of the exercise of those powers. In other words, whether it is an incident to those powers, or a

substantive power in other cases, which may concern the common defence and the general welfare. If there are no other cases, which concern the common defence and general welfare, except those within the scope of the other enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say, that, being for the common defence and general welfare, the constitution did not intend to embrace them? The preamble of the constitution declares one of the objects to be, to provide for the common defence, and to promote the general welfare; and if the power to lay taxes is in express terms given to provide for the common defence and general welfare, what ground can there be to construe the power, short of the object? To say, that it shall be merely auxiliary to other enumerated powers, and not co-extensive with its own terms, and its avowed objects? One of the best established rules of interpretation, one, which common sense and reason forbid us to overlook, is, that when the object of a power is clearly defined by its terms, or avowed in the context, it ought to be construed, so as to obtain the object, and not to defeat it. The circumstance, that so construed the power may be abused, is no answer. All powers may be abused; but are they then to be abridged by those, who are to administer them, or denied to have any operation? If the people frame a constitution, the rulers are to obey it. Neither rulers, nor any other functionaries, much less any private persons, have a right to cripple it, because it is according to their own views inconvenient, or dangerous, unwise or impolitic, of narrow limits, or of wide influence.

§ 922. Besides; the argument itself admits, that "congress is authorized to provide money for the

common defence and general welfare." It is not pretended, that, when the tax is laid, the specific objects, for which it is laid, are to be specified, or that it is to be solely applied to those objects. That would be to insert a limitation, no where stated in the text. But it is said, that it must be applied to the general welfare; and that can only be by an

application of it to some particular measure, conducive to the general welfare. This is admitted. But then, it is added, that this particular measure must be within the enumerated authorities vested in congress, (that is, within some of the powers not embraced in the first clause,) otherwise the application is not authorized.1 Why not, since it is for the general welfare? No reason is assigned, except, that not being within the scope of those enumerated powers, it is not given by the constitution. Now, the premises may be true; but the conclusion does not follow, unless the words common defence and general welfare are limited to the specifications included in those powers. So, that after all, we are led back to the same reasoning, which construes the words, as having no meaning per se, but as dependent upon, and an exponent of, the enumerated powers. Now, this conclusion is not justified by the natural connexion or collocation of the words; and it strips them of all reasonable force and efficacy. And yet we are told, that "this fair and obvious interpretation coincides with, and is enforced by, the clause of the constitution, which provides, that no money shall be drawn from the treasury, but in consequence of appropriations by law;" as if the clause did not equally apply, as a restraint upon drawing money, whichever construction is adopted. Suppose

1 See also 4 Elliot's Debates, 280, 281.

congress to possess the most unlimited power to appropriate money for the general welfare; would it not be still true, that it could not be drawn from the treasury, until an appropriation was made by some law passed by congress? This last clause is a limitation, not upon the powers of congress, but upon the acts of the executive, and other public officers, in regard to the public monies in the treasury.

§ 923. The argument in favour of the construction, which treats the clause, as a qualification of the power to lay taxes, has, perhaps, never been presented in a more concise or forcible shape, than in an official opinion, deliberately given by one of our most distinguished statesmen.1 "To lay taxes to provide for the general welfare of the United States, is," says he, "to lay taxes for the purpose, of providing for the general welfare. For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes ad libitum, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do any thing they please, to provide for the general welfare; but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding, and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a pow

1 Mr. Jefferson.

er to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give that, which will allow some meaning to the other parts of the instrument, and not that, which will render all the others useless. Certainly, no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those, without which, as means, those powers could not be carried into effect."1

§ 924. The same opinion has been maintained at different and distant times by many eminent statesmen.2 It was avowed, and apparently acquiesced in, in the state conventions, called to ratify the constitution;3 and it has been, on various occasions, adopted

1 Jefferson's Opinion on the Bank of the United States, 15th February, 1791; 4 Jefferson's Correspondence, 524, 525. -- This opinion was deliberately reasserted by Mr. Jefferson on other occasions. There may, perhaps, also be found traces of an opinion still more restrictive in his later writings; but they are are obscure and unsatisfactory. See 4 Jefferson's Correspondence, 306, 416, 457; Message of President Jefferson, 2d December, 1806; 5 Wait's State Papers, 453, 458, 459.

2 It was maintained by Mr. Hamilton, in his Treasury Report on Manufactures, (5th Dec. 1791,) and in his argument on the constitutionality of a National Bank, 23d Feb 1791, p, 147, 148; by Mr. Gerry in the debate on the National Bank in Feb. 1791,(4 Elliot's Debates, 226;) by Mr. Ellsworth in a speech in 1788, (3 American Museum, 338;) and by President Monroe, in his Message of the 4th of May, 1822, (p. 33 to 38,) in an elaborate argument, which well deserves to be studied. He contends, that the power to lay taxes is confined to purposes for the common defence and general welfare. And that the power of appropriation of the monies is co-extensive, that is, that it may be applied to any purposes of the common

defence or general welfare. Mr. Adams, in his Letter to Mr. Speaker Stevenson. 11th of July, 1832, published since the preparation of these Commentaries, has given a masterly exposition of the clause, to which it may be important hereafter again to recur.

3 2 Elliot's Debates, 170, 183, 195, 328, 314; 3 Elliot's Debates, 262; 2 American Museum, 434; 1 Elliot's Debates, 311; Id. 81, 82; 3 Elliot's Debates, 262, 290; 2 American Museum, 544.

by congress,1 and may fairly be deemed, that which the deliberate sense of a majority of the nation has at all times supported. This, too, seems to be the construction maintained by the Supreme Court of the United States. In the case of Gibbons v. Ogden,2 Mr. Chief Justice Marshall, in delivering the opinion of the court, said, "Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power, that is granted to the United States. In imposing taxes for state purposes, they are not doing, what congress is empowered to do. Congress is not empowered to tax for those purposes, which are within the exclusive province of the states. When, then, each government is exercising the power of taxation, neither is exercising the power of the other." Under such circumstances, it is not, perhaps, too much to contend, that it is the truest, the safest, and the most authoritative construction of the constitution.3

§ 925. The view thus taken of this clause of the constitution will receive some confirmation, (if it should be thought by any person necessary,) by an historical examination of the proceedings of the convention.

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1 See cases referred to in President Monroe's Message, 4th of May, 1822; 1 Kent's Comm. Lect. p. 250, 251; 4 Elliot's Deb. 226, 243, 244, 279 to 282; Id. 291, 292; 2 United States Law Journal, April, 1826, p. 263 to 280; Webster's Speeches, 380 to 401, 411, 412, 426.

2 9 Wheat. R. 1, 199.

3 1 Kent's Comm. Lect. p. 251; Sergeant on Const. Law, ch. 28, p. 311 to 315; Rawle on the Constitution, ch. 9, p. 104; 2 United States Law Journal, April, 1826, p. 251 to 282.

The first resolution adopted by the convention on this subject of the powers of the general government, was that the national legislature ought to be empowered to enjoy the legislative rights vested in congress by the confederation, and moreover to legislate in all cases, to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation;"1 At a subsequent period, the latter clause was altered, so as to read thus: "And, moreover, to legislate in all cases for the general interests of the Union, and also in those, to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."2 When the first draft of the constitution was prepared, in pursuance of the resolutions of the convention, the clause respecting taxation (being the first section of the seventh article) stood thus: "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises," without any qualification or limitation whatsoever.

§ 926. Afterwards a motion was made to refer certain propositions, and among others a proposition to secure the payment of the public debt, and to appropriate funds exclusively for that purpose, and to secure the public creditors from a violation of the public faith, when pledged by the authority of the legislature, to a select committee, (of five,) which was accordingly done.3 Another committee (of eleven) was appointed at the same time, to consider the necessity and expediency of the debts of the several states being, assumed

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1 Journ. of Convention, 68, 86, 87, 135, 136.

2 Journ. of Convention, 181, 182, 208.

3 Journ. of Convention, 261.

by the United States.1 The latter committee reported, that "the legislature of the United States shall have power to fulfil the engagements, which have been entered into by congress, and to discharge, as well the debts of the United States, as the debts incurred by the several states during the late war, for the common defence and general welfare." This proposition (it may be presumed) has no reference whatsoever to the clause in the draft of the constitution to lay taxes. The former committee (of five) at a later day reported, that there should be added to the first section of the seventh article (the clause to lay taxes) the following words, "for payment of the debts and the necessary expenses of the United States, provided, that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than -- years."2 It was

then moved to amend the first clause of the report of the other committee, (on state debts,) so as to read as follows: "The legislature shall fulfil the engagements and discharge the debts of the United States," which (after an ineffectual attempt to amend by striking out the words, "discharge the debts," and inserting the words, "liquidate the claims,") passed unanimously in the affirmative.3 So, that the provision in the report, to assume the state debts, was struck out. On a subsequent day, it was moved to amend the first section of the seventh article, so as to read: "The legislature shall fulfil the engagements, and discharge the debts of the United States, and shall have power to lay and. collect taxes, duties, imposts,

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1 Journ. of Convention, 261.

2 Id. 277.

3 Journ. of Convention, 279, 280.

and excises," which passed in the affirmative;1 thus incorporating the amendment already stated with the clause respecting taxes in the draft of the constitution. On a subsequent day the following clause was proposed and agreed to: "All debts contracted, and engagements entered into by or under the authority of congress, shall be as valid against the United States, under this constitution, as under the confederation." On the same day, and after the adoption of this amendment, it was proposed to add to the first clause of the first section of the seventh article, (to lay taxes, &c.,) the following words: "for the payment of said debts, and for the defraying the expenses, that shall be incurred for the common defence, and general welfare," which passed in the negative by the vote of ten states against one.2 So, that the whole clause stood without any further amendment, giving, the power of taxation in the same unlimited terms, as it was reported in the original draft of the constitution. This unlimited extent of the power of taxation seems to have been unsatisfactory; and at a later day another committee reported, that the clause respecting taxation should read as follows: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence, and general welfare of the United States;" and this passed in the affirmative without any division.3 And in the final draft the whole clause now stands thus: "The congress, &c. shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States."4 From this historical survey,

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1 Journ. of Convention, 284.

2 Id. 291.

3 Journ. of Convention, 323, 324, 326.

4 Id. 351, 356.

it is apparent, that it was first brought forward in connexion with the power to lay taxes; that it was originally adopted, as a qualification or limitation of the objects of that power; and that it was not discussed, as an independent power, or as a general phrase pointing to, or connected with, the subsequent enumerated powers. There was another amendment proposed, which would have created a general power to this effect; but it was never adopted, and seems silently to have been abandoned.1

§ 927. Besides; it is impracticable in grammatical propriety to separate the different parts of the latter clause. The words are, "to pay the debts, and provide for the common defence," &c. "To pay the debts" cannot be construed, as an independent power; for it is connected with the other by the copulative "and." The payment of the antecedent debts of the United States was already provided for by a distinct article;2 and the power to pay future debts must necessarily be implied to the extent, to which they could constitutionally be contracted; and would fall within the purview of the enumerated power to pass all laws necessary and proper to carry the powers given by the constitution into effect. If, then, these words were and ought to be read, as a part of the preceding power to lay taxes, and in connexion with it, (as this historical review establishes beyond any reasonable controversy,) they draw the other words, "and provide for the common defence," &c. with them into the same connexion. On the other hand, if this connexion be once admitted, it would be almost absurd to contend, that "to pay the debts" of the United States was a general phrase,

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1 Journ. of Convention, 277.

2 Journ. of Convention, 291. See also the Constitution, art. 6.

which pointed to the subsequent enumerated powers, and was qualified by them; and yet, as a part of the very clause, we are not at liberty to disregard it. The truth is, (as the historical review also proves,) that after it had been

decided, that a positive power to pay the public debts should be inserted in the constitution, and a desire had been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, broad enough to embrace all the other purposes contemplated by the constitution. Among these none were more appropriate, than the words, "common defence and general welfare," found in the articles of confederation, and subsequently with marked emphasis introduced into the preamble of the constitution. To this course no opposition was made, because it satisfied those, who wished to provide positively for the public debts, and those, who wished to have the power of taxation co-extensive with all constitutional objects and powers. In other words, it conformed to the spirit of that resolution of the convention, which authorized congress "to legislate, in all cases, for the general interests of the Union."1

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1 Journal of Convention, 181, 182, 208. -- The letter of Mr. Madison to Mr. Stevenson of 27th November, 1830, contains an historical examination of the origin and progress of this clause substantially the same, as that given above. After perusing it, I perceive no reason to change the foregoing, reasoning. In one respect, Mr. Madison seems to labour under a mistake, viz. in supposing, that the proposition of the 25th of August, to add to the power to lay taxes, as previously amended on the 23d of August, the words, "for the payment of the debt and for defraying the expenses, that shall be incurred for the common defence and general welfare," was rejected on account of the generality of the

§ 928. Having thus disposed of file question, what is the true interpretation of the clause, as it stands in the text of the constitution, and ascertained!. that the power

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phraseology. The known opinions of some of the states, which voted in the negative (Connecticut alone voted in the affirmative) shows, that it could not have been rejected on this account. It is most probable, that it was rejected, because it contained a restriction upon the power to tax; for this power appears at first to have passed without opposition in its general form.* It may be acceptable to the general reader to have the remarks of this venerable statesman in his own words, and therefore they are here inserted. After giving an historical review of the origin and progress of the whole clause, he says,

"A special provision in this mode could not have been necessary for the debts of the new congress; for a power to provide money, and a power to perform certain acts, of which money is the ordinary and appropriate means, must, of course, carry with them, a power to pay the expense of performing the acts. Nor was any special provision for debts proposed, till the case of the revolutionary debts was brought into view; and it is a fair presumption, from the course of the varied propositions, which have been noticed, that but for the old debts, and their association with the terms, 'common defence and general welfare,' the clause would have remained, as reported in the first draft of a constitution, expressing generally 'a power in congress to lay and collect taxes, duties, imposts, and excises;' without any addition of the phrase 'to provide for the common defence and general welfare.' With this addition, indeed, the language of the clause being in conformity with that of the clause in the articles of confederation, it would be qualified, as in those articles, by the specification of powers subjoined to it. But there is sufficient reason to suppose, that the terms in question would not have been introduced, but for the introduction of the old debts, with which they happened to stand in a familiar, though inoperative, relation. Thus introduced, however, they pass undisturbed through the subsequent stages of the constitution.

"If it be asked, why the terms 'common defence and general welfare,' if not meant to convey the comprehensive power, which, taken literally, they express, were not qualified and explained by some reference to the particular power subjoined, the answer is at hand, that although it might easily have been done, and experience shows it might be well, if it had been done, yet the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by identity with the harmless character attached to it in the instrument, from which it was borrowed.

"But may it not be asked with infinitely more propriety, and without the possibility of a satisfactory answer, why, if the terms were meant to

*** Journal of Convention, p. 220, 257, 284, 291.**

of taxation, though general, as to the 'subjects, to which it may be applied, is yet restrictive, as to the purposes, for which it may be exercised; it next becomes matter

embrace, not only all the powers particularly expressed, but the indefinite power, which has been claimed under them, the intention was not so declared; why, on that supposition, so much critical labour was employed in enumerating the particular powers. and in defining and limiting their extent?

"The variations and vicissitudes in the modification of the clause, in which the terms 'common defence and general welfare' appear, are remarkable; and to be no otherwise explained, than by differences of opinion, concerning the necessity or the form of a constitutional provision for the debts of the revolution; some of the members, apprehending improper claims for losses by depreciated bills of credit; others, an evasion of proper claims, if not positively brought within the authorized functions of the new government; and others again, considering the past debts of the United States, as sufficiently secured by the principle, that no change in the government could change the obligations of the nation. Besides the indications in the Journal, the history of the period sanctions this explanation.

"But, it is to be emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms 'common defence and general welfare,' unless we were so to understand the proposition containing them, made on August 25th, which was disagreed to by all the states, except one.

"The obvious conclusion, to which we are brought, is, that these terms, copied from the articles of confederation, were regarded in the new, as in the old instrument, merely as general terms, explained and limited by the subjoined specifications, and therefore requiring no critical attention or studied precaution.

"If the practice of the revolutionary congress be pleaded in opposition to this view of the case, the plea is met by the notoriety, that on several accounts, the practice of that body is not the expositor of the 'articles of confederation.' These articles were not in force, till they were finally ratified by Maryland in 1781. Prior to that event, the power of congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the states. After that event, habit, and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority, which was the more readily overlooked, as the members of the body held their seats during pleasure, as its acts, particularly after the failure of the bills of credit, depended for their efficacy on the will of the slates; and as its general impotency become manifest. Examples of departure from the prescribed rule are too well known to require proof. The

of inquiry, what were the reasons, for which this power was given, and what were the objections, to which it was deemed liable.

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case of the old bank of North America might be cited, as a memorable one. The incorporating ordinance grew out of the inferred necessity of such an institution to carry on the war, by aiding the finances, which were starving under the neglect or inability of the states to furnish their assessed quotas. Congress was at the time so much aware of the deficient authority, that they recommended it to the state legislatures to pass laws giving due effect to the ordinance, which was done by Pennsylvania and several other states.

"Mr. Wilson, justly distinguished for his intellectual powers, being deeply impressed with the importance of a bank at such a crisis, published s small pamphlet, entitled 'Considerations on the Bank of North America,' in which he endeavoured to derive the power from the nature of the Union, in which the colonies were declared and become independent states; and also from the tenour of the articles of confederation' themselves. But what is particularly worthy of notice is, that with all his anxious search in those articles for such a power, he never glanced at the terms, 'common defence and general welfare,' as a source of it. He rather chose to rest the claim on a recital in the text, 'that for the more convenient management of the general interests of the United States, delegates shall be annually appointed to meet in congress,' which he said implied, that the United States had general rights, general powers, and general obligations, not derived from any particular state, nor from all the particular states, taken separately, but 'resulting from the union of the whole;' these general powers, not being controlled by the article declaring, that each state retained all powers not granted by the articles, because 'the individual states never possessed, and could not retain, a general power over the others.'

"The authority and argument here resorted to, if proving the ingenuity and patriotic anxiety of the author, on one hand, show sufficiently on the other, that the terms, 'common defence and general welfare,' could not, according to the known acceptation of them, avail his object.

"That the terms in question were not suspected in the convention, which formed the constitution, of any such meaning, as has been constructively applied to them may be pronounced with entire confidence. For it exceeds the possibility of belief; that the known advocates in the convention for a jealous grant, and cautious definition of federal powers, should have silently permitted the introduction of words or phrases, in a sense rendering fruitless the restrictions and definitions elaborated by them.

"Consider, for a moment, the immeasurabIe difference between the constitution, limited in its powers to the enumerated objects; and ex-

§ 929. That the power of taxation should be, to some extent, vested in the national government, was admitted by all persons, who sincerely desired to escape

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panded, as it would be by the import claimed for the phraseology in question. The difference is equivalent to two constitutions, of characters essentially contrasted with each other; the one possessing powers confined to certain specified cases; the other extended to all cases whatsoever. For what is the case, that would not be embraced by a general power to raise money; a power to provide for the general welfare; and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding at the same time, all local laws and constitutions at variance with them? Can less be said, with the evidence before us, furnished by the Journal of the Convention itself, than that it is impossible, that such a constitution, as the latter, would have been recommended to the states by all the members of that body, whose names were subscribed to the instrument?

"Passing from this view of the sense, in which the terms, 'common defence and general welfare,' were used by the framers of the constitution, let us look for that, in which they must have been understood by the conventions, or rather by the people, who. through their conventions, accepted and ratified it. And here the evidence is, if possible, stilt more irresistible, that the terms could have been regarded, as giving a scope to federal legislation, infinitely more objectionable, than any of the specified powers, which produced such strenuous opposition, and calls for amendments, which might be safeguards against the dangers apprehended from them. "Without recurring to the published debates of those conventions. which, as far as they can be relied on for accuracy, would, iris believed, not impair the evidence furnished by their recorded proceedings, it will suffice to consult the lists of amendments proposed by such of the conventions, as considered the powers granted to the government, too extensive, or not safely defined.

"Besides the restrictive and explanatory amendments to the text of the constitution, it may be observed, that a long list was premised under the name, and in the nature of 'Declaration of Rights;' all of them indicating a jealousy of the federal powers, and an anxiety to multiply securities against a constructive enlargement of them. But the appeal is more particularly made to the number and nature of the amendments, proposed to be made specific and integral part, of the constitutional text.

"No less than seven states, it appears, concurred in adding to their ratifications a series of amendments, which they deemed requisite. Of these amendment,, nine were proposed by the convention of Massachusetts; live by that of South-Carolina; twelve by that of New-Hamp-

from the imbecilities, as well as the inequalities of the confederation.1 Without such a power, it would not be possible to provide for the support of the national

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shire; twenty by that of Virginia; thirty-three by that of New-York; twenty-six by that of North-Carolina; and twenty-one by that of RhodeIsland.

"Here are a majority of the states, proposing amendments, in one instance thirty-three by a single state; all of them intended to circumscribe the power granted to the general government, by explanations, restrictions, or prohibitions, without including a single proposition from a single state referring to the terms, 'common defence and general welfare;' which, if understood to convey the asserted power; could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range, titan all the powers objected to, put together, And that the terms should have passed altogether unnoticed by the many eyes, which saw danger in terms and phrases employed in some of the most minute and limited of the enumerated powers, must be regarded as a demonstration, that it was taken for granted, that the terms were harmless, because explained and limited, as in the 'articles of confederation,' by the enumerated powers, which followed them.

"A like demonstration, that these terms were not understood in any sense, that could invest congress with powers not otherwise bestowed by the constitutional charter, may be found in what passed in the first session of congress, when the subject of amendments was taken up, with the conciliatory view of treeing the constitution from objections, which had been made to the extent of its powers, or to the unguarded terms employed in describing them. Not only were the terms, 'common defence and general welfare,' unnoticed in the long list of amendments brought forward in the outset; but the Journals of Congress show, that in tile progress of the discussions not a single proposition was made in either branch of the legislature, which referred to tile phrase, an admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it. Such a forbearance and silence on such an occasion, and among so many members, who belonged to the part of the nation, which called for explanatory and restrictive amendments, and who had been elected, as known advocates for them, cannot be accounted for, without supposing, that the terms, 'common defence and general weIfare,' were not, at that time, deemed susceptible of any such construction, as has since been applied to them.
"It tony be thought, perhaps, due to tile subject, to advert to a letter of October 5th, 1787, to Samuel Adams, and another of October 16th, of

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1 See The Federalist, No. 21, 30.

forces by land or sea, or the national civil list, or the ordinary charges and expenses of government. For these purposes at least, there must be a constant and regular supply of revenue.1 If there should be a deficiency, one of two evils must inevitably ensue; either the people must be subjected to continual arbitrary plunder; or the government must sink into a fatal atrophy.2 The former is the fate of Turkey under its sovereigns: the latter was the fate of America under the confederation.3

§ 930. If, then, there is to be a real, effective national government, there must be a power of taxation co-extensive with its powers, wants, and duties. The only inquiry properly remaining is, whether the resources of taxation should be specified and limited; or, whether the power in this respect should be general, leaving a full choice to the national legislature. The opponents of the constitution strenuously contended, that

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he same year, to the governor of Virginia, from R.H. Lee, in both of which it is seen, that the terms had attracted his notice, and were apprehended by him 'to submit to congress every object of human legislation.' But it is particularly worthy of remark, that although a member of tile senate of the United States, when amendments to the constitution were before that house, and sundry additions and alterations were there made to the list sent from the other, no notice was taken of those terms, as pregnant with danger. it must be inferred, that the opinion Formed by the distinguished member, at the first view of the constitution, and before it had been fully discussed and elucidated, had been changed into a conviction, that the terms did not fairly admit the construction he had originally put on them; and therefore needed no explanatory precaution against it."
Against the opinion of Mr. Madison, there are the opinions of men of great eminence, and well entitled to the confidence of their country; and among these away be enumerated Presidents Washington, Jefferson, and Monroe, and Mr. Hamilton. The opinion of the latter upon this very point will be given hereafter in his own words.

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1 1 Tucker's Black. Comm. App. 235 et seq.; Id. 244, 245.
2 The Federalist, No. 30.
3 Id.

4 the power should be restricted; its fiends, as strenuously contended, that it was indispensable for the public safety, that it should be general.

§ 931. The general reasoning, by which an unlimited power was sustained, was to the following effect. Every government ought to contain within itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts, for which it is responsible, free from every other control, but a regard to the public good, and to the security of the people. In other words, every power ought to be proportionate to its object. The duties of superintending the national defence, and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers, to which no possible limits can be assigned; and therefore the power of making that provision ought to know no other bounds, than the exigencies of the nation, and

the resources of the community. Revenue is the essential engine, by which the means of answering the national exigencies must be procured; and therefore the power of procuring it must necessarily be comprehended in that of providing for those exigencies. Theory, as well as practice, the past experience of other nations, as well as our own sad experience under the confederation, conspire to prove, that the power of procuring revenue is unavailing, and a mere mockery, when exercised over states in their collective capacities. If, therefore, the federal government was to be of any efficiency, and a bond of union, it ought to be invested with an unqualified power of taxation for all national purposes.1 In the history of mankind it has ordinarily

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1 The Federalist, No. 31; Id. No. 30; Id. No. 21.

been found, that in the usual progress of things the necessities of a nation in every stage of its existence are at least equal to its resources.1 But, if a more favourable state of things should exist in our own government, still we must expect reverses, and ought to provide against them. It is impossible to foresee all the various changes in the posture, relations, and power of different nations, which might affect the prosperity and safety of our own. We may have formidable foreign enemies. We may have internal commotions. We may suffer from physical, as well as moral calamities; from plagues, famine, and earthquakes; from political convulsions, and rivalries; from the gradual decline of particular sources of industry; and from the necessity of changing our own habits and pursuits, in consequence of foreign improvements and competitions, and the variable nature of human wants and desires. A source of revenue adequate in one age, may wholly or partially fail in another. Commerce, or manufactures, or agriculture may thrive under a tax in one age, which would destroy them in another. The power of taxation, therefore, to be useful, must not only be adequate to all the exigencies of the nation, but it must be capable of reaching from time to time all the most productive sources. It has been observed with no less truth, than point, that "in political arithmetic two and two do not always make four."2 Constitutions of government are not to be framed upon a calculation of existing exigencies; but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. There ought to be a capacity to provide for future contingencies, as they may happen; and as these are (as has been

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1 The Federalist, No. 30. 2 The Federalist, No. 21.

already suggested) illimitable in their nature, so it is impossible safely to limit that capacity.1

§ 932. In answer to this reasoning it was objected, that "it is not true, because the exigencies of the Union may not be susceptible of limitation, that its power of taxation ought to be unconfined. Revenue is as requisite to the purposes of the local administrations, as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. it is, therefore, as necessary, that the state governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect to the Wants of the Union. But an indefinite power in the latter might, and probably would in time, deprive the former of he means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; and as it is to have power to pass all laws, that may be necessary, for carrying into execution the authorities, with which it is proposed to vest the national government, it might at any time abolish the taxes imposed for state objects upon the. pretence of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenue; and thus all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."2 The

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1 The Federalist, No. 34; 1 Elliot's Debates, 77 to 89; Id. 303 to 308; Id. 309, 311 to 316, 321 to 329; Id. 337; 2 Elliot's Debates, 95, 96, 118; Id. 198 to 204; 3 Elliot's Debates, 261, 262, 290; 3 Amer. Museum 334, 338; 1 Tucker's Black. Comm. 234 235 236. 2 The Federalist, No. 31; 1 Ellot's, Debates, 77, 78 to 89; Id. 91, 105, 112; Id. 293, 294 to 296; Id. 301, 302, 303; Id. 329 to 333; 2 Elli-

difficulties arising from this collision between the state and national governments might be easily avoided by a separation and distinction, as to the subjects of taxation, or by other methods, which might be easily devised. Thus, for instance, the general government might be entrusted with the power of external taxation, such as laying duties and imposts on goods imported; and the states remain exclusively in possession of the power of internal taxation. Or power might be given to the general government to lay taxes exclusively upon certain specified subjects; or to lay

taxes, if requisitions on the states were not complied with;1 or, if the specified subjects failed to produce an adequate revenue, resort might be had to requisitions, or even to direct taxes, to supply the deficiency.2

§ 933. In regard to these objections it was urged, that it was impossible to rely (as the history of the government under the confederation abundantly proved) upon requisitions upon the states.3 Direct taxes were exceedingly unequal, and difficult to adjust;4 and could

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ot's Debates. 52, 51, 208; 3 Elliot's Debates, 77 to 91; 1 Tuck. Black. Comm. App. 240; 2 Amer. Museum, 543, 544. 1 3 Amer. Museum, 423; 2 Elliot's Debates, 52, 53, 200, 206. 2 See The Federalist, No. 30; 1 Elliot's Debates, 294; 1 Tucker's Black. Comm. App. 234, 235; 1 Elliot's Debates, 294, 295; 2 Elliot's Debates, 52, 53, 111, 112; Id. 200, 206, 208. -- It was moved in the convention, that whenever revenue was required to be raised by direct taxation, it should be apportioned among the states, and then requisitions made upon the states to pay the amount; and in default only of their compliance, congress should be authorized to pass acts directing the mode of collecting it. But this proposition was rejected by a vote of seven states against one, one state being divided.* 3 The Federalist, No. 30; 1 Elliot's Debates, 303, 304; Id..325, 326, 327; 2 Elliot's Debates, 195, 199, 204. 4 The Federalist, No. .21; 1 Elliot's Debates, 81, 82; 2 Elliot's Debates, 105; Id. 199, 204, 296; 1 Tucker's Black. Comm. App. 234, 235; 236; Dull. R. 171, 178. *Journal of the Convention, p. 974.

not safely be relied on, as an adequate or satisfactory source of revenue, except as a final resort, when others more eligible failed. The distinction between external and internal taxation was indeed capable of being reduced to practice. But in many emergencies it might leave the national government without any adequate resources, and compel it to a course of taxation ruinous to our trade and industry, anti the solid interests of the country. No one of due reflection can contend, that commercial imports are, or could be equal to all future exigencies of the Union; and indeed ordinarily they may not be found equal to them.1 Suppose they are equal to the ordinary expenses of the Union; yet, if war should come, the civil list must be entirely overlooked, or the military left without any adequate supply.2 How is it possible, that a government half supplied and half necessitous cart fulfil the purposes of its institution, or can provide for the security, advance the prosperity, or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home, or respectability abroad? How can its administration be any thing else, than a succession of expedients, temporary, impotent, and disgraceful? How will it be able to avoid a frequent sacrifice of its engagements to immediate necessity? How can. it undertake, or execute any liberal or enlarged plans of public good?3 Who would lend to a

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1 The Federalist, No. 41. See 1 Elliot's Debates, 303 to 306. 2 The Federalist, No. 30, 34. --"A government," (said one of our most distinguished statesmen, Mr. Ellsworth, of Connecticut, speaking on this very subject,) "which can command but half its resources, is like a man with but one arm to defend himself." Speech in Connecticut Convention, 7th January, 1788; 3 Amer. Museum, 338 3 The Federalist, No. 30.

government, incapable of pledging any permanent resources to redeem its debts? It would be the common case of needy individuals, who must borrow upon onerous conditions and usury, because they cannot promise a punctilious discharge of their engagements.1 It would, therefore, not only not be wise, but be the extreme of folly to stop short of adequate resources for all emergencies, and to leave the government entrusted with the care of the national defence in a state of total, or partial incapacity to provide for the protection of the community against future invasions of the public peace by foreign war, or domestic convulsions. If, indeed, we are to try the novel, not to say absurd experiment in politics, of tying up the hands of government from protective and offensive war, rounded upon reasons of state, we ought certainly to be able to compel foreign nations to abstain from all measures, which shall injure, or cripple us.2 We must be able to repress their ambition, and disarm their enmity; to conquer their prejudices, and destroy their rivalries and jealousies. Who is so visionary, as to dream of such a moral influence in a republic over the whole world? It should never be forgotten, that the chief sources of expense in every government have ever arisen from wars and rebellions, from foreign ambition and enmity, or from domestic insurrections and factions. And it may well be presumed, that what has been in the past, will continue to be in the future.

§ 934. Besides; it is manifest, that however adequate commercial imposts. might be for the ordinary expenditures of peace, the operations of war might, and indeed ordinarily would, if our adversary possess-

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1 The Federalist, No. 80. 2 The Federalist, No. 34.

ed a large naval force, greatly endanger, if it did not wholly cut off our supplies from this source.1 And if this were the sole reliance of the national government, a naval warfare upon our commerce would, on this very account, be at once the most successful, and the most irresistible means of subduing us, or compelling us to sue for peace. What could Great Britain, or France do in a naval war, if they were compelled to rely on commerce alone, as a resource for taxation to raise armies, or maintain navies? What could America do, in a contest with a rival power, whose navy possessed a superiority, sufficient to blockade all her principal ports?2 And, independent of any such exigencies, the history of the world shows, that nothing is more fluctuating and capricious than trade. The proudest commercial nations in one age have sunk down to comparative insignificance in another. Look at Venice, and Genoa, and the Hanse Towns, and Holland, and Portugal, and Spain! What is their present, commercial importance; compared with its glory, and success, in past times? Could either of them now safely rely on imposts, as an exclusive source of revenue?

§ 935. There is another, very important view of this

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1 3 Elliot's Debates, 290. 2 In the recent war, of 1812-1813, between Great Britain, and the United States, we had abundant. proofs of the correctness, of this reasoning. Notwithstanding the duties upon importations were doubled; from the naval superiority of our enemy, our government, were compelled to resort to direct, and internal taxes, to land taxes and excises; and even with all these advantage, it is notorious, that the credit of the government sunk exceedingly low, during the contest; and the public securities were bought and sold, under the very eyes of the administration, at a discount of nearly fifty per cent, from their nominal amount. Nay, at one time. it was impracticable to borrow any money upon the government credit. This event. (let it be remembered,) took place, after twenty years, of unexampled prosperity of the country. It is a sad, but solemn admonition.

subject. If the power of taxation of the general government were confined to duties on imports, it is evident, that it might be compelled, for want of other adequate resources, to extend these duties to an injurious excess. Trade might become embarrassed, and perhaps oppressed, so as to diminish the receipts, while the duty was increased; smuggling, always facile; and always demoralizing in a republic of a widely extended seacoast, would be most mischievously encouraged.1 The first effect would be, that commerce would thus gradually change its channels; and if other interests should be (as, indeed, they might be to some extent) aided by such exorbitant duties;the ultimate result would be a great diminution of the revenue, and the ruin of a great branch of industry. It never can be either politic or just, wise or patriotic, to found a government upon principles, which in its ordinary, or even extraordinary operations, must naturally, if not necessarily, lead to such a result. This would be, to create a government, not for the happiness, or prosperity of the whole people; but for oppressions, and inequalities, arising from scanty means, and inadequate powers.

§ 936. In regard to the other part of the objection, rounded on the dangers to the state governments from this general power of taxation, it is wholly without any solid foundation. It assumes, that the national government will have an interest to oppress or destroy the state governments; a supposition, wholly inadmissible in principle, and unsupported by fact. There is quite as much reason to presume, that there will be a disposition in the state governments to encroach on that of the union.2 In truth, no reasoning,

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1 The Federalist, No. 35. 2 The Federalist, No. 31.

founded exclusively on either ground, is safe, or satisfactory. There ought to be power in each government to maintain itself, and execute its own powers; but it does not necessarily follow, that either would. become dangerous to the other. The objection, indeed, is rather aimed at the structure, and organization of the government, than at its powers; since it is impossible, if the structure and organization be reasonably skilful, that any usurpation or oppression can take place.1

§ 937. But waiving this consideration, it will at once be seen, that the state governments have complete means of self-protection, as with the sole exception of duties on imports and exports, (which the constitution has taken from the states, unless it is exercised by the consent of congress,) the power of taxation remains in the. states concurrent and co-extensive with that of congress. The slightest attention to the subject will demonstrate this beyond all controversy. The language of the constitution does not, in terms, make it an exclusive power in congress; the existence of a concurrent power is not incompatible with the exercise of it by congress; and the states are not

expressly prohibited from using it by the constitution. Under such circumstances, the argument is irresistible, that a concurrent power remains in the states, as a part of their original and unsurrendered sovereignty?

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1 The Federalist, No. 31, 32. 2 The Federalist, No. 32. See Gibbons v. Ogden, 9 Wheat. R. 1, 199 to 902. 1 Kent's Comm. Lect. 18, p. 363, 367, 368, 369. -- This subject has been already considered in these Commentaries, in the rules of interpretation of the constitution; and a very important illustration, in the Federalist, No. 32, on this very point of taxation, was cited there. It seems, therefore, wholly unnecessary to repeat the reasoning. See also 4 Wheaton's R. 193, 316; 5 Wheaton's R. 22, 24, 28, 45, 49; 9 Wheaton's R. 199, 210, 238; 12 Wheaton's R. 446.

§ 938. The remarks of the Federalist, on this point, are very full and cogent. "There is, plain]y," says that work, "no expression, in the granting clause, which makes that power exclusive in the Union. There is no independent clause, or sentence, which prohibits the states from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the states, in relation to duties on imports and exports. This restriction implies an admission, that, if it were not inserted, the states would possess the power it excludes; and it implies a further admission, that as to all other taxes the authority of the states remains undiminished. In any other view, it would be both unnecessary and dangerous. It would be unnecessary, because, if the grant to the Union of the power of laying such duties implied the exclusion of the states, or even their subordination in this particular, there would be no need of such a restriction. It would be dangerous, because the introduction of it leads directly to the conclusion, which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean, that the states in all cases, to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a negative pregnant; that is, a negation of one thing, and an affirmance of another; a negation of the authority of the states to impose taxes on imports and exports; and an affirmance of their authority to impose them on other articles." -- "As to a supposition of repugnancy between the power of taxation in the states, and in the Union; it cannot be supported in that sense, which would be requisite to work

an exclusion of the states. It is indeed possible, that a tax might be laid on a particular article by a state, which might render it inexpedient, that a further tax should be laid on the same article by the Union. But it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency of an increase, on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and state system of finance might, now and then, not exactly coincide, and might require reciprocal forbearance. It is not, however, a. mere possibility of inconvenience, in the exercise of powers; but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a preexisting right of sovereignty."1

§ 939. It is true, that the laws of the Union are to be supreme. But, without this, they would amount to nothing. It may be admitted, that a law, laying a tax for the use of the United States, would be supreme in its nature, and legally uncontrollable. Yet a law, abrogating a state tax, or preventing its collection, would be as clearly unconstitutional; and, therefore, not the supreme law. As far as an improper accumulation of taxes on the same thing. might tend to render the collection difficult, or precarious, it would be a mutual inconvenience, not arising from superiority, or defect of, power on either side, but from an injudicious exercise of it.2

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1 The Federalist, No. 32, 36. See also 3 American Museum, 338, 341; 1 Elliot's Deb. 307, 308; Id. 315, 316; Id. 321 to 323; 2 Elliot's Deb. 198 to 204; M'Culloch v. State of Maryland, 4 Wheat. R. 316, 433 to 436; 9 Wheaton's R. 199, 200; 201; 12 Wheaton's R. 448. -- Whether a state can tax an instrument, created by the national government, to accomplish national objects, will be hereafter considered. 2 The Federalist, No. 33, 36; 1 Elliot's Deb. 307, 308; Id. 321, 322.

§ 940. The states, with this concurrent power, will be entirely safe, and have ample resources to meet all their wants, whatever they may be, although few public expenses, comparatively speaking, will fail to their lot to provide for. They will be chiefly of a domestic character, and affecting internal polity; whereas, the resources of the Union will cover the vast expenditures, occasioned by foreign intercourse, wars, and other charges necessary for the safety and prosperity of the Union. The mere civil list of any country is always small; the expenses of armies, and navies, and foreign relations unavoidably great. There is no sound reason, why the states should possess any exclusive power over sources of revenue, not required by their wants. But there is the most urgent propriety in conceding to .the

Union all, which may be commensurate by their wants. Any attempt to discriminate between the sources of revenue would leave too much, or too little to the states. If the exclusive power of external taxation were given to the Union, and of external taxation to the states, it would, at a rough calculation, probably give to the states a command of two thirds of the resources of the community, to defray from a tenth to a twentieth of its expenses; and to the Union, one third of the resources of the community, to defray from nine tenths to nineteen twentieths of its expenses. Such an unequal distribution is wholly indefensible. And it may be added, that the resources of the Union would, or might be diminished exactly in proportion to the increase of demands upon its treasury; for (as has been already seen) war, which brings the great expenditures, narrows, or at least may narrow the resources of taxation from duties on imports to a very alarming degree. If we enter any other line of discrimination, it

will be equally difficult to adjust the proper proportions; for the inquiry itself, in respect to the future wants, as well of the states, as of the Union, and their relative proportion, must involve elements, for ever changing, and incapable of any precise ascertainment. Too much, or too little would for ever be found to belong to the states; and the states, as well as the Union, might be endangered by the very precautions to guard against abuses of power.1 Any separation of the subjects of revenue, which could have been fallen upon, would have amounted to a sacrifice of the interests of the Union to the power of the individual states; or of a surrender of important functions by the latter, which would have removed them to a mean provincial servitude, and dependence.2

§ 941. Other objections of a specious character were urged against confiding to congress a general power of taxation. Among these, none were insisted on with more frequency, and earnestness, than the incapacity of congress to judge of the proper subjects of taxation, considering the diversified interests, and pursuits of the states, and the impracticability of representing in that body all their interests and pursuits.3 The principal pressure of this argument has been already examined, in the survey already taken of the

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1 The Federalist, No. 34; 4 Tucker's Black. Comm. App. 234, 235, 236. 2 The Federalist calculated, that. the highest probable sum, required for the ordinary permanent expenses of any state government, would not exceed a million of dollars. But that of the Union, it was supposed, could not be susceptible of any exact measure. The Federalist, No. 34. 3 The Federalist, No. 35, 36; 1 Elliot's Deb. 297 to 300 ; Id. 309 to 313. 1 Tucker's Black. Comm. App. 237, 238; 2 Elliot's Deb. 98; Id. 185, 186 to 188; Id. 201, 202, 203; Id. 232, 236; 3 Elliot's Debates, 77 to 91.

structure and organization of the senate, and house of Representatives. In truth, if it has any real force, or efficacy, it is an argument against any national government, having any efficient national powers; and it is not necessary to repeat the reasoning, on which the expediency, or necessity of such a government has been endeavoured to be demonstrated. And, in respect to the particular subject of taxation, there is quite as much reason to suppose, that there will be an adequate assemblage of experience, knowledge, skill, and wisdom, in congress, and as adequate means of ascertaining the proper bearing of all taxes, whether direct, or indirect, whether affecting agriculture, commerce, or manufactures, as to discharge any other functions delegated to congress. To suppose otherwise, is to suppose the Union impracticable, or mischievous.1

§ 949. Other objections were raised on the ground of the multiplied means of influence in the national government, growing out of the appointments to office, necessary in the collection of the revenues; the host of officers, which would swarm over the land, like locusts, to devour its substance; and the terrific oppressions, resulting from double taxes, and harsh, and arbitrary regulations.2 These objections were answered, as well might be supposed, by appeals to common sense, and common experience; and they are the less necessary now to be refuted, since in the actual practice of the government they have been proved to be visionary, and fallacious, the dreams of speculative statesmen, indulging their love of ingenious paradoxes,

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1 The Federalist, No. 35, 36, 41, 45; 1 Tucker's Black. Comm. App. 244, 245. 2 The Federalist, No 36; 2 Elliot's Debates, 52, ,53, 70; Id. 208; 3 Elliot's Debates, 262, 263; 2 American Museum, 543.

or the suggestions or fear, stimulated by discontent, or carried away by phantoms or the imagination.1

§ 943. But another extraordinary objection, which shows, how easily men may persuade themselves or the truth of almost any proposition, which temporary interests or excitements induce them to believe, was urged from the North; and it was, that the impost would be a partial tax; and that the southern states will pay but little in comparison with the northern. It was refuted by unanswerable reasoning;2 and would hardly deserve mention, if the opposite doctrine had not been recently revived and propagated with abundant zeal at the South, that duties on importations fail with

the most calamitous inequality on the southern states. Nay, it has been seriously urged, that a single southern state is burthened. with the payment of more than half of the whole duties levied on foreign goods throughout the Union.
§ 944. Again; it was objected, that there was no certainty, that any duties would be laid on importations; for the southern states might object to all imposts of this nature, as they have no manufactures of their own, and consume more foreign goods, than the northern states; and, therefore, direct taxes would be the common resort to supply revenue.3 To which no other answer need be given, than, that the rule of apportionment, as well as the inequalities of such taxes, would, undoubtedly, produce a strong disinclination in the nation, and especially in the southern states, to resort to them, unless under extraordinary circumstances.4

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1 The Federalist, No. 36; 3 American Museum, 338, 341; 1 Elliot's Deb. 81, 293, 294, 300 to 302; Id. 337, 338; 2 Elliot's Deb. 98; Id. 198 to 204. 2 See Mr. Ellsworth's Speech, 3 American Museum, 338, 340. 3 1 Elliot's Debates, 90, 91. 4 1 Tuck. Black. Comm. App. 234 to 238; The Federalist, No. 12.

An objection, of a directly opposite character, was also taken; viz. that the power of laying direct taxes was not proper to be granted to the national government, because it was unnecessary, impracticable, unsafe, and accumulative of expense.1 This objection also was shown to be unfounded; and, indeed, under certain exigencies, which have been already. alluded to, the national government might for want of it he utterly prostrated.2
§ 945. Other objections were urged, which it seems unnecessary to enumerate, as they were either temporary in their nature, or were mere auxiliaries to those already mentioned. The experience of the national government has hitherto shown the entire safety, practicability, and even necessity of its possessing the general power of taxation. The states have exercised a concurrent power without obstruction or inconvenience, and enjoy revenues adequate to all their wants; more adequate, indeed, than they could possibly possess, if the Union were abolished, or the national government were not vested with a general power of taxation, which enables it to provide for all objects of common defence and general welfare. The triumph of the friends of the constitution, in securing this great fundamental source of all real effective national sovereignty, was most signal; and it is the noblest monument of their wisdom, patriotism, and independence. Popular feelings, and popular prejudices, and local interests, and the pride of state authority, and the jeal-

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21, 36; 1 Elliot's Debates, 61, 62; 2 Elliot's Debates, 105; 11 Elliot's Debates, 77 to 91; 8 Journ. of Continent. Congress, 16th Dec. 1782, p. 203 1 2 Elliot's Debates, 197 to 204; Id. 208, 232, 235; 3 Elliot's Debate, 77, 91. 2 Ibid.

ousy of state sovereignty, were all against them. Yet they were not dismayed; and by steadfast appeals to reason, to the calm sense of the people, and to the lessons of history, they subdued opposition, and won. confidence. Without the possession of this power, the constitution would have long since, like the confederation, have dwindled down to an empty pageant. It would have become an unreal mockery, deluding our hopes, and exciting our fears. It would have flitted. before us for a moment with a pale and ineffectual light, and then have departed for ever to the land of shadows. There is so much candour and force in the remarks of the learned American commentator on Blackstone, on this subject, that they deserve to be cited in this place.1 "A candid review of this part of the federal constitution cannot fail to excite our just applause of the principles, upon which it is founded. All the arguments against it appear to have been drawn from the inexpediency of establishing such a form of government, rather than from any defect in this part of the system, admitting, that a general government was necessary to the happiness and prosperity of the states individually. This great primary question being once decided in the affirmative, it might be difficult to prove, that any part of the powers granted to congress in this clause ought to have been altogether withheld: yet being granted, rather as an ultimate provision in any possible case of emergency, than as a means of ordinary revenue, it is to be wished, that the exercise of powers, either oppressive in their operation, or inconsistent with the genius of the people, or irreconcilable to their prejudices, might be reserved for cogent occasions, which might justify the temporary recourse to a

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1 1 Tuck. Black. Comm. App. 246.

lesser evil, as the means of avoiding one more permanent, and of greater magnitude."
§ 946. The language of the constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises," &c. "But all duties, imposts, and excises shall be uniform throughout the United States." A distinction is here taken between taxes, and duties, imposts, and excises; and, indeed, there are other parts of the constitution

respecting the taxing power, (as will presently be more fully seen,) such as the regulations respecting direct taxes, the prohibition of taxes or duties on exports by the United States, and the prohibition of imposts or duties by the states on imports or exports, which require an attention to this distinction.

§ 947. In a general sense, all contributions imposed by the government upon individuals for the service of the state, are called taxes, by whatever name they may be known, whether by the name of tribute, tythe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.1 In this sense, they are usually divided into two great classes, those, which are direct, and those, which are indirect. Under the former denomination are included taxes on land, or real property, and under the latter, taxes on articles of consumption.2 The constitution, by giving the power to lay and collect taxes in general terms, doubtless meant to include all sorts of taxes, whether direct or indirect.3 But, it may be asked, if such was the intention, why were the sub-

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1 See 2 Stuart's Polit. Econ. 485; 1 Tuck. Black. Comm. App. 232; 1 Black. Comm. 308; 3 Dall. R. 171; Smith's Wealth of Nations, B. 3, ch. 3, B. 5, ch. 2, P. 1, P. 2, art. 4. 2 The Federalist, No. 21, 36, 1 Tuck. Black. Comm. 233, 238, 239; Smith's Wealth of Nations, B. 5, ch. 3, Pt. 2, art. 1 and 2, and App. 3 Loughborough v. Blake, 5 Whteat. R. 317, 318, 319.

sequent words, duties, imposts and excises, added in the clause? Two reasons may be suggested; the first, that it was done to avoid all possibility of doubt in the construction of the clause, since, in common parlance, the word taxes is sometimes applied in contradistinction to duties, imposts, and excises, and, in the delegation of so vital a power, it was desirable to avoid all possible misconception of this sort; and, accordingly, we find, in the very first draft of the constitution, these explanatory words are added.1 Another reason was, that the constitution prescribed different rules of laying taxes in different cases, and, therefore, it was indispensable to make.a discrimination between the classes, to which each rule was meant to apply.2

§ 948. The second section of the first article, which has been already commented on for another purpose, declares, that "direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers." The fourth clause of the ninth section of the same article (which would regularly be commented on in a future page) declares, that "no capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." And the clause now under consideration, that "all duties, imposts, and excises shall be uniform throughout the United States." Here, then, two rules are prescribed, the rule of apportionment (as it is called) for direct taxes, and the rule of uniformity for duties, imposts, and excises. If there are any other kinds of taxes, not embraced in one or the other of these two classes, (and it is certainly difficult to give full effect to

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1 Journal of Convention, 220. 2 Hylton v. United State, 3 Dall. 171, 174.

the words of the constitution without supposing them to exist,) it would seem, that congress is left at full liberty to levy the same by either rule, or by a mixture of both rules, or perhaps by any other rule, not inconsistent with the general purposes of the constitution.1 It is evident, that "duties, imposts, and excises" are indirect taxes in the sense of the constitution. But the difficulty still remains, to ascertain1 what taxes are comprehended under this description; and what under the description of direct taxes. It has been remarked by Adam Smith, that the private revenue of individuals arises ultimately from three different sources, rent, profit, and wages; and, that every public tax must be finally paid from some one, or all of these different sorts of revenue.2 He treats all taxes upon land, or the produce of land, or upon houses, or parts, or appendages thereof, (such as hearth taxes and window taxes,) under the head of taxes upon rent; all taxes upon stock, and money at interest, upon other personal property yielding an income, and upon particular employments, or branches of trade and business, under the head of taxes on profits; and taxes upon salaries under the head of wages. He treats capitation taxes and taxes on consumable articles, as mixed taxes, falling upon all or any of the different species of revenue.3 A full consideration of these different classifications of taxes belongs more properly to a treatise upon political economy, than upon constitutional law.

§ 949. The word "duties" has not, perhaps, in all cases a very exact signification, or rather it is used sometimes in a larger, and sometimes in a narrower

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1 Hylton v. United States, 3 DalI. R. 171. 2 1 Smith's Wealth of Nations, B. 5, ch. 2, P. 2. 3 Smith's Wealth of Nations, B. 5, ch. 2, P. 2, art. 1, 2, 3, 4.

sense. In its large sense, it is very nearly an equivalent to taxes, embracing all impositions or charges levied on persons or things.1 In its more restrained sense, it is often used as equivalent to "customs," which appellation is usually applied to those. taxes, which are payable upon goods and merchandise imported, or exported, and was probably given on account of the usual and constant demand of them for the use of kings, states, and governments.2 In this sense, it is nearly synonymous with "imposts," which is sometimes used in the large sense of taxes, or duties, or impositions, and sometimes in the more restrained sense of a duty on imported goods and merchandise.3 Perhaps it is not unreasonable to presume, that this narrower sense might be in the minds of the framers of the constitution, when this clause was adopted, since, in another clause, it is subsequently provided, that "No tax or duty shall be laid on articles exported from any state;" and, that "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."4 There is another provision, that "No state shall, without the consent of congress, lay any duty of tonnage," &c.; from which, perhaps, it may be gathered, that a tonnage duty, (by which is to be understood, not the ancient custom in England, so called, on wines imported,5 but a duty on the ton

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1 See The Federalist, No. 86. 2 Smith's Wealth of Nations, B. 4, ch. 1, P. 3, B. 5, oh. 2, art. 4; Hale on Customs, Harg. Tracts, p. 115, &c.; 1 Black. Comm. 313, 314, 315, 316; Com. Dig. Prerogative, D. 43 to D. 49. 3 The Federalist, No. 30; 3 Elliot's Debates, 289. 4 Mr. Madison is of opinion. that the terms, imposts, and duties, in these clauses, are used as synonymous. There is much force in his suggestions. Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828. 5 1 Black. Comm. 315; Hale on Customs, Harg. Law Tracts, p. 3, ch. 7, ch. 14, ch. 15.

nage of ships and vessels,) was not deemed an impost, strictly, but a duty. However, it must be admitted, that little certainty can be arrived at from such slight changes of phraseology, where the words are susceptible of various interpretations, and of more or less expansion. The most, that can be done, is, to offer a probable conjecture from the apparent use of words in a connexion, where it is desirable not to deem any one superfluous, or synonymous with the others. A learned commentator has supposed, that the words, "duties and imposts," in the constitution, were probably intended to comprehend every species of tax or contribution, not included under the ordinary terms, "taxes and excises."1 Another learned judge has said,2 "what is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain. They present no clear or precise idea to the mind. Different persons wilt annex different significations to the terms." On the same occasion, another learned judge said, "The term, duty is the most comprehensive, next to the generical term, tax; and practically in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.) embraces taxes on stamps, tolls for passage, &c. and is not confined to taxes on importations only." 3

§ 950. "Excises" are generally deemed to be of an opposite nature to "imposts," in the restrictive sense of the latter term, and are defined to be an in]and imposition, paid sometimes upon the consumption of the com-

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1 1 Tuck. Black. Comm. App. 243. 2 Mr. Justice Patterson in Hylton v. U. States, 3 Dall. R. 171,177. 3 Mr. Justice Chase, Ibid. 174. See The Federalist, No. 36.

modity, or frequently upon the retail sale, which is the last stage before the consumption.1

§ 951. But the more important inquiry is, what are direct taxes in the sense of the constitution, since they are required to be laid by the rule of apportionment, and all indirect taxes, whether they fall under the head of "duties, imposts, or excises," or under any other description, may be laid by the rule of uniformity. It is clear, that capitation taxes,2 or, as they are more commonly called, poll taxes, that is, taxes upon the polls, heads, or persons, of the contributors, are direct taxes, for the constitution has expressly enumerated them, as such. "No capitation, or other direct tax, shall be laid," &c. is the language of that instrument.

§ 952. Taxes on lands, houses, and other permanent real estate, or on parts or appurtenances thereof, have always been deemed of the same character, that is, direct taxes.3 It has been seriously doubted, if, in the sense of the constitution, any taxes are direct taxes, except those on polls or on lands. Mr. Justice Chase, in Hylton v. United States, (3 Dall. R. 171,) said, "I am inclined to think, that the direct taxes, contemplated by the constitution, are only two, viz. a capitation or poll tax simply, without regard to property, profession, or other circumstance, and a tax on land. I doubt, whether a tax by a general assessment of personal property within the United States is included within the term,

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1 1 Black. Comm. 318; 1 Tuck. Black. Comm. App. 341; Smith's Wealth of Nations, B. 5, ch. P. art. 4; 2 Elliot's Debates, 209; 3 Elliot's Debates, 289, 290. 2 See 2 Smith's Wealth of Nations, B. 5, ch. 2, art. 4; The Federalist, No. 36; 2 Elliot's Debates, 209. 3 1 Tuck. Black. Comm. App. 232, 233; Hylton v. United States, 3 Dall. R. 171; The Federalist, No. 21; Loughborough v. Blake, 5 Wheat. R. 317 to 395.

direct tax." Mr. Justice Patterson, in the same case, said, "It is not necessary to determine, whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered, as a part of the land itself. When the produce is converted into a manufacture, it assumes a new shape, &c. Whether 'direct taxes,' in the sense of the constitution, comprehend any other tax, than a capitation tax, or a tax on land, is a questionable point, &c. I never entertained a doubt, that the principal, I will not say the only, objects, that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land." And he proceeded to state, that the rule of apportionment, both as regards representatives, and as regards direct taxes, was adopted to guard the Southern states against undue impositions and oppressions in the taxing of slaves. Mr. Justice Iredell, in the same case, said, "Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description. The latter is to be considered so, particularly under the present constitution, on account of the slaves in the Southern states, who give a ratio in the representation in the proportion of three to five. Either of these is capable of an apportionment. In regard to other articles, there may possibly be considerable doubt." The reasoning of the Federalist seems to lead to the same result.1

§ 953. In the year 1794, congress passed an act,2 laying duties upon carriages for the conveyance of per

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1 The Federalist, No. 31, 36. 2 Act of 1794, ch. 45.

sons, which were kept by or for any person, for his own use, or to be let out to hire, or for the conveying of passengers, to wit, for every coach the yearly sum of ten dollars, &c. &c.; and made the levy uniform throughout the United States. The constitutionality of the act was contested, in the case before stated,1 upon the ground, that it was a direct tax, and so ought to be apportioned among the states. according to their numbers. After solemn argument, the Supreme Court decided, that it was not a direct tax within the meaning of the constitution. The grounds of this decision, as stated in the various opinions of the judges, were; first, the doubt, whether any taxes were direct in the sense of the constitution, but capitation and land taxes, as has been already suggested; secondly, that in eases of doubt, the rule of apportionment ought not to be favoured, because it was matter of compromise, and in itself radically indefensible and wrong; thirdly, the monstrous inequality and injustice of the carriage tax, if laid by the rule of apportionment, which would show, that no tax of this sort could have been contemplated by the convention, as within the rule of apportionment; fourthly, that the terms of the constitution were. satisfied by confining the clause, respecting direct taxes, to capitation and land taxes; fifthly, that, accurately speaking, all taxes on expenses or consumption are indirect taxes, and a tax on carriages is of this kind; and, sixthly, (what is probably of most cogency and force, and. of itself decisive,) that no tax could be a direct one in the sense of the constitution, which was not capable of apportionment according to the rule laid down in the constitution. Thus, suppose ten dollars were contemplated as a tax on each coach or post-chaise in the United

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1 3 Dallas's Reports, 571.

States, and the, number of such carriages in the United States were one hundred and five, and the number of representatives in congress the same. This would produce ten hundred and fifty dollars. The share of Virginia would be 19/100 parts, or $190; the share of Connecticut would be 7/100 parts, or $70. Suppose, then, in Virginia, there are fifty carriages, the sum of $190 must be collected from the owners of these carriages, and apportioned among them, which would make each owner pay $380. And suppose, in Connecticut, there are but two carriages, the share of that state ($70) must be paid by the owners of those two carriages, viz. $35 each. Yet congress, in such a case, intend to lay a tax of but ten dollars on each coach. And if, in any state, there should be no coach or post-chaise owned, then, there could be no apportionment at all. The absurdity, therefore, of such a mode of taxation demonstrates, that such a tax cannot be a direct tax in the sense of the constitution. It is no answer to this reasoning, that congress, having determined to raise such a sum of money, as such a tax on carriages would produce, might apportion the sum due by the rule of apportionment, and then order it to be collected on different articles, selected in each state. That would be, not to lay and collect a tax on carriages, but oh the articles, which were made

contributory to the payment. Thus, the tax might be called a tax on carriages, and levied on horses. And the same objection would lie to an apportionment of the sum, and then a general assessment of it by congress upon all articles.1

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1 3 Dallas's Reports, 171; Rawle on Const. ch. 9; 4 Elliot's Deb. 242; 1 Kent's Comm. Lect. 12, p. 239, 240; 1 Tuck. Black. Comm. App. 294.

§ 954. Having endeavoured to point out the leading distinctions between direct and indirect taxes, and that duties, imposts, and excises, in the sense of the constitution, belong to the latter class, the order of the subject would naturally lead us to the inquiry, why direct taxes are required to be governed by the rule of apportionment; and why "duties, imposts, and excises" are required to be uniform throughout the United States. The answer to the former will be given, when we come to the farther examination of certain prohibitory and restrictive clauses of the constitution on the subject of taxation. The answer to the latter may be given in a few words. It was to cut off all undue preferences of one state over another. in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different states, might exist. The agriculture, commerce, or manufactures of one state might be built up on the ruins of those of another; and a combination of a few states in congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favoured neighbours. The constitution throughout all its provisions is an instrument of checks, and restraints, as well as of powers. It does not rely on confidence in the general government to preserve the interests of all the states. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power, which may endanger the states, as far as it is practicable. If this provision, as to uniformity of duties, had been omitted, although the power might never have been abused to the injury of the

feebler states of the Union, (a presumption, which history does not justify us in deeming quite safe or certain;) yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the constitution. New York and Pennsylvania might, by an easy combination with the Southern states, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western states, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests ofmanufactures. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarms, and suppress discontents.1

§ 955. Two practical questions of great importance have arisen upon the construction of this clause, either standing alone, or in connexion with other clauses, and incidental powers, given by the constitution. One is, whether the government has a right to lay taxes for any other purpose, than to raise revenue, however much that purpose may be for the common defence, or general welfare. The other is, whether the money, when raised, can be appropriated to any other purposes, than such, as are pointed out in the other enumerated powers of congress. The former involves the question, whether congress can lay taxes to protect and encourage domestic manufactures; the latter, whether congress can appropriate money to internal improvements. Each of these questions has given rise to much animated controversy; each has been affirmed and denied, with great pertinacity, zeal, and eloquent reasoning;

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1 See 4 Elliot's Deb. 235, 236.

each has become prominent in the struggles of party; and defeat in each has not hitherto silenced opposition, or given absolute security to victory. The contest is often renewed; and the attack and defence maintained with equal ardour. In discussing this subject, we are treading upon the ashes of yet unextinguished fires, incedimus per ignes suppositos cineri doloso; -- and while the nature of these Commentaries requires, that the doctrine should be freely examined, as maintained on either side, the result will be left to the learned reader, without a desire to influence his judgment, or dogmatically to announce that belonging to the commentator.

§ 956. First, then, as to the question, whether congress can lay taxes, except for the purposes of revenue. This subject has been already touched, in considering what is the true reading, and interpretation of the clause, conferring the power to lay taxes. If the reading and interpretation, there insisted on, be correct, it furnishes additional means to resolve the question, now under consideration.

§ 957. The argument against the constitutional authority is understood to be maintained on the following grounds, which, though applied to the protection of manufactures, are equally applicable to all other cases, where revenue is not the object. The general government is one of specific powers, and it can rightfully exercise only the powers expressly granted, and those, which may be "necessary and proper" to carry them into effect; all others being reserved expressly to the states, or to the people. It results necessarily, that those, who claim to exercise a power under the constitution, are bound to show, that it is expressly granted, or that it is "necessary and proper," as a means to execute some of the granted powers. No such proof has been offered in regard to the protection of manufactures.

§ 958. It is true, that the eighth section of the first article of the constitution authorizes congress to lay and collect an impost duty; but it is granted, as a tax power, for the sole purpose of revenue; a power, in its nature, essentially different from that of imposing protective, or prohibitory duties. The two are incompatible; for the prohibitory system must end in destroying the revenue from imports. It has been said, that the system is a violation of the spirit, and not of the letter of the constitution. The distinction is not material. The constitution may be as grossly violated by acting against its meaning, as against its letter. The constitution grants to congress the power of imposing a duty on imports for revenue, which power is abused by being converted into an instrument for rearing up the industry of one section of the country on the ruins of another. The violation, then, consists in using a power, granted for one object, to advance another, and that by a sacrifice of the original object. It is in a word a violation of perversion, the most dangerous of all, because the most insidious and difficult to resist. Such is the reasoning emanating from high legislative authority.1 On another interesting occasion, the argument has been put in the following shape. It is admitted, that congress has power to lay and collect such duties, as they may deem necessary for the purposes of revenue, and within these limits so to arrange those duties, as incidentally, and to that extent to give protection to the manufacturer. But the right is denied to convert, what is here denominated

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1 See the exposition and protest, reported by a committee of the house of representatives, of South Carolina, on 19th of December, 1829, and adopted; the draft of which has been attributed to Mr. Vice President Calhoun. I have followed, as nearly as practicable, the very words of the report.

the incidental, into the principal power, and transcending the limits of revenue, to impose an additional duty substantially and exclusively for the purpose of affording that protection. Congress may countervail the regulations of a foreign power, which may be hostile to our commerce; but their authority is denied permanently to prohibit all importation, for the purpose of securing the home market exclusively to the domestic manufacturer; thereby destroying the commerce they were entrusted to regulate, and fostering an interest, with which they have no constitutional power to interfere. To do so, therefore, is a palpable abuse of the taxing power, which was conferred for the purpose of revenue; and if it is referred to the authority to regulate commerce, it is as obvious a perversion of that power, since it may be extended to an utter annihilation of the objects, which it was intended to protect.1

§ 959. In furtherance of this reasoning, it has been admitted, that under the power to regulate commerce, congress is not limited to the imposition of duties upon imports for the sole purpose of revenue. It may impose retaliatory duties on foreign powers; but these retaliatory duties must be imposed for the regulation of commerce, not for the encouragement of manufactures. The power to regulate manufactures, not having been confided to congress, they have no more right to act upon it, than they have to interfere with the systems of education, the poor law, or the road laws, of the states. Congress is empowered to lay taxes for rev-

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1 This is extracted from the address of the Free Trade Convention, at Philadelphia, in Oct. 1831, p. 33, 34, attributed to the pen of Mr. Attorney General Berrien. Mr. Senator Hayne, in his Speech, 9 January, 1832, says, that he does not know, where the constitutional objections to the tariff system are better summed up, than in this address, (p. 31, 32.)

enue, it is true; but there is no power to encourage, protect, or meddle with manufactures.1

§ 960. It is unnecessary to consider the argument at present, so far as it bears upon the constitutional authority of congress to protect or encourage manufactures; because that subject will more properly come under review, in all its bearings, under another head, viz. the power to regulate commerce, to which it is nearly allied, and from which it is more usually derived. Stripping the argument, therefore, of this adventitious circumstance, it resolves itself into this statement. The power to lay taxes is a power exclusively given to raise revenue, and it can constitutionally be applied to no other purposes. The application for other purposes is an abuse of the power; and, in fact, however it

may be in form disguised, it is a premeditated usurpation of authority. Whenever money or revenue is wanted for constitutional purposes, the power to lay taxes may be applied to obtain it. When money or revenue is not so wanted, it is not a proper means for any constitutional end.

§ 961. The argument in favour of the constitutional authority is grounded upon the terms and the intent of the constitution. It seeks for the. true meaning and objects of the power according to the obvious sense of the language, and the nature of the government proposed to be established by that instrument. It relies upon no strained construction of words; but demands a fair and reasonable interpretation of the clause, without any restrictions not naturally implied in it, or in the context. It will not do to assume, that the clause was intended solely for the purposes of raising revenue; and

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1 Col. Drayton's Oration, at Charleston, 4th of July, 1831, p. 11, 14.

then argue, that being so, the power cannot be constitutionally applied to any other purposes. The very point in controversy is, whether it is restricted to purposes of revenue. That must be proved; and cannot be assumed, as the basis of reasoning.

§ 962. The language of the constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises." If the clause had stopped here, and remained in this absolute form, (as it was in fact, when reported in the first draft in the convention,) there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form, in which it may be used, and for every purpose, to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. A fortiori it might be applied by congress to purposes, for which nations have been accustomed to apply to it. Now, nothing is more clear, from the history of commercial nations, than the fact, that the taxing power is often, very often, applied for other purposes, than revenue. It is often applied, as a regulation of commerce. It is often applied, as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products, and industry; lot the support of agriculture commerce, and manufactures;1 for retaliation upon foreign monopolies and injurious restrictions;2 for mere purposes of state policy, and domestic economy; sometimes to banish a noxious article of consumption; sometimes, as a bounty upon an infant manufacture, or agricultural

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1 Hamilton's Report on Manufactures, in 1791. 2 See Mr. Jefferson's Report on Commercial Restrictions, in 1793; 5 Marshall's Life of Washington, ch. 7, p. 482 to 487; 1 Wait's State Papers, 422, 434.

product; sometimes, as a temporary restraint of trade; sometimes, as a suppression of particular employments; sometimes, as a prerogative power to destroy competition, and secure a monopoly to the government!1

§ 963. If, then, the power to lay taxes, being general, may embrace, and in the practice of nations does embrace, all these objects, either separately, or in combination, upon what foundation does the argument rest, which assumes one object only, to the exclusion of all the rest? which insists, in effect, that because revenue may be one object, therefore it is the sole object of the power? Which assumes its own construction to be correct, because it suits its own theory, and denies the same right to others, entertaining a different theory? If the power is general in its terms, is it not an abuse of all fair reasoning to insist, that it is particular? to desert the import of the language, and to substitute other and different language? Is this allowable in regard to any instrument? Is it allowable in an especial manner, as to constitutions of government, growing out of the rights, duties, and exigencies of nations, and looking to an infinite variety of circumstances, which may require very different applications of a given power?

§ 964. In the next place, then, is the power to lay taxes, given by the constitution, a general power; or is it a limited power? If a limited power, to what objectsis it limited by the terms of the constitution?

§ 965. Upon this subject, (as has been already stated,) three different opinions appear to have been held by statesmen of no common sagacity and ability. The first is, that the power is unlimited; and that the subsequent clause, "to pay the debts, and provide for the common defence and general welfare," is a substan-

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1 See Smith's Wealth of Nations, B. 5, oh. 2, art. 4.

tive, independent power. In the view of those, who maintain this opinion, the power, being general, cannot with any consistency be restrained to purposes of revenue.

§ 966. The next is, that the power is restrained by the subsequent clause, so that it is a power to lay taxes in order to pay debts, and to provide for the common defence and general welfare. Is raising revenue the only proper mode to

provide for the common defence and general welfare? May not the general welfare, in the judgment of congress, be, in given circumstances, as well provided for, nay better provided for, by prohibitory duties, or by encouragements to domestic industry of all sorts? If a tax of one sort, as on tonnage, or foreign vessels, will aid commerce, and a tax on foreign raw materials will aid agriculture, and a tax on imported fabrics will aid domestic manufactures, and so promote the general welfare; may they not be all constitutionally united by congress in a law for this purpose? If congress can unite them all, may they not sustain them severally in separate laws? Is a tax to aid manufactures, or agriculture, or commerce, necessarily, or even naturally, against the general welfare, or the common defence? Who is to decide upon such a point? Congress, to whom the authority is given to exercise the power? Or any other body, state or national, which may choose to assume it?

§ 967. Besides; if a particular act of congress, not for revenue, should be deemed an excess of the powers; does it follow, that all other acts are so? If the common defence or general welfare can be promoted by laying taxes in any other manner, than for revenue, who is at liberty to say, that congress cannot constitutionally exercise the power for such a purpose? No

One has a right to say, that the common defence and general weifare can never be promoted by laying taxes, except for revenue. No one has ever yet been bold enough to assert such a proposition. Different men have entertained opposite opinions on subjects of this nature. It is a matter of theory and speculation, of political economy, and national policy, and not a matter of power. It may be wise or unwise to lay taxes, except for revenue; but the wisdom or inexpediency of a measure is no test of its constitutionality. Those, therefore, who hold the opinion above stated, must unavoidably maintain, that the power to lay taxes is not confined to revenue; but extends to all cases, where it is proper to be used for the common defence and general welfare.1 One of the most effectual means of defence against the injurious regulations and policy of foreign nations, and which is most commonly resorted to, is to apply the power of taxation to the products and manufactures of foreign nations by way of retaliation; and, short of war, this is found to be practically that, which is felt most extensively, and produces the most immediate redress. How, then, can it be imagined for a moment, that this was not contemplated by the framers of the Constitution, as a means to provide for the common defence and general welfare?

§ 968. The third opinion is, (as has been already stated,) that the power is restricted to such specific objects, as are contained in the other enumerated powers. Now, if revenue be not the sole and exclusive means of carrying into effect all these enumerated powers, the advocates of this doctrine must maintain with those of the second opinion, that the power is not

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1 See Hamilton's Report on Manufactures, in 1791; 1 Hamilton's Works, (edit. 1810,) 230; 2 Elliot's Debates, 344.

limited to purposes of revenue. No man will pretend to say, that all those enumerated powers have no other objects, or means to effectuate them, than revenue. Revenue may be one mode; but it is not the sole mode. Take the power "to regulate commerce." Is it not clear from the whole history of nations, that laying taxes is one of the most usual modes of regulating commerce? Is it not; in many cases, the best means of preventing foreign monopolies, and mischievous commercial restrictions? In such cases, then, the power to lay taxes is confessedly not for revenue. If so, is not the argument irresistible, that it is not limited to purposes of revenue? Take another power, the power to coin money and regulate its value, and that of foreign coin; might not a tax be laid on certain foreign coin for the purpose of carrying this into effect by suppressing the circulation of such coin, or regulating its value? Take the power to promote the progress of science and useful arts; might not a tax be laid on foreigners, and foreign inventions, in aid of this power, so as to suppress foreign competition, or encourage domestic science and arts? Take another power, vital in the estimation of many statesmen to the security of a republic, -- the power to provide for organizing, arming, and disciplining the militia; may not a tax be laid on foreign arms, to encourage the domestic manufacture of arms, so as to enhance our security, and give uniformity to our organization and discipline? Take the power to declare war, and its auxiliary powers; may not congress, for the very object of providing for the effectual exercise of these powers, and securing a permanent domestic manufacture and supply of powder, equipments, and other warlike apparatus, impose a prohibitory duty upon foreign articles of the same

nature? If congress may, in any, or all of these cases, lay taxes; then as revenue constitutes, upon the very basis of the reasoning, no object of the taxes, is it not clear, that the enumerated powers require the power to lay taxes to be more extensively construed, than for purposes of revenue? It would be no answer to say, that the power of taxation, though in its nature only a power to raise revenue, may be resorted to, as an implied power to carry into effect these

enumerated powers in any effectual manner. That would be to contend, that an express power to lay taxes is not co-extensive with an implied power to lay taxes; that when the express power is given, it means a power to raise revenue only; but when it is implied, it no longer has any regard to this object. How, then, is a case to be dealt with, of a mixed nature, where revenue is mixed up with other objects in the framing of the law?

§ 969. If, then, the power to lay taxes were admitted to be restricted to cases within the enumerated powers; still the advocates of that doctrine are compelled to admit, that the power must be construed, as not confined to revenue, but as extending to all other objects within the scope of those powers. Where the power is expressly given, we are not at liberty to say, that it is to be implied. Being given, it may certainly be resorted to, as a means to effectuate all the powers, to which it is appropriate; not, because it is to be implied in the grant of those powers; but because it is expressly granted, as a substantive power, and may be used, of course, as an auxiliary to them.1

§ 970. So that, whichever construction of the power to lay taxes is adopted, the same conclusion is sustain-

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1 See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

ed, that the power to lay taxes is not by the constitution confined to purposes of revenue. In point of fact, it has never been limited to such purposes by congress; and all the great functionaries of the government have constantly maintained the.doctrine, that it was not constitutionally so limited.1

§ 971. Such is a general summary of the reasoning on each side, so far as it refers to the power of laying taxes. It will be hereafter resumed in examining the nature and extent of the power to regulate commerce.

§ 972. The other questions, whether congress has any power to appropriate money, raised by taxation or otherwise, for any other purposes, than those pointed out in the enumerated powers, which follow the clause respecting taxation. It is said, "raised by taxation or otherwise;" for there may be, and in fact are, other sources of revenue, by which money may, and does come into the treasury of the United States otherwise, than by taxation; as, for instance, by fines, penalties, and forfeitures; by sales of the public lands, and interests and dividends on bank stocks; by captures and prize in times of war; and by other incidental profits and emoluments growing out of governmental transactions and prerogatives. But, for all the common purposes of argument, the question may be treated, as one growing out of levies by taxation.

§ 973. The reasoning, upon which the opinion, adverse to the authority of congress to make appropria-

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1 The present Commentaries were written before the appearance of Mr. John. Q. Adams's Letter to Mr. Speaker Stevenson, in 1832. That Letter (as has been already intimated) contains a very able and elaborate vindication of the power to lay taxes, as extending to all purposes of the common defence and general welfare. It is the fullest response to the Letter of Mr. Madison to Mr. Speaker Stevenson, 27th Nov. 1830, which has ever yet been given.

tions not within the scope of the enumerated powers, is maintained, has been already, in a great measure, stared in the preceding examination of the grammatical construction of the clause, giving the power to lay taxes.1 The controversy is virtually at an end, if it is once admitted, that the words, "to provide for the common defence and general welfare," are a part and qualification of the power to lay taxes; for then, congress has certainly a right to appropriate money to any purposes, or in any manner, conducive to those ends. The whole stress of the argument is, therefore, to establish, that the words, "to provide for the common defence and general welfare," do not form an independent power, nor any qualification of the power to lay taxes. And the argument is, that they are "mere general terms, explained and limited by the subjoined specifications." It is attempted to be fortified (as has been already seen) by a recurrence to the history of the confederation; to the successive reports and alterations of the tax clause in the convention; to the inconveniences of such a large construction; and to the supposed impossibility, that a power to make such appropriations for the common defence and general welfare, should not have been, at the adoption of the constitution, a subject of great alarm, and jealousy; and as such, resisted in and out of the state conventions.2

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1 See Virginia Resolutions, 7th Jan. 1800; Mr. Madison's Letter to Mr. Speaker Stevenson, 27th Nov. 1830. See also 4 Elliot's Debates, 280, 281; 2 Elliot's Debates, 344. 2 The following summary, taken from President Madison's Veto Message on the Bank Bonus Bill for Internal Improvements, 3d March, 1817,* contains a very clear statement of the reasoning. "To refer the power in question," (that is, of constructing road, canals, and other internal improvements,)" to the clause, to provide for the common defence * 4 Elliot's Debates, 280, 281.

§ 974. The argument in favour of the power is derived, in the first place, from the language of the clause, conferring the power, (which it is admitted in its literal terms covers it;1) secondly, from the nature of the power, which renders it in the highest degree expedient, if not indispensable for the due operations of the national government; thirdly, from the early, constant and decided maintenance of it by the government and its functionaries, as well as by many of our ablest statesmen from the very commencement of the constitution. So, that it has the language and intent

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and general welfare, would," says he, "be contrary to the established rules of interpretation, as rendering the special and careful enumeration of powers, which follow the clause, nugatory and improper. Such a view of the constitution would have the effect of giving to congress a general power of legislation, instead of the defined and limited one; hitherto understood to belong to them; the terms, 'the common defence and general welfare,' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the constitution and laws of the several states, in all cases not specifically exempted, to be superceded by the laws of congress; it being expressly declared, that the constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the land, and the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. Such a view of the constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the general and state governments; inasmuch as questions relating to the general welfare, being' questions of policy and expediency, are unsusceptible of judicial cognizance and decision. A restriction of the power 'to provide for the common defence and general welfare,' to cases, which are to he provided for by the expenditure of money, would still leave within the legislative power of congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution." It will be perceived at once, that this is the same reasoning insisted on by Mr. Madison in the Virginia Report and Resolutions, of 7th Jan. 1800; and in his Letter to Mr. Speaker Stevenson, of 27th Nov. 1830; and by the same gentleman in the Debate on the Cod-fishery Bill, in 1792. 4 Elliot's Debates, 236.

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1 Mr. Madison's Letter to .Mr Speaker Stevenson, 27th Nov. 1830.

of the text, and the practice of the government to sustain it against an artificial doctrine, set up on the other side.

§ 975. The argument derived from the words and intent has been so fully considered already, that it cannot need repetition. It is summed up with great force in the report of the secretary of the treasury1 on manufactures, in 1791. "The national legislature," says he, "has express authority to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare, with no other qualifications, than that all duties, imposts, and excises, shall be uniform throughout the United States; that no capitation or other direct tax shall be laid, unless in proportion to numbers ascertained by a census, or enumeration taken on the principle prescribed in the constitution; and that no tax or duty shall be laid on articles exported from any state. These three qualifications excepted, the power to raise money is plenary and indefinite. And the objects, to which it may be appropriated, are no less comprehensive, than the payment of the public debts, and the providing for the common defence and general welfare. The terms 'general welfare' were doubtless intended to signify more, than was expressed or imported in those, which preceded; otherwise numerous exigencies, incident to the affairs of the nation, would have been left without a provision. The phrase is as comprehensive, as any, that could have been used; because it was not fit, that the constitutional authority. of the Union to appropriate its revenues should have been restricted within narrower limits, than the general wel-

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1 Mr. Hamilton.

fare; and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification, nor of definition. It is, therefore, of necessity left to the discretion of the national legislature to pronounce upon the objects, which concern the general weifare, and for which, under that description, an appropriation of money is requisite and proper. And there seems no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the Sphere of the national councils, so far as regards an application of money. The only qualification of the generality of the phrase in question, which seems to be admissible, is this; that the object, to which an appropriation of money is to be made,

must be general, and not local; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot. No objection ought to arise to this construction from a supposition, that it would imply a power to do, whatever else should appear to congress conducive to the general weifare. A power to appropriate money with this latitude, which is granted. in express terms, would not carry a power to do any other thing, not authorized in the constitution either expressly, or by fair implication."1

§ 976. But the most thorough and elaborate view, which perhaps has ever been taken of the subject, will be found in the exposition of President Monroe, which

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1 There is no doubt, that President Washington fully concurred in this opinion, as his repeated recommendations to congress of objects of this sort, especially of the encouragement of manufactures, or learning, of a university, of new inventions, of agriculture, or commerce and navigation; of a military academy, abundantly prove. See 5 Marshall's Life of Washington, ch. 4, p. 231, 232; 1 Wait's State Papers, 15; 2 Wait's State Papers, 109, 110, 111.

accompanied his message respecting the bill for the repairs of the Cumberland Road, (4th of May, 1822.) The following passage contains, what is most direct to the present purpose; and, though long, it will amply reward a diligent perusal. After quoting the clause of the constitution respecting the power to lay taxes, and to provide for the common defence and general welfare, he proceeds to say,

§ 977. "That the second part of this grant gives a right to appropriate the public money, and nothing more, is evident from the following. considerations: (1.) If the right of appropriation is not given by this clause, it is not given at all, there being no other grant in the constitution, which gives it directly, or which has any bearing on the subject, even by implication, except the two following: first, the prohibition, which is contained in the eleventh of the enumerated powers, not to appropriate money for the support of armies for a longer term than two years; and, secondly, the declaration in the sixth member or clause of the ninth section of the first article, that no money shall be drawn from the treasury, but in consequence of appropriations made by law. (2.) This part of the grant has node of the characteristics of a distinct and original power. It is manifestly incidental to the great objects of the first branch of the grant, which authorizes congress to lay and collect taxes, duties, imposts, and excises; a power of vast extent, not granted by the confederation, the grant of which formed one of the principal inducements to the adoption of this constitution. If both parts of the grant are taken together, as they must be, (for the one follows immediately after tim other in the same sentence,) it seems to be impossible to give to the latter any other construction, than that contended for. Con-

gress shall have power to lay and collect taxes, duties, imposts, and excises. For what purpose? To pay the debts, and provide for the common defence and general welfare of the United States; an arrangement and phraseology, which clearly show, that the latter part of the clause was intended to enumerate the purposes, to which the money thus raised might be appropriated. (3.) If this is not the real object and fair construction of the second part of this grant, it follows, either that it has no import or operation whatever, or one of much greater extent, than the first part. This presumption is evidently groundless in both instance; in the first, because no part of the constitution can be considered as useless; no sentence or clause in it without a meaning. In the second, because such a construction, as would make the second part of the clause an original grant, embracing the same objects with the first, but with much greater power than it, would be in the highest degree absurd. The order generally observed in grants, an order founded in common sense, since it promotes a clear understanding of their import, is to grant the power intended to be conveyed in the most full and explicit manner; and then to explain or qualify it, if explanation or qualification should be necessary. This order has, it is believed, been invariably observed in all the grants contained in the constitution. In the next place, because, if the clause in question is not construed merely as an authority to appropriate the public money, it must be obvious, that it conveys a power of indefinite and unlimited extent; that there would have been no use for the special powers to raise and support armies, and a navy; to regulate commerce; to call forth the militia; or even to lay and collect taxes, duties, imposts, and excises. An unqualified power to pay the debts

and provide for the common defence and general welfare, as the second part of this clause would be, if considered, as a distinct and separate grant, would extend to every object, in which the public could be interested. A power to provide for the common defence would give to congress the command of the whole force, and of all the resources of the Union; but a right to provide for the general welfare would go much further. It would, in effect, break down all the barriers between the states and the general government, and consolidate the whole under the latter.

§ 978. "The powers specifically granted to congress, are what are called the enumerated powers, and are numbered in the order, in which they stand; among which, that contained in the first clause holds the first place in point of importance. If the power created by the latter part of the clause is considered an original grant, unconnected with, and independent of, the first, as in that case it must be; then the first part is entirely done away, as are all the other grants in the constitution, being completely absorbed in the transcendent power granted in the latter part. But, if the clause be construed in the sense contended for, then every part has an important meaning and effect; not a line, or a word, in it is superfluous. A power to lay and collect taxes, duties, imposts, and excises, subjects to the call of congress every branch of the public revenue, internal and external; and the addition to pay the debts and provide for the common defence and general welfare, gives the right of applying the money raised, that is, of appropriating it to the purposes specified, according to a proper construction of the terms. Hence it follows, that it is the first part of the clause only, which gives a power, which affects in any manner the power remain

ing to the states; as the power to raise money from the people, whether it be by taxes, duties, imposts, or excises, though concurrent in the states, as to taxes and excises, must necessarily do. But the use or application of the money, after it is raised, is a power altogether of a different character. It imposes no burthen on the people, nor can it act on them in a sense to take power from the states; or in any sense, in which power can be controverted, or become a question between the two governments. The application of money raised under a lawful power, is a right or grant, which may be abused. It may be applied partially among the states, or to improper purposes in our foreign and domestic concerns; but still it is a power not felt in the sense of other powers; since the only complaint, which any state can make of such partiality and abuse is, that some other state or states have obtained greater benefit from the application, than, by a just rule of apportionment, they were entitled to. The right of appropriation is, therefore, from its nature, secondary and incidental to the right of raising money, and it was proper to place it in the same grant, and same clause with that right. By finding them then in that order, we see a new proof of the sense, in which the grant was made, corresponding with the view herein taken of it.

§ 979. The last part of this grant, which provides, that all duties, imposts, and excises. shall be uniform throughout the United States, furnishes another strong proof, that it was not intended, that the second part should constitute a distinct grant, in the sense above stated, or convey any other right, than that of appropriation. This provision operates exclusively on the power granted in the first part of the clause. It recites three branches of that power -- duties, imposts, and es

cises -- those only, on which it could operate; the rule, by which the fourth, that is, taxes, should be laid, being already provided for in another part of the constitution. The object of this provision is, to secure a just equality among the states in the exercise of that power by congress. By placing it after both the grants, that is, after that to raise, and that to appropriate the public money, and making it apply to the first only, it shows, that it was not intended, that the power granted in the second should be paramount to, and destroy that granted in the first. It shows, also, that no such formidable power, as that suggested, had been granted in the second, or any power, against the abuse of which it was thought necessary specially to provide. Surely, if it was deemed proper to guard a specific power, of limited extent and well known import, against injustice and abuse, it would have been much more so, to have guarded against the abuse of a power of such vast extent, and so indefinite, as would have been granted, by the second part of the clause, if considered as a distinct and original grant.

§ 980. "With this construction all the other enumerated grants, and indeed all the grants of power contained in the constitution, have their full operation and effect. They all stand well together, fulfilling the great purposes intended by them. Under it we behold great scheme consistent in all its parts, a government instituted for national purposes, vested with adequate powers for those purposes, commencing with the most important of all, that of revenue, and proceeding, in regular order, to the others, with which it was deemed proper to endow it; all too drawn with the utmost circumspection and care. How much more consistent is this construction with the great objects of the institu

tion, and with the high character of the enlightened and patriotic. citizens, who framed it, as well as of those, who ratified it, than one, which subverts every sound principle and rule of construction, and throws every thing into confusion.

§ 981. "I have dwelt thus long on this part of the subject, from an earnest desire to fix, in a clear and satisfactory manner, the import of the second part of this grant, well knowing, from the generality of the terms used, their tendency to lead into error. I indulge a strong hope, that the view, herein presented, will not be without effect, but will tend to satisfy the unprejudiced and impartial, that nothing more was granted by that part, than a power to

appropriate the public money raised under the other part. To what extent that power may be carried, will be the next object of inquiry.

§ 982. "It is contended, on the one side, that, as the national government is a government of limited powers, it has no right to expend money, except in the performance of acts, authorized by the other specific grants, according to a strict construction of their powers; that this grant, in neither of its branches, gives to congress discretionary power of any kind; but is a mere instrument in its hands, to carry into effect the powers contained in the other grants. To this construction I was inclined in the more early stage of our government; but, on further reflection and observation, my mind has undergone a change, for reasons; which I will frankly unfold.

§ 983. "The grant consists, as heretofore observed, of a two-fold power; the first, to raise, and the second, to appropriate the public money; and the terms used in both instances are general and unqualified. Each

branch was obviously drawn with a view to the other, and the import of each tends to illustrate that of the other. The grant to raise money gives a power over every subject, from which revenue may be drawn; and is made in the same manner with the grants to declare war; to raise and support armies and a navy; to regulate commerce; to establish post-offices and post roads; and with all the other specific grants to the general government. In the discharge of the powers contained in any of these grants, there is no other check, than that, which is to be found in the great principles of our system -- the responsibility of the representative to his constituents. If war, for example, is necessary, and congress declare it for good cause, their constituents will support them in it. A like support will be given them for the faithful discharge of their duties under any and every other power, vested in the United States. It. affords to the friends of our free governments the most heart felt consolation to know, and from the best evidence,-- our own experience, -- that, in great emergencies, the boldest measures, such as form the strongest appeals to the virtue and patriotism of the people, are sure to obtain their most decided approbation. But should the representative act corruptly, and betray his trust, or otherwise prove, that he was unworthy of the confidence of his constituents, he would be equally sure to lose it, and to be removed, and otherwise censured, according to his deserts. The power to raise money by taxes, duties, imposts, and excises, is alike unqualified; nor do I see any check on the exercise of it, other than that, which applies to the other powers above recited, -- the responsibility of the representative to his constituents. Congress know the extent of the public engagements, and the sums necessary to meet them;

they know, how much may be derived from each branch of revenue without pressing it too far; and, paying due regard to the interests of the people, they likewise know, which branch ought to be resorted to in the first instance. From the commencement of the government, two branches of this power (duties and imposts) have been in constant operation, the revenue from which has supported the government in its various branches, and met its other ordinary engagements. In great emergencies, the other two (taxes and excises) have likewise been. resorted to; and neither was the right nor the policy ever called in question.

§ 984. "If we look to the second branch of this power, that, which authorizes the appropriation of the money thus raised, we find, that it is not less general and unqualified, than the power to raise it. More comprehensive terms, than to 'pay the debts and provide for the common defence and general weifare,' could not have been used. So intimately connected with, and dependent on each other, are these two branches of power, that had either been limited, the limitation would have had a like effect on the other. Had the power to raise money been conditional, or restricted to special purposes, the appropriation must have corresponded with it; for none but the money raised could be appropriated, nor could it be appropriated to other purposes, than those, which were permitted. On the other hand, if the right of appropriation had been restricted to certain purposes, it would be useless and improper to raise more, than would be adequate to those purposes. It may fairly be inferred, that these restraints or checks have been carefully and intentionally avoided. The power in each branch is alike broad and unqualified, and each is drawn with peculiar fitness to the other;

the latter requiring terms of great extent and force to accommodate the former, which have been adopted; and both placed in the same clause and sentence. Can it be presumed, that all these circumstances were so nicely adjusted by mere accident? Is it not more just to conclude, that they were the result of due deliberation and design? Had it been intended, that congress should be restricted in the appropriation of the public money to such expenditures, as were authorized by a rigid construction of the other specific grants, how easy would it have been to have provided for it by a declaration to that effect. The omission of such declaration is, therefore, an additional proof, that it was not intended, that the grant should be so construed.

§ 985. "It was evidently impossible to have subjected this grant, in either branch, to such restriction, without exposing the government to very serious embarrassment. How carry it into effect? If the grant had been made in any

degree dependent upon the states, the government would have experienced the fate of the confederation. Like it, it would have withered, and soon perished. Had the Supreme Court been authorized, or should any other tribunal, distinct from the government, be authorized to interpose its veto, and to say, that more money had been raised under either branch of this power, (that is, by taxes, duties, imposts, or excises,) than was necessary; that such a tax or duty was useless; that the appropriation to this or that purpose was unconstitutional; the movement might have been suspended, and the whole system disorganized. It was impossible to have created a power within the government, or any other power, distinct from congress and the executive, which should control the movement of the government in this respect,

and not destroy it. Had it been declared by a clause in the constitution, that the expenditures under this grant should be restricted to the construction, which night be given of the other grants, such restraint, though the most innocent, could not have failed to have had an injurious effect on the vital principles of the government; and often on its most important measures. Those, who might wish to defeat a measure proposed, might construe the power relied on in support of it, in a narrow and contracted manner, and in that way fix a precedent inconsistent with the true import of the grant. At other times, those, who favoured a measure, might give to the rower relied on a forced or strained construction; and, succeeding in the object, fix a precedent in the opposite extreme. Thus it is manifest, that, if the right of appropriation be confined to that limit, measures. may oftentimes be carried, or defeated by Considerations and motives, altogether independent of, and unconnected with, their merits, and the several powers of congress receive constructions equally inconsistent with their true, import. No such declaration, however, has been made; and from the fair import of the grant, and, indeed, its positive terms, the inference, that such was intended, seems to be precluded.

§ 986. "Many considerations of great weight operate in favour.of this construction while I do not perceive any serious objection to it. If it be established, it follows, that the words, 'to provide for the common defence and general welfare,' have a definite, safe, and useful meaning. The idea of their forming an original grant with unlimited power, superseding every other grant, is abandoned. They will be considered, simply; as conveying a right of appropriation; a right indispensable to that of raising a revenue, and necessary to ex-

penditures under every grant. By it, as already observed, no new power will be taken from the states, the money to be appropriated being raised under a power already granted to congress. By it, too, the motive for giving a forced or strained construction to any of the other specific grants will, in most instances, be diminished, and, in many, utterly destroyed. The importance of this consideration cannot be too highly estimated; since, in addition to the examples already given, it ought particularly to be recollected, that, to whatever extent any specific power may be carried, the right of jurisdiction goes with it, pursuing it through all its incidents. The very important agency, which this grant has in carrying into effect every other grant, is a strong argument in favour of the construction contended for. All the other grants are limited by the nature of the offices, which .they have severally to perform; each conveying a power to do a certain thing, and that only; whereas this is co-extensive with the great scheme of the government itself. It is the lever, which raises and puts the whole machinery in motion, and continues the movement. Should either of the other grants fail, in consequence of any condition or limitation attached to it, or misconstruction of its powers, much injury might follow; but still it would be the failure of one branch of power, of one item in the system only. All the others might move on. But should the right to raise and appropriate the public money be improperly restricted, the whole system might be sensibly affected, if not disorganized. Each of the other grants is limited by the nature of the grant itself. This, by the nature of the government only. Hence, it became necessary, that, like the power to declare war, this power should

be commensurate with the great scheme of the government, and with all its purposes.

§ 987. "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants, according to a strict construction of their powers respectively, is there no limitation to it? Have congress a right to raise and appropriate the public money to any, and to every purpose, according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the states, whose duty it is to provide for them. Each government should 'look to the great and essential purposes, for which it was instituted, and confine itself to those purposes. A state government will rarely, if ever, apply money to national purposes, without making it a charge to the nation. The people of the State would not permit it. Nor will congress be apt to apply money in aid of the state administrations, for purposes strictly local, in which the nation at large has no interest, although the state should desire it. The people of the other states would condemn it. They would declare, that congress had no right to

tax them for such a purpose, and dismiss, at the next election, such of their representatives, as had voted for the measure, especially if it should be severely felt. I do not think, that in offices of this kind there is much danger of the two governments mistaking their interests, or their duties. I rather suspect, that they would soon have a clear and distinct understanding of them, and move on in great harmony."

§ 988. In regard to the practice of the government, it has been entirely in conformity to the principles here

laid down. Appropriations have never been limited by congress to cases falling within the specific powers enumerated in the constitution, whether those powers be construed in their broad, or their narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance.1 In some cases, not silently, but upon discussion, congress has gone the length of making appropriations to aid destitute foreigners, and cities labouring under severe calamities; as in the relief of the St. Domingo refugees, in 1794, and the citizens of Venezuela, who suffered ,from an earthquake in 1812.2 An illustration equally forcible, of a

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1 It would be impracticable to enumerate 811 these various objects of appropriation in detail. Many of them will be found enumerated in President Monroe's Exposition, of 4 of May, 1822, p. 41 to 45. The annual appropriation acts speak a very strong language on this subject Every president of the United States, except President Madison, seems to have acted upon the same doctrine. President Jefferson can hardly be deemed an exception. In his early opinion, already quoted, (4 Jefferson's Corresp. 521,) he manifestly maintained it. In his message to congress, (2 Dec. 1806,*) he seems to have denied it. In signing the bill for the Cumberland Road, on 29th March, 1806,+ he certainly gave it a partial sanction, as well as upon other occasions. See Mr. Monroe's Exposition, on 4th May, 1822, p. 41. But see 4 Jefferson's Corresp. 457, where Mr. Jefferson adopts an opposite reasoning. President Jackson has adopted it with manifest reluctance; but he considers it as firmly established by the practice of the government. See his veto message on the Maysville Road bill, 27 May, 18:10, 4 Elliot's Deb. 333 to 335. The opinions maintained in congress, for and against the same doctrine, will be found in 4 Elliot's Deb. 236, 240, 265, 278, 280, 284, 291, 292, 332, 334. Report on Internal Improvements, by Mr. Hemphill, in the house of representatives, 10 Feb. 18:11. See 1 Kent. Comm. Lect. 12, p. 250, 251 , Sergeant's Const. Law: ch. 98, p. 311 to 314; Rawle on the Const. ch. 9, p. 104; 2 United States Law Jour. April, 1826, p. 251, 264 to 282. 2 See act of 12 Feb. 1794, ch. 2; Act of 8 May, 1812, ch. 79; 4 Elliot's Debates, 240. * Wait's State Papers, 457, 458. + Act of 1806, ch. 19.

domestic character, is in the bounty given in the codfisheries, which was strenuously resisted on constitutional grounds in 1792; but which still maintains its place in the statute book of the United States.1

§ 989. No more need be said upon this subject in this place. It will be necessarily resumed again in the discussion of other clauses of the constitution, and especially of the powers to regulate commerce, to establish post-offices and post-roads, and to make internal improvements.

§ 990. In order to prevent the necessity of recurring again to the subject of taxation, it seems desirable to bring together, in this connexion, all the remaining provisions of the constitution on this subject, though they are differently arranged in that instrument. The first one is, "no capitation or other direct tax shall be laid, "unless in proportion to the census, or enumeration, herein before directed to be taken." This includes poll taxes, and land taxes, as has been already remarked.

§ 991. The object of this clause doubtless is, to secure the Southern states against any undue proportion of taxation; and, as nearly as practicable, to overcome the necessary inequalities of direct tax. The South has a very large slave population; and consequently a poll tax, which should be laid by the rule of uniformity, would operate with peculiar severity on them. It would tax their property beyond its supposed

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1 See act of congress, of 16 Feb. 1792, ch. 6; 4 Elliot's Debates, 234 to 238; Act of 1813, ch. 34. See also Hamilton's Report on Manufactures, 1791, article, Bounties. -- The Speech of the lion. Mr. Grimke, in the senate of South Carolina, in Dec. 1828, and of the Hon. Mr. Huger, in the house of representatives of the same state, in Dec. 1830, contain very elaborate and able expositions of the whole subject, and will reward a diligent perusal.

relative value, and productiveness to white labour. Hence, a rule is adopted, which, in effect, in relation to poll taxes, exempts two fifths of all slaves from taxation; and thus is supposed to equalize the burthen with the white population.1

§ 992. In respect to direct taxes on land, the difficulties of making a due apportionment, so as to equalize the burthens and expenses of the Union according to the relative wealth and ability of the states, was felt as a most serious evil under the confederation. By that instrument, (it will be recollected,) the apportionment was to be among the states according to the value of all land within each state, granted or surveyed for any person, and the buildings and improvements thereon, to be estimated in such mode, as congress should prescribe. The whole proceedings to accomplish such an estimate were so operose and inconvenient, that congress, in April, 1783,2 recommended, as a substitute for the article, an apportionment, founded on the basis of population, adding to the whole number of white and other free citizens and inhabitants, including those bound to service for a term of years, three fifths of all other persons, &c. in each state; which is precisely the rule adopted in the constitution.

§ 993. Those, who are accustomed to contemplate the circumstances, which produce and constitute national wealth, must be satisfied, that there is no common standard, by which the degrees of it can be ascertained. Neither the value of lands, nor the numbers of the people, which have been successively proposed, as the rule of

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1 The Federalist, No. 21, 36, 54; 3 Dall. R. 171, 178; 1 Tucker's Black. Comm. App. 236, 287; 2 Elliot's Deb. 208 to 210; 3 Elliot's Debates, 290; 3 Amer. Museum, 424; 2 Elliot's Deb. 338. 2 8 Journal of Continental Congress, 184, 188, 198.

state contributions, has any pretension to being deemed a just representative of that wealth. If we compare the wealth of the Netherlands with that of Russia or Germany, or even of France, and at the same time compare the total value of the lands, and the aggregate population of the contracted territory of the former, with the total value of the lands, and the aggregate population of the immense regions of either of the latter kingdoms, it will be at once discovered, that there is no comparison between the proportions of these two subjects, and that of the relative wealth of those nations. If a like parallel be run between the American states, it will furnish a similar result.1 Let Virginia be contrasted with Massachusetts, Pennsylvania with Connecticut, Maryland with Virginia, Rhode-Island with Ohio, and the disproportion will be at once perceived. The wealth of neither will be found to be, in proportion to numbers, or the value of lands.

§ 994. The truth is, that the wealth of nations depends upon an infinite variety of causes. Situation, soil, climate; the nature of the productions; the nature of the government; the genius of the citizens; the degree of information they possess; the state of commerce, of arts, and industry; the manners and habits of the people; these, and many other circumstances, too complex, minute, and adventitious to admit of a particular enumeration, occasion differences, hardly conceivable, in the relative opulence and riches of different countries. The consequence is, that there can be no common measure of national wealth; and, of course, no general rule, by which the ability of a state to pay taxes can be determined.2 The estimate, however fairly or

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1 The Federalist, No. 21. 2 The Federalist, No. 21.

deliberately made, is open to many errors and inequalities, which become the fruitful source of discontents, controversies, and heart-burnings. These are sufficient, in themselves, to shake the foundations of any national government, when no common artificial rule is adopted to settle permanently the apportionment; and every thing is left open for debate, as often as a direct tax is to be imposed. Even in those states, where direct taxes are constantly resorted to, every new valuation or apportionment is found, practically, to be attended with great inconvenience, and excitements. To avoid these difficulties, the land tax in England is annually laid according to a valuation made in the reign of William the Third, (1692,) and apportioned among the counties, according to that valuation.1 The gross inequality of this proceeding cannot be disguised; for many of the counties, then comparatively poor, are now enormously increased in wealth. What is Yorkshire or Lancashire now, with its dense manufacturing population, compared with what it then was? Even when the population of each state is ascertained, the mode, by which the assessment shall be laid on the lands in the state, is a subject of no small embarrassment. It would be gross injustice to tax each house or acre to the same amount, however different may be its value, or however different its quality, situation, or productiveness. And in estimating the absolute value, so much is necessarily matter of opinion, that different judgments may, and will arrive at different results. And in adjusting the comparative values in different counties or towns, new elements of discord are unavoidably introduced.2 In short, it may be

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1 1 Black. Comm. 312, 313. 2 See the remarks of Mr. Justice Patterson, in Hylton v. United States, 3 Dall. 171, 178, 179.

affirmed without fear of contradiction, that some artificial rule of apportionment of a fixed nature is indispensable to the public repose; and considering the peculiar situation of the American states, and especially of the slave and agricultural states, it is difficult to find any rule of greater equality or justice, than that, which the constitution has adopted. And it may be added, (what was indeed foreseen,) that direct taxes on land will not, from causes sufficiently apparent, be resorted to, except upon extraordinary occasions, to supply a pressing want.1 The history of the government has abundantly established the correctness of the remark; for in a period of forty years three direct taxes only have been laid; and those only with reference to the state and operations of war.

§ 995. The constitution having, in another clause, declared, that "Representatives and direct taxes shall "be apportioned among the several states within this Union according to their respective numbers," and congress having, in 1815,2 laid a direct tax on the District of Columbia, (according to the rule of apportionment,) a question was made, whether congress had constitutionally a right to lay such a tax, the district not being one of the states; and it was unanimously decided by the Supreme Court, that congress had Such a right.3 It was further held, that congress, in laying a direct tax upon the states, was not constitutionally bound to extend such tax to the district, or the territories of the United States; but, that it was a matter for

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1 1 Tuck. Black. Comm. App. 234, 235, and note; Id. 236, 237; 2 Dall. R. 178, 179; Federalist, No. 21, 36; 2 Elliot's Deb. 208 to 2210. 2 Act of 27 Feb. 1815, ch. 213. 3 Loughborough v. Blake, 5 Wheaton's, R. 317; Sergeant on Const. Law, ch. 28, p. 290; 1 Kent. Comm. Lect. 12, p. 241.

their discretion. When, however, a direct tax is to be laid on the district or the territories, it can be laid only by the rule of apportionment. The reasoning, by which this doctrine is maintained, will be most satisfactorily seen by giving it in the very words used by the court on that occasion.

§ 996. "The eighth section of the first article gives to congress 'power to lay and collect taxes, duties, imposts, and excises,' for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It, consequently, extends to all places, over which the government extends. If this could be doubted, the doubt is removed by the subsequent words, which modify the grant. These words are, 'but all duties, imposts, and excises shall be uniform throughout the United States.' It will not be contended, that the modification of the power extends to places, to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one, than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter

extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States.

§ 997. "The extent of the grant being ascertained, how far is It abridged by any part of the constitution? The twentieth section of the first article declares, that 'representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers.'

§ 998. "The object of this regulation is, we think, to furnish a standard, by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those, who are not represented in congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean, that direct taxes shall be imposed on states only, which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one state had been found to contain 59,000, and another 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the states.

§ 999. "The fourth paragraph of the ninth section of the same article will next be considered. It is in these words: 'No capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration herein before directed to be taken.'

§ 1000. "The census referred to is in that clause of the constitution, which has just been considered, which makes numbers the standard, by which both representatives and direct taxes shall be apportioned among the states. The actual enumeration is to be made ' within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.'

§ 1001. "As the direct and declared object of this census is, to furnish a standard, by which 'representatives, and direct taxes, may be apportioned among the several states, which may be included within this Union,' it will be admitted, that the omission to extend it to the district, or the territories, would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective States. It cannot, however, be admitted, that the argument, which limits the application of the power of direct taxation to the population contained in this census, is a just one. The language of the clause does not imply this restriction. It is not, that 'no capitation, or other direct tax shall be laid, unless on those comprehended within the census herein before directed to be taken,' but 'unless in proportion to' that census. Now this proportion may be applied to the district or the territories. If an enumeration be taken of the population in the district and the territories, on the same principles, on which the enumeration of the respective states is made, then

congress the power of exercising 'exclusive legislation in all cases whatsoever within this district.'

§ 1007. "On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended, that they must be limited by that great principle, which was asserted in our revolution, that representation is inseparable from taxation. The difference between requiring a continent, with an immense population, to submit to be taxed by a government, having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality, as soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of congress for its legitimate government, as is the case with the district; is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted, whether in fact, its interests would be rendered thereby the more secure; and certainly the constitution does not consider its want of a representative in congress as exempting it from equal taxation.

§ 1008. "If it were true, that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises, within this district? If the principles of liberty, and of

our constitution, forbid the raising of revenue from those, who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our revolution give a rule applicable to this case, we cannot have forgotten, that neither the stamp act, nor the duty on tea, were direct taxes. Yet it is admitted, that the constitution not only allows, but enjoins the government to extend the ordinary revenue system to this district.

§ 1009. "If it be said, that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true, that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes."

§ 1010. The next clause in the constitution is: "No tax or duty shall be la id on articles exported from any state. No preference shall be given by any regulation of commerce, or revenue, to the ports of one state over those of another; nor shall vessels bound to, or from one state be obliged to enter, clear, or pay duties in another."

§ 1011. The obvious object of these provisions is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another. If congress were allowed to lay a duty on exports from any one state it might unreasonably injure, or even destroy, the staple productions, or common articles of that state.1 The inequality of such a tax would be extreme. In some of the states, the whole of their

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1 Rawle on the Constitution, ch. 10, p. 115, 116.

means result from agricultural exports. In others, a great portion is derived from ether sources; from external fisheries; from freights; and from the profits of commerce in its largest extent. The burthen of such a tax would, of course, be very unequally distributed. The power is, therefore, wholly taken away to intermeddle with the subject of exports. On the other hand, preferences might be given to the ports of one state by regulations, either of commerce or revenue, which might confer on them local facilities or privileges in regard to commerce, or revenue. And such preferences might be equally fatal, if individually given under the milder form of requiring an entry, clearance, or payment of duties in the ports of any state, other than the ports of the state, to or from which the vessel was bound. The last clause, therefore, does not prohibit congress from requiring an entry or clearance, or payment of duties at the custom-house on importations in any port of a state, to or from which the vessel is bound; but cuts off the right to require such acts to be done in other states, to which the vessel is not bound.1 In other words, it cuts off the power to require, that circuity of voyage, which, under the British colonial system, was employed to interrupt the American commerce before the revolution. No American vessel could then trade with Europe, unless through a circuitous voyage to and from a British port.2

§ 1012. The first part of the clause was reported in the first draft of the constitution. But it did not pass

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1 Journ. of Convention, 293, 294; Sergeant on Const. Law, oh. 28, p. 346; United States v. Brig William, 2 Hall's Law Journal, 255, 259, 260; Rawle on the Const. ch. 10. p. 116; 1 Jefferson's Corresp. 104 to 106, 112.. 2 Reeves on Shipping, 28, 36, 47, 49, 52 to 105; Id. 491, 492, 493; Burke's Speech on American Taxation, in 1774; 1 Pitk. Hist. ch. 3, p. 91 to 106.

without opposition; and several attempts were made to amend it; as by inserting after the word "duty" the words, "for the purpose of revenue," and by inserting at the end of it, "unless by consent of two thirds of the legislature;" both of which propositions were negatived.1 It then passed by a vote of seven states against four.2 Subsequently, the remaining parts of the clause were proposed by a report of a committee, and they appear to have been adopted without objection.3 Upon the whole, the wisdom and sound policy of this restriction cannot admit of reasonable doubt; not so much that the powers of the general government were likely to be abused, as that the constitutional prohibition would allay jealousies, and confirm confidence.4 The prohibition extends not only to exports, but to the exporter. Congress can no more rightfully tax the one, than the other.5

§ 1013. The next clause contains a prohibition on the states for the like objects and purposes. "No state shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports and exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress. No state shall, without the consent of congress, lay any tonnage duty." In the first draft of the constitution, the clause stood, "no state, without "the consent," &c. "shall lay imposts or duties on im-

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1 Journ. of Convention, 272, 275. 2 Id. 275, 276. 3 Journ. of Convention, 301, 318; Id. 377, 378. 4 1 Tuck. Black. Comm. App. 252, 253; Id. 294. 5 Brown v. Maryland, 12 Wheat R. 449.

ports." The clause was then amended by adding, "or exports," not however without opposition, six states voting in the affirmative, and five in the negative;"1 and again by adding, "nor with such consent, but for the use of the treasury of the United States," by a vote of nine states against two.2 In the revised draft, the clause was reported as thus amended. The clause was then altered to its present shape by a vote of ten states against one; and the clause, which respects the duty on tonnage, was then added by a vote of six states against four, one being divided.3 So, that it seems, that a struggle for state powers was constantly maintained with zeal and pertinacity throughout the whole discussion. If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the states, there is, at least, equal wisdom and policy in restraining the states themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is tim prevented, which would rouse resentments, and create dissensions, to the ruin of the harmony and amity of the states. The power to enforce their respective. laws is still retained, subject to the revision and control of congress; so, that sufficient provision is made for the convenient arrangement of their domestic and internal trade, whenever it is not injurious to the general interests.4

§ 1014. Inspection laws are not, strictly speaking, regulations of commerce, though they may have a

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1 Journ. of Convention, 227, 303. 2 Id. 303, 304. 3 Journ. of Convention, 359, 380, 381. See 2 American Museum, 534; Id. 540. 4 The Federalist, No. 44; 1 Tuck. Black. Comm. App. 252, 313. See also 2 Elliot's Debates, 354 to 356; Journ. of Convention, 294, 295.

remote and considerable influence on commerce. The object of inspection laws is to improve the quality of articles produced by the labour of a country; to fit them for exportation, or for domestic use. These laws act upon the subject, before it becomes an article of commerce, foreign or domestic, and prepare it for the purpose. They form a portion of that immense mass of legislation, which embraces every thing in the territory of a state not surrendered to the general government. Inspection laws, quarantine laws, and health laws, as well as laws for regulating the internal commerce of a state, and others, which respect roads, fences, &,c. are component parts of state legislation, resulting from the residuary powers of state sovereignty. No direct power over these is given to congress, and consequently they remain subject to state legislation, though they many be controlled by congress, when they interfere with their acknowledged powers.1 Under the confederation, there was a provision, that "no state shall lay any imposts or duties, which may interfere with any stipulations of treaties entered into by the United States," &c. &c. This prohibition was notoriously (as has been already stated) disregarded by the states ; and in the exercise by the states of their general authority to lay imposts and duties, it is equally notorious, that the most mischievous restraints, preferences, and inequalities existed; so, that very serious irritations and feuds were constantly generated, which threatened the peace of the Union, and indeed must have inevitably led to a dissolution of it.2 The power to lay duties and imposts on

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1 Gibbons v. Ogden, 9 Wheat. R. 1, 203 to 206, 210, 235, 236, 311; Brown v. Maryland, 12 Wheat. R. 419, 438, 439, 440. 2 The Federalist, No. 7, 22.

imports and exports, and to lay a tonnage duty, are doubtless properly considered a part of the taxing power; but they may also be. applied, as a regulation. of commerce.1

§ 1015. Until a recent period, no difficulty occurred in regard to the prohibitions of this clause. Congress, with a just liberality, gave full effect to the inspection laws of the states, and required them to be observed by the revenue officers of the United States.2 In the year 1821, the state of Maryland passed an act requiring, that all importers of foreign articles or commodities, &c. by bale or package, or of wine, rum, &c. &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, should, before they were authorized to sell, take out a license, for which they were to pay fifty dollars, under certain penalties. Upon this act a question arose, whether it was, or not a violation of the constitution of the United States, and especially of the prohibitory clause now under consideration. Upon solemn argument, the Supreme Court decided, that it was? The judgment of the Supreme Court, delivered on that occasion, contains a very full exposition of the whole subject; and although it is long, it seems difficult to abridge it without marring the reasoning, or in some measure leaving imperfect a most important constitutional inquiry. It is, therefore, inserted at large.

§ 1016. "The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a

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1 Gibbons v. Ogden, 9 Wheat. R. 1, 199, 200, 201; Brown v. Maryland, 17 Wheat. R. 446, 447. 2 Act of 2d April, 1790, ch. 5; Act of 2d. March, 1799, ch. 128, § 93. 3 Brown v. Maryland, 12 Wheat. R. 419; The Federalist, No. 278.

license from the state, before he shall be permitted to sell a bale or package so imported. It has been truly said, that the presumption is in favour of every legislative act, and that the whole burthen of proof lies on those, who deny its constitutionality. The plaintiffs in error take the burthen upon themselves, and insist, that the act under consideration is repugnant to two provisions in the constitution of the United States. (1.) To that, which declares, that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' (2.) To that, which declares, that congress shall have power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'

§ 1017. "1. The first inquiry is, into the extent of the prohibition upon states, 'to lay any imposts or duties on imports or exports.' The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope. In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning

of the words to be expounded, of their connexion with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power. What, then, is the 'meaning of the words, 'imposts or duties oft imports or exports?' An impost or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership

over them, because evasions of the law can be prevented more certainly by executing it, while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them alter they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves, which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied, while the article Is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent, in which it was understood. The limitation is, 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far, as they act upon importations, they are generally executed upon articles, which are landed. The tax or duty of inspection, then, is a tax, which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made, because the tax would otherwise have been within the prohibition. If

it be a rule of interpretation, to which all assent, that the exception of a particular thing from general words proves, that in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made, we know no reason, why this general rule should not be as applicable to the constitution, as to other instruments. If it be applicable then this exception in favour of duties for the support of inspection laws, goes far in proving, that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and Supposed them to be prohibited.

§ 1018. "If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation. From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner, in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives, which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary, as it was, and jealous, as the states were, of any encroachment on it, was so far abridged, as to forbid them to touch imports or exports, with the single exception, which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to 'lay imposts, or duties on imports or ex-

ports,' proceeded from an apprehension, that the power might be so exercised, as to disturb that equality among the states, which was generally advantageous, or that harmony between them, which it was desirable to preserve; or to maintain unimpaired our commercial connexions with foreign nations; or to confer this source of revenue on the government of the Union; or, whatever other motive might have induced the prohibition; it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer, the instant it was landed, as by a power to tax it, while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power, which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree, to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those, in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent, which will defeat the revenue by impost, so far, as it is drawn from importations into the particular state.

§ 1019. We are told, that such a wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is

to constitute an argument against its existence, it might be urged against the existence of that, which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad, as to destroy their own commerce, or even to lessen it. We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground. These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason be said, that no state would be so blind to its own interests, as to lay duties on importation, which would either prohibit, or diminish its trade. Yet the framers of our constitution have thought this a power, which no state ought to exercise. Conceding, to the full extent, which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax, because their interest would afford ample security against its ever being so heavy, as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those states, whose situation was less favourable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. When we are inquiring, whether a particular act is within this prohibition, the question is not, whether the state may so legislate, as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already

been shown, that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it, while entering the port.

§ 1020. "The counsel for the state of Maryland insist with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent, which has never yet been suspected; and will deprive them of resources, which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time, when the prohibition ceases, and the power of the state to tax commences. It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers, which remain in the states, must always be taken into view, and may aid in expounding the words. of any particular clause. But while we admit, that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object, which the constitution is intended to secure; that there must be a point of time, when the prohibition ceases, and the power of the state to tax commences; we cannot admit, that this point of time is the instant, that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

§ 1021. "The constitutional prohibition on the states to lay a duty on imports, a prohibition, which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked, as the cases arise. Till they do arise, it might be premature to state any rule, as being universal in its application. It is sufficient for the present, to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character, as an import, and has become subject to the taxing power of the state. But, while remaining the property of the importer, in his warehouse, in the, original form or package, in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

§ 1022. "The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration, for which the duty is paid,

every principle of fair dealing requites, that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only,

which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

§ 1093. "The counsel for the defendant in error have endeavoured to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences, which they suppose must follow the denial of it. If the importer acquires the right to sellby the payment of duties, he may, they say, exert that right, when, where, and as he pleases; and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant pedlar. He may introduce articles, as gun-powder, which endanger a city, into the midst of its population; he may introduce articles, which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

§ 1024. "These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, conse-

quently, not to prove, that it may not be resorted to with safety, as a criterion, by which to measure the extent of the prohibition. This indictment is against the importer for selling a package of dry goods in the form, in which it was imported, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them, as an itinerant pedlar. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege, which he has purchased from the United States, until he shall have also purchased it from the state. In the last case, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them, as it finds them. The same observations apply to plate, or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other, for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gun-powder is a branch of the police power, which unquestionably remains, and ought to remain with the states. If the possessor stores it himself out of town, the removal cannot be a duty on

imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure, that this may not he classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.

§ 1095. "The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the states, to that dangerous extent, which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no farther, than to prevent the states from doing that, which it was the great object of the constitution to prevent.

§ 1026. "But if it should be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally; but this tax must be paid by those, who employ the individual, or is a tax. on his business.

The lawyer, the physician, or the mechanic, must either charge more on the article, in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the

article, and be paid by the consumer, or by the importer himself, in like manner, as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

§ 1027. "In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act, which is prohibited. The United States have the same right to tax occupations, which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax, as congress might think proper to impose; would the government be permitted to shield itself from the just censure, to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty

on all merchandise found in vessels, which were leaving the United States for foreign countries, would it be received, as an excuse for this outrage, were the government to say, that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into tim country, so the prohibition to tax articles exported ceased, when they were carried out or the country?

§ 1028. "We think, then, that the act, under which the plaintiffs in error were indicted, is repugnant to that article of the constitution, which declares, that 'no state shall lay any impost or duties on imports or exports.' "1

§ 1029. As the power of taxation exists in the states concurrently with the United States, subject only to the restrictions imposed by the constitution, several questions have from time to time arisen in regard to the nature and extent of the state power of taxation.

§ 1030. In the year 1818, the state of Maryland passed an act, laying a tax on all banks, and branches thereof, not chartered by the legislature of that state; and a question was made, whether the state had a right under that act, to lay a tax on the Branch Bank of the United States in that state. This gave rise to a most animated discussion in the Supreme Court of the United States; where it was finally decided, that the tax was, as to the Bank of the United States, unconstitutional.2 The reasoning of the Supreme Court, on this subject, was as follows.

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1 The opinion also proceeded to declare, that the act was a violation. of the exclusive power of congress to regulate commerce. But the examination of this part of the question properly belongs to another head. 2 M'Culloch v. State of Maryland, 4 Wheat. R. 316; 1 Kent's Comm. Lect. 19, p. 398; Id. 401.

§ 1031. "Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by ,the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths, which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of oven this power is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded; if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other, as if express terms of repeal were used.

§ 1032. "On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case; but the claim has been sustained on a principle, which so entirely pervades the constitution; is so intermixed with the materials, which compose it; so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.

From this, which may be almost termed an axiom, other propositions are deduced, as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create. implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and, incompatible with the powers to create and to preserve. 3d. That where this repugnancy exists, that

authority, which is supreme, must control, not yield to that over, which it is supreme. These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

§ 1033. "The power of congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so, as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits, than those expressly prescribed in the constitution; and like sovereign power of every other description, is trusted to the discretion of those, who use it. But the very terms of this argument admit, that the sovereignty of the state in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of

supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

§ 1034. "The argument, on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence, that they will not abuse it. Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects, to which it is applicable, to the utmost extent, to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over

their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security; nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state; not given by the constituents of the legislature, which claim the right to tax them; but by the people of all the states. They are given by all, for the benefit of all; and upon theory, should be subjected to that government only, which belongs to all.

§ 1035. "It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that, to which it is an incident. All subjects, over which the sovereign power of a state extends, are objects of taxation; but those, over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to every thing, which exists by its own authority, or is introduced by its permission; but does it extend to those means, which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States to a government, whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty, which will extend over them.

§ 1036. "If we measure the power of taxation residing in a state, by the extent of sovereignty, which the people of a single state possess, and can confer on, its government, we have an intelligible standard, applicable to every case, to which the power may be applied. We have a principle, which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources; and which places beyond its reach all those powers, which are conferred by the people of the United States on the government of the Union, and all those means, which are given for the purpose of carrying those powers into execution. We have a principle, which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from

interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single state cannot give.

§ 1037. "We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed; and the question, whether it has been surrendered, cannot arise.

§ 1038. "But waiving this theory for the present, let

us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat, and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that, which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence, which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state would be willing to trust those of another with a power to control the operations of a government, to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures, which concern all, in the confidence, that it will not be abused. This, then, is not a case of confidence, and we must consider it, as it really is.

§ 1039. "If we apply the principle, for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting

all the measures of the government, and of prostrating it, at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any, and every other instrument. They may tax the mall; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess, which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. Gentlemen say, they do not c]alto the right to extend statetaxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those, who make it, have furnished no reason for it; and the principle, for which they contend, denies it. They contend, that the power of taxation has no other limit, than is found in the loth section of the 1st article of the constitution; that, with respect to every thing else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects, to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all If the controlling power of the states be established; if their supremacy, as to taxation, be acknowledged; what is to restrain their exercising this control, in any shape they may please to give it? Their sovereignty is not confined to taxation. This is not the only mode, in which it might be displayed. The question is, in truth,

a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration, that the.constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

§ 1040. "It has also been insisted, that, as the power of taxation in the general and state governments, is acknowledged to be concurrent, every argument, which would sustain the right of the general government to tax banks, chartered by the states, will equally sustain the right of the states to tax banks, chartered by the general government. But, the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state

taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people, over whom they claim no control. It acts upon the measures of a government, created by others, as well as themselves, for the benefit of others in common with themselves. The difference is, that, which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government, which, when in opposition to those laws, is not supreme. But if the full application of this argument could be admitted, it might bring into question the

right of congress to tax the state banks, and could not prove the right of the states to tax the bank of the United States.

§ 1041. "The court has bestowed on this subject its most deliberate consideration. The result is a conviction, that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy, which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the bank of the United States, is unconstitutional and void."1

§ 1049. In another case the question was raised, whether a state had a constitutional authority to tax stock issued for loans to the United States; and it was held by the Supreme Court, that a state had not.2 The reasoning of the court was as follows. "Is the stock, issued for loans made to the government of the United States, liable to be taxed by states and corporations? Congress has power, 'to borrow money on the credit of the United States.' The stock it issues is the evidenceof a debt created by the exercise of this power. The tax in question is a tax upon the contract, subsisting between the government and the individual. It bears directly upon that contract, while subsisting,

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1 The doctrine was again re-examined by the Supreme Court in a later case, and deliberately re-affirmed; Osborn v. Bank of the United States, 9 Wheat. R. 738, 859 to 868; 1 Kent's Comm. Lect. 12, p. 235 to 239. 2 Weston v. The City Council of Charleston, 2 Peters's R. 449.

and in full force. The power operates upon the contract; the instant it is framed, and must imply a right to affect that contract. If the states and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt, which will not be exposed to its influence?

§ 1043. "But it is unnecessary to pursue this principle, through its diversified application to all the contracts, and to the various operations of government. No one can be selected, which is of more vital interest to the community, than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburthened exercise of which more deeply affects every member of our republic. In war, when the honour, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important, which can occur in the progress of nations, have empowered their government to make these anticipations, 'to borrow, money on the credit of the United States.' Can any thing be more dangerous, or more injurious, than the admission of a principle, which authorizes every state, and every corporation in the Union, which possesses the right of taxation, to burthen the exercise of this power at their discretion?

§ 1044. "If the right to impose the tax exists, it. is a right, which in its nature acknowledges no limits. It

may be carried to any extent within the jurisdiction of the state or corporation, which imposes it, which the will of each state and corporation may prescribe. A power, which is given by the whole American people for their common good; which is to be exercised at the most critical periods for the most important purposes; on the free exercise of which the interests certainly, perhaps the liberty, of the whole may depend; may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy.

§ 1044. "In a society, formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes; in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule, which shall limit its exercise, is undoubtedly among the most delicate and difficult duties, which can devolve on those, whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once

devolved on this Court. In the performance of it we have considered it, as a necessary consequence, from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot, rightfully, be so exercised, as to impede and obstruct the free course of those measures, which the government of the United States, may rightfully adopt.

§ 1045. "This subject was brought before the Court

in the case of M'Culloch v. The State of Maryland,1 when it was thoroughly argued, and deliberately considered. The question decided in that case bears a near resemblance to that, which is involved in this. It was discussed at the bar in all its relations, and examined by, the Court with its. utmost attention. We will not repeat the reasoning, which conducted us to the conclusion thus formed; but that conclusion was, that 'all subjects, over which the sovereign power of a state extends, are objects of taxation; but those, over which it does not-extend, are, upon the soundest principles, exempt from taxation.' 'The sovereignty of a state extends to every thing, which exists by its own authority, or is introduced by its permission;' but not 'to those means, which are employed by congress to carry into execution powers conferred on that body by the people of the United States.' 'The attempt to use' the power of taxation 'on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse; because it is the usurpation of a power, which the people of a single state cannot give.' 'The states have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws, enacted by congress to carry into execution the powers vested in the general government.' We retain the opinions, which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state, in which the individual, who lends, may reside; and is undoubtedly an operation essential

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1 4 Wheaton, 316.

to the important objects, for which the government was created. It ought, therefore, on the principles settled in the case of M'Culloch v. The State of Maryland to be exempt from state taxation, and consequently from being taxed by corporations, deriving their power from states.

§1046. "It is admitted, that the power of the government to borrow money cannot be directly opposed; and that any law, directly obstructing its operations, would be void. But a distinction is taken between direct opposition, and.those measures, which may consequentially affect it; that is, a law prohibiting loans to the United States, would be void; but a tax on them to any amount is allowable. It is, we think, impossible not to perceive the intimate connexion, which exists between these two modes of acting on the subject. It is not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government; and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power; and the declaration of supremacy is a declaration, that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on

the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent, which will arrest them entirely.

§ 1047. "It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms, on which loans will be made. But this objection, it is said, has no more weight, when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States. The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no implied exemption from common burthens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation, in any form it may then assume, is not questioned. The connexion between the borrower and the lender is dissolved. It is no burthen on loans; it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on

lands, which the government has sold. The Federalist has been quoted in the argument, and an eloquent and well merited eulogy has been bestowed on the great statesman, who is supposed to be the author of the number, from which the quotation was made. This high authority was also relied upon in the case of M'Culloch v. The State of Maryland, and was considered by the Court. Without

repeating, what was then said, we refer to it, as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

§ 1048. "It has been supposed, that a tax on stock comes within the exceptions stated in the case of M'Culloch v. The State of Maryland. We do not think so. The bank of the United States is an instrument, essential to the fiscal operations of the government; and the power, which might be exercised to its destruction, was denied. But property, acquired by that corporation in a state, was supposed to be placed in the same condition with property acquired by an individual. The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution."

§ 1049. It is observable, that these decisions turn upon the point, that no state can have authority to tax an instrument of the United States, or thereby to diminish the means of the United States, used in the exercise of powers confided to it. But there is no prohibition upon any state to tax any bank or other corporation created by its own.authority, unless it has restrained itself, by the charter of incorporation, from the power of taxation.1 This subject, however, will more properly fall under notice in some future discussions. It may be added, that congress may, without doubt, tax state banks; for it is clearly within the taxing power confided to the general government. When congress tax the chartered institutions of the states, they tax their

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1 Providence Bank v. Billings, 4 Peters's R. 514.

own constituents; and such taxes must be uniform.1 But when a state taxes an institution created by congress, it taxes an instrument of a superior and independent sovereignty, not represented in the state legislature.

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1 M'Culloch v. Maryland, R Wheat R. 316, 435.

CHAPTER XV. POWER TO BORROW MONEY AND REGULATE COMMERCE.

§ 1050. Having finished this examination of the power of taxation, and of the accompanying restrictions and prohibitions, the other powers of congress will be now examined in the order, in which they stand in the eighth section.

§ 1051. The next, is the power of congress "to borrow money on the credit of the United States." This power seems indispensable to the sovereignty and existence of a national government. Even under the confederation this power was expressly delegated.1 The remark is unquestionably just, that it is a power inseparably connected with that of raising a revenue, and with the duty of protection, which that power imposes upon the general government. Though in times of profound peace it may not be ordinarily necessary to anticipate the revenues of a state; yet the experience of all nations must convince us, that the burthen and expenses of one year, in time of war, may more than equal the ordinary revenue of ten years. Hence, a debt is almost unavoidable, when a nation is plunged into a state of war. The least burthensome mode of contracting a debt is by a loan. Indeed, this recourse becomes the more necessary, because the ordinary duties upon importations are subject to great diminution and fluctuations in times of war; and a resort to direct taxes for the whole supply would, under such circum-

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1 Article 9.

stances, become oppressive and ruinous to the agricultural interests of the country.1 Even in times of peace exigencies may occur, which render a loan the most facile, economical, and ready means of supply, either to meet expenses, or to avert calamities, or to save the country from an undue depression of its staple productions. The government of the United States has, on several occasions in times of profound peace, obtained large loans, among which a striking illustration of the economy and convenience of such arrangements wilt be found in the creation of stock on the purchase of Louisiana. The power to borrow money by the United States cannot (as has been already seen) in any way be controlled, or interfered with by the states. The granting of the power is incompatible with any restraining or controlling power; and the declaration of supremacy in the constitution is a declaration, that no such restraining or controlling power shall be exercised.2

§ 1052. The next power of congress is, "to regulate "commerce with foreign nations, and among the several states, and with the Indian tribes."

§ 1053. The want of this power (as has been already seen) was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the constitution.3 It is a power vital to the prosperity of the Union; and without it the government would scarcely deserve the name of a national government; and would soon sink into discredit and imbecility.4 It Would stand, as a mere

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1 1 Tuck. Black. Comm. App. 245, 246; The Federalist, No. 41.

2 Weston v. City Council of Charleston, 2 Peters's R. 449, 468.

3 Gibbons v. Ogden, 9 Wheat. R. 1, 225, Johnson J.'s Opinion; Brown v. Maryland, 12 Wheat. R. 445, 446.

4 The Federalist, No. 4, 7, 11, 22, 37.

shadow or sovereignty, to mock our hopes, and involve us in a common ruin.

§ 1054. The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those, who felt the injury arising from this state of things, and those, who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise, that the grant should be as extensive, as the mischief, and should comprehend all foreign commerce, and all commerce among the states.1

§ 1055. But this subject has been already so much discussed, and the reasons for conferring the power so fully. developed, that it seems unnecessary to dwell farther upon its importance and necessity.2 In the convention there does not appear to have been any considerable (if, indeed, there was any) opposition to the grant of the power. It was reported in the first draft of the constitution exactly, as it now stands, ex-

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1 Brown v. State of Maryland, 12 Wheat. R. 419, 445, 446; 1 Tucker's Black. Comm. App. 248 to 252; 1 Amer. Museum, 8, 272, 273, 281, 282, 288; 2 Amer. Museum, 263 to 276; Id. 371, 372; The Federalist, No. 7, 11, 22; Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 5 Marshall's Life of Washington, ch. 2, p. 74 to 80; 2 Pitkin's Hist. 189, 192.

2 The Federalist, No. 7. 11, 12, 22, 41, 42.

cept that the words, "and with the Indian tribes," were afterwards added; and it passed without a division.1

§ 1056. In considering this clause of the constitution several important inquiries are presented. In the first place, What is the natural import of the terms; in the next place, how far the power is exclusive of that of the states; in the third place, to what purposes and for what objects the power may be constitutionally applied; and in the fourth place, what are the true nature and extent of the power to regulate commerce with the Indian tribes.

§ 1057. In the first place, then, what is the constitutional meaning of the words, "to regulate commerce;" for the constitution being (as has been aptly said) one of enumeration, and not of definition, it becomes necessary, in order to ascertain the extent of the power, to ascertain the meaning of the words.2 The power is to regulate; that is, to prescribe the rule. by which commerce is to be governed.3 The subject to be regulated is commerce. Is that limited to traffic, to buying and selling, or the interchange of commodities? Or does it comprehend navigation and intercourse? If the former construction is adopted, then a general term applicable to many objects is restricted to one of its significations. If the latter, then a general term is retained in its general sense. To adopt the former, without some guiding grounds furnished by the context, or the nature of the power, would be improper. The words being general, the sense must be general also, and embrace all subjects comprehended under them, unless there be some obvious mischief or repugnance to other

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1 Journal of Convention, 220, 257, 260, 356, 378.

2 Gibbons v. Ogden, 9 Wheat. R. 189.

3 9 Wheat. R. 196.

clauses to limit them. In the present case there is nothing to justify such a limitation. Commerce undoubtedly is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation; which shall be silent on the admission of the vessels of one nation into the ports of another; and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or barter.1

§ 1058. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing, what shall constitute American vessels, or requiring, that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government; it has been exercised with the consent of all America; and it has been always understood to be a commercial regulation. The power over navigation, and over commercial intercourse, was one of the primary objects, forwhich the people of America adopted their government; and it is impossible, that the convention should not so have understood the word "commerce," as embracing it.2 Indeed, to construe the power, so as to impair its efficacy, would defeat the very object, for which it was introduced into the constitution;3 for there cannot be a doubt, that to exclude

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1 Gibbons v. Ogden, 9 Wheat. 189, 190; Id. 229, 230.

2 9 Wheat. R. 190, 191; Id. 215, 216, 217; Id. 229, 230; 1 Tucker's Black. Comm. App. 249 to 252.

3 12 Wheat. R. 446.

navigation and intercourse from its scope would be to entail upon us all the prominent defects of the confederation, and subject the Union to the ill-adjusted systems of rival states, and the oppressive preferences of foreign nations in favour of their own navigation.1

§ 1059. The very exceptions found in the constitution demonstrate this; for it would be absurd, as well as useless, to except from a granted power that, which was not granted, or that, which the words did not comprehend. There are plain exceptions in the constitution from the power over navigation, and plain inhibitions to the exercise of that power in a particular way. Why should these be made, if the power itself was not understood to be granted? The clause already cited, that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, is or this nature. This clause cannot be understood, as applicable to those laws only, which are passed for purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference, which can be given to one port over another, relates to navigation. But the remaining part of the sentence directly points to navigation. "Nor shall vessels, bound to or from one state, be obliged to enter, clear, or pay duties in another."2 In short, our whole system for the encouragement of navigation in the coasting trade and fisheries, is exclusively founded upon this supposition. Yet no one has ever been bold enough to question the constitutionality of the laws, creating this system.3

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1 1 Tucker's Black. Comm. App. 247, 248, 249.

2 9 Wheat. R. 191.

3 9 Wheat. R. 191, 215, 216; North River Steamboat Company v. Livingston, 3 Cowen's R. 713.

§ 1060. Foreign and domestic intercourse has been universally understood to be within the reach of the power. How, otherwise, could our systems of prohibition and non-intercourse be defended? From what other source has been derived the power of laying embargoes in a time of peace, and without any reference to war, or its operations? Yet this power has been universally admitted to be constitutional, even in times of the highest political excitement. And although the laying of an embargo in the form of a perpetual law was contested, as unconstitutional, at one period of our political history, it was so, not because an embargo was not a regulation of commerce, but because a perpetual embargo was an annihilation, and not a regulation of commerce.1 It may, therefore, be safely affirmed, that the terms of the constitution have at all times been understood to include a power over navigation, as well as trade, over intercourse, as well as traffic;2 and, that, in the practice of other countries, and especially in our own, there has been no diversity of judgment or opinion. During our whole colonial history, this was acted upon by the British parliament, as an uncontested doctrine. That government regulated not merely our traffic with foreign nations, but our navigation, and intercourse, as unquestioned functions of the power to regulate commerce.3

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1 9 Wheat. 193; 1 Kent's Comm. Lect. 19, p. 404, 405; The Brigantine William, 2 Hall's Law Journal, 265; Sergeant on Const. ch. 28, p. 290, &c.

2 9 Wheat. 193, 215, 216, 217; Id. 226; 12 Wheat. R. 446, 447; North River Steamboat Company v. Livingston, 3 Cowen's R. 713.

3 Gibbons v. Ogden, 9 Wheaton's R. 1, 201; Ib. 224; Ib. 225 to 228. See Mr. Verplank's letter to Col. Drayton in 1831; Resolves of Congress, 14th Oct. 1774, (1 Journal of Congress, 27); 2 Marshall's Life of Washington, (in five volumes,) p. 77, 81; Dr. Franklin's Examination,

§ 1061. This power the constitution extends to commerce with foreign nations, and among the several states, and with the Indian tribes. In regard to foreign nations, it is universally admitted, that the words comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this country and another, to which it does not extend. Commerce, as used in the constitution, is a unit, every part of which is indicated by the term. If this be its admitted meaning in its application to foreign nations, it must carry the same meaning throughout the sentence.1 The next words are "among the several states." The word "among" means intermingled with. A thing, which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It does not, indeed, comprehend any commerce, which is purely internal, between man and man in a single state,. or between different parts of the same state, and not extending to, or affecting other states. Commerce among the states means, commerce, which concerns more states than one. It is not an apt phrase to indicate the mere interior traffic of a single state. The completely internal commerce of a state may be properly considered, as reserved to the state itself.2

§ 1062. The importance of the power of regulating commerce among the states, for the purposes of the

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before the house of commons, in 1766; Dickerson's Farmer's Letters, No. 2, 1767; 1 Jefferson's Corresp. 7; Burke's Speech on American Taxation, 1774. 1 Gibbons v. Ogden, 9 Wheaton's R. 194.

2 Gibbon's v. Ogden, 9 Wheaton's R. 194, 195, 196; Brown v. Maryland, 12 Wheaton, 446, 447.

Union, is scarcely less, than that of regulating it with foreign states.1 A very material object of this power is the relief of the states, which import and export through other states, from the levy of improper contributions on them by the latter. If each state were at liberty to regulate the trade between state and state, it is easy to foresee, that ways would be found out to load the articles of import and export, during their passage through the jurisdiction, with duties, which should fail on the makers of the latter, and the consumers of the former.2 The experience of the American states during the confederation abundantly establishes, that such arrangements could be, and would be made under the stimulating influence of local interests, and the desire of undue gain.3 Instead of acting as a nation in regard to foreign powers, the states individually commenced a system of restraint upon each other, whereby the interests of foreign powers were promoted at their expense. When one state imposed high duties on the goods or vessels of a foreign power to countervail the regulations of such powers, the next adjoining states imposed lighter duties to invite those articles into their ports, that they might be transferred thence into the other states, securing the duties to themselves. This contracted policy in some of the states was soon counteracted by others. Restraints were immediately laid on such commerce by the suffering states; and thus a state of affairs disorderly and unnatural grew up, the necessary tendency of which was to destroy the Union itself.4 The history

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1 See the Federalist, No. 6, 7, 11, 12, 22, 41, 42; N. R. Steamboat Company v. Livingston, 3 Cowen's R. 713.

2 12 Wheaton's R. 448, 449; 9 Wheaton, 199 to 204.

3 The Federalist, No. 42; 1 Tuck. Black. Comm. App. 247 to 252.

4 See President Monroe's Exposition and Message, 4 May, 1822, p. 31, 32.

of other nations, also, furnishes the same admonition. In Switzerland, where the union is very slight, it has been found necessary to provide, that each canton shall be obliged to allow a passage to merchandise through its jurisdiction into other cantons without an augmentation of tolls. In Germany, it is a law of the empire, that the princes shall not lay tolls on customs or bridges, rivers, or passages, without the consent or the emperor and diet. But these regulations are but imperfectly obeyed; and great public mischiefs have consequently followed.1 Indeed, without this power to regulate commerce among the states, the power of regulating foreign commerce would be incomplete and ineffectual.2 The very laws of the Union in regard to the latter, whether for revenue, for restriction,

for retaliation, or for encouragement or domestic products or pursuits, might-be evaded at pleasure, or rendered impotent.3 In short, in a practical view, it is impossible to separate the regulation of foreign commerce and domestic commerce among the states from each other. The same public policy applies to each; and not a reason can be assigned for confiding the power over the one, which does not conduce to establish the propriety of conceding the power over the other.4

§ 1063. The next inquiry is, whether this power to regulate commerce is exclusive or the same power in the states, or is Concurrent with it.5 It has been

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1 The Federalist, No. 42, 22.

2 The Federalist, No. 42.

3 The Federalist, No. 11, 12.

4 See the opinion of Mr. Justice Johnson, 9 Wheaton's R. 224 to 228. 5 In the convention, it was moved to amend the article, so as to give to congress "the sole and exclusive" power; but the proposition was rejected by the vote of six states against five.*

*** Journal of Convention, 220, 270.**

settled upon the most solemn deliberation, that the power is exclusive in the government of the United States.1 The reasoning, upon which this doctrine is founded, is to the following effect. 'The power to regulate commerce is general and unlimited in its terms. The full power to regulate a particular subject implies the whole power, and leaves no residuun. A grant of the whole is incompatible with the existence of a right in another to any part of it. A grant of a power to regulate necessarily excludes the action of all others, who would perform the same operation on the same thing. Regulation is designed to indicate the entire result, applying to those parts, which remain as they were, as well as to those, which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing, what the regulating power designs to have unbounded, as that, on which it has operated.2

§ 1064. The power to regulate commerce is not at all like that to lay taxes. The latter may well be concurrent, while the former is exclusive, resulting from the different nature of the two powers. The power of congress in laying taxes is not necessarily, or naturally inconsistent with that of the states. Each may lay a tax on the same property, without interfering with the action of the other; for taxation is but taking small. portions from the mass of property, which is susceptible of almost infinite division. In imposing taxes for state purposes, a state is not doing, what congress is empowered to do. Congress is not empowered to tax for those purposes,

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1 Gibbons v. Ogden, 9 Wheaton's R. 1; Brown v.Maryland, 12 Wheaton's R. 419, 445. 446; 1 Tucker's Black. Comm. App, 180, 309; N. R. Steam Boat Company v. Livingston, 3 Cowen's R. 713.

2 9 Wheaton's R. 196, 198, 209; lb. 227, 228.

which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power, which i.s granted to congress; and is doing the very thing, which congress is authorized to do. There is no analogy, then, between the power of taxation, and the power of regulating commerce.1

§ 1065. Nor can any power be inferred in the states to regulate commerce from other clauses in the constitution, or the acknowledged rights exercised by the states. The constitution has prohibited the states from laying any impost or duty on imports or exports; but this does not admit, that the state might otherwise have exercised the power, as a regulation of commerce. The laying of such imposts and duties may be, and indeed often is used, as a mere regulation of commerce, by governments possessing that power.2 But the laying of such imposts and duties is as certainly, and more usually, a right exercised as a part of the power to lay taxes; and with this latter power the states are clearly entrusted. So, that the prohibition is an exception from the acknowledged power of the state to lay taxes, and not from the questionable power to regulate commerce. Indeed, the constitution treats these as distinct and independent powers. The same remarks apply to a duty on tonnage.3

§ 1066. Nor do the acknowledged powers of the states over certain subjects, having a connexion with

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1 Wheaton's R. 199, 200.

2 9 Wheaton's R. 201, 202; 1 Jefferson's Corresp. 7; The Federalist, No. 56; 12 Wheaton's R. 446, 447.

3 9 Wheaton's R. 201, 202.

commerce, in any degree impugn this reasoning. These powers are entirely distinct in their nature from that to regulate commerce; and though the same means may be resorted to, for the purpose of carrying each of these powers into effect, this by no just reasoning furnishes any ground to assert, that they are identical.1 Among these, are inspection laws, health laws, laws regulating turnpikes, roads, and ferries, all of which, when exercised by a state, are legitimate, arising from the general powers belonging to it., unless so far as they conflict with the powers delegated to congress.2 They are not so much regulations of commerce, as of police; and may truly be said to belong, if at all to commerce, to that which is purely internal. The pilotage laws of the states may fall under the same description. But they have been adopted by congress, and without question are controllable by it.3

§1067. The reasoning, by which the power given to congress to regulate commerce is maintained to be exclusive, has not been of late seriously controverted; and it seems to have the cheerful acquiescence of the learned tribunals of a particular state, one of whose acts brought it first under judicial examination.4

§ 1068. The power to congress, then, being exclusive, no state is at liberty to pass any laws imposing a

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1 See Corfield v. CargiIl, 4 Wash. Cir. R. 371, 379, &c.

2 9 Wheaton's. R. 203 to 207, 209.

3 9 Wheaton's R. 207, 208, 209.

4 1 Kent's Comm. Lect 19, p. 404, 410, 411. See also Rawle on the Constitution, ch. 9, p. 81 to 84; Sergeant on Const. ch. 98, p. 291, 292.

-- There is a very able and candid review of the whole subject by Mr. Chancellor Kent in his excellent commentaries. (1 Kent's Comm. Lect. 19, p. 404.) I gladly avail myself of this, as well as of all other occasions, to recommend his learned labours to those, who seek to study the law, or the constitution, with a liberal and enlightened spirit.

tax upon importers, importing goods from foreign countries, or from other states. It is wholly immaterial, whether the tax be laid on the goods imported, or on the person of the importer. In each case, it is a restriction of the right of commerce, not conceded to the states. As the power of congress to regulate commerce reaches the interior of a state,1 it might be capable of authorizing the sale of the articles, which it introduces. Commerce is intercourse; and one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize traffic, when given in the most comprehensive terms, with the intent, that its efficacy should be complete, should cease at the point, when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation; and it is an essential ingredient of that intercourse, of which importation constitutes apart. As congress has the right to authorize importation, it must have a right to authorize the importer to sell. What would be the language of a foreign government, which should be informed, that its merchants after importation were forbidden to sell the merchandize imported? What answer could the United States give to the complaints and just reproaches, to which such extraordinary conduct would expose them? No apology could be received, or offered. Such a state of things would annihilate commerce. It is no answer, that the tax may be moderate; for, if the power exists in the states, it may be carried to any extent they may choose. If it does

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1 9 Wheaton's R. 197 to 204.

not exist, every exercise of it is, pro tanto, a violation of the power of congress to regulate commerce.1

§ 1069. How far any state possesses the power to authorize an obstruction of any navigable stream or creek, in which the tide ebbs and flows, within its territorial limits, as by authorizing the erection of a dam across it, has been a subject of much recent discussion. If congress, in regulating commerce, should pass any act, the object of which should be to control state legislation over such navigable streams or creeks, there would be little difficulty in saying, that a state law in conflict with such an act would be void. But if congress has passed no general or special act on the subject, the invalidity of such a state act must be placed entirely upon its repugnancy to the power to regulate commerce in its dormant Mate. Under such circumstances, it would be difficult to affirm, that the sovereignty of a state, acting on subjects within the reach of other powers, beside that of regulating commerce, and which belonged to its general territorial jurisdiction, would be intercepted by the exclusive power of commerce, unexercised by congress, over the same subject matter. The value of the property on the banks of such streams and creeks may be materially enhanced by excluding the waters from them and the adjacent low and marshy grounds, and the health of the inhabitants be improved. Measures calculated to produce these objects, provided they do not come into collision with the power of the general government, are undoubtedly within those, which are reserved to the states.2

1 Brown v. State of Maryland, 12 Wheaton's R. 419, 445 to 447; 9 Wheaton's R. 197. &c. -- Mr. Justice Thompson dissented from this doctrine, as will be seen in his opinion in 12 Wheaton's R. 449, &e.

2 Wilson v. Blackbird Creek Company, 2 Peters's R. 245.

§ 1070. In the next place, to what extent, and for what objects and purposes the power to regulate commerce may be constitutionally applied.

§ 1071. And first, among the states. It is not doubted, that it extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any state, wherever it is connected with the commerce or intercourse with any other state, or with foreign nations.1 It extends to the regulation and government of seamen on board of American ships; and to conferring privileges upon ships built and owned in the United States in domestic, as well as foreign trade.2 It extends to quarantine laws, and pilotage laws, and wrecks of the sea.3 It extends, as well to the navigation of vessels engaged in carrying passengers, and whether steam vessels or of any other description, as to the navigation of vessels engaged in traffic and general coasting business.4 It extends to the laying of embargoes, as well on domestic, as on foreign voyages.5 It extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds, and bays, and the establishment of securities to navigation against the inroads of the ocean. It extends also to the designation of particular port or ports of entry and delivery for the purposes of foreign commerce.6 These powers have been actually exerted by the national government

1 Gibbons v. Ogden, 9 Wheat. R. 189 to 198; Id. 211 to 215; 1 Tuck. Black. Comm. App. 247 to 249; Id. 250.

2 1 Tuck. Black. Comm. App. 252.

3 9 Wheat. R. 203, 204, 205, 206, 207, 208; 1 Tuck. Black Comm. App. 251, 252.

4 9 Wheat. R. 214, 915 to 221.

5 9 Wheat. R. 191, 192; 1 Kent's Comm. Lect. 19, p. 404, 405.

6 1 Tuck. Black. Comm. App. 249, 251; 9 Wheat. R. 208, 209.

under a system of laws, many of which commenced with the early establishment of the constitution; and they have continued unquestioned unto our day, if not to the utmost range of their reach, at least to that of their ordinary application.1

§ 1072. Many of the like powers have been applied in the regulation of foreign commerce. The commercial system of the United States has also been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes;2 sometimes to encourage domestic navigation, and the shipping and mercantile interest by bounties, by discriminating duties, and by special preferences and privileges;3 and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the national government by the unequivocal voice of the people.

§ 1073. A question has been recently made, whether congress have a constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures. It is not denied, that congress may, incidentally, in its arrange

1 Mr. Hamilton, in his celebrated argument on the national bank, (23d Feb. 1791,) enumerates the following as within the power to regulate commerce, viz. the regulation of policies of insurance, of salvage upon goods found at sea, a.d the disposition of such goods; the regulation of pilots; and the regulation of bills of exchange drawn by one merchant upon a merchant of another state; and, of course, the regulation of foreign bills of exchange.*

2 Sergeant on Const. Law ch. 28, (ch. 30, 2d edit.)

3 See 1 Elliot's Debates, 144.

*** 1 Hamilton's Work's, 134.**

ments for revenue, or to countervail foreign restrictions, encourage the growth of domestic manufactures. But it is earnestly and strenuously insisted, that, under the colour of regulating commerce, congress have no right permanently to prohibit any importations, or to tax any unreasonably for the purpose of securing the home market to

the domestic manufacturer, as they thereby destroy the commerce entrusted to them to regulate, and foster an interest, with which they have no constitutional power to.interfere.1 This opinion constitutes the leading doctrine of several states in the Union at the present moment; and is maintained, as vital to the existence of the Union. On the other hand, it is as earnestly and strenuously maintained, that.congress does possess the constitutional power to encourage and protect manufactures by appropriate regulations of commerce; and that the opposite opinion is destructive of all the purposes of the Union, and would annihilate its value.

§ 1074. Under such circumstances, it becomes indispensable to review the grounds, upon which the doctrine of each party is maintained, and to sift them to the bottom; since it cannot be disguised, that the controversy still agitates all America, and marks the divisions of party by the strongest lines, both geographical and political, which have ever been seen since the establishment of the national government.

§ 1075. The reasoning, by which the doctrine is maintained, that the power to regulate commerce cannot be constitutionally applied, as a means, directly to encourage domestic manufactures, has been in part already adverted to in considering the extent of the power to lay taxes. It is proper, however, to present

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1 See Address of the Philadelphia Free Trade Convention, in September and October 1831.

it entire in its present connexion. It is to the following effect. -- The constitution is one of limited and enumerated powers; and none of them can be rightfully exercised. beyond the scope of the objects, specified in those powers. It is not disputed, that, when the power is given, all the appropriate means to carry it into effect are included. Neither is it disputed, that the laying of duties is, or may be an appropriate means of regulating commerce. But the question is a very different one, whether, under pretence of an exercise of the power to regulate commerce, congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power, exclusively for the regulation of commerce, is a power for the regulation of manufactures? The statement of such a question would seem to involve its own answer. Can a power, granted for one purpose, be transferred to another? If it can, where is the limitation in the constitution? Are not commerce and manufactures as distinct, as commerce and agriculture? If they are, how can a power to regulate one arise from a power to regulate the other? It is true, that commerce and manufactures are, or may be, intimately connected with each other. A regulation of one may injuriously or beneficially affect the other. But that is not the point in controversy. It is, whether congress has a right to regulate that, which is not committed to it, under a power, which is committed to it, simply because there is, or may be an intimate connexion between the powers. If this were admitted, the enumeration of the powers of congress would be wholly unnecessary and nugatory. Agriculture, colonies, capital, machinery, the wages of labour, the profits of stock, the rents of land, the punctual performance of contracts, and the diffusion of knowledge

would all be within the scope of the power; for all of them bear an intimate relation to commerce. The result would be, that the powers of congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments. When duties are laid, not for purposes of revenue, but of retaliation and restriction, to countervail foreign restrictions, they are strictly within the scope of the power, as a regulation of commerce. But when. laid to encourage manufactures, they have nothing to do with it. The power to regulate manufactures is no more confided to congress, than the power to interfere with the systems of education, the poor laws, or the road laws of the states. It is notorious, that, in the convention, an attempt was made to introduce into the constitution a power to encourage manufactures; but it was withheld.1 In stead of granting the power to congress, permission was given to the states to impose duties, with the consent of that body, to encourage their own manufactures; and thus, in the true spirit of justice, imposing the burthen on those, who were to be benefited. It is true, that congress may, incidentally, when laying duties for revenue, consult the other interests of the country. They may so arrange the details, as indirectly to aid manufactures. And this is the whole extent, to which congress has ever gone until. the tariffs, which have given rise to the present controversy. The former precedents of congress are not, even if admitted to be authoritative, applicable to the question now presented.2

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1 A proposition was referred to the committee of Details and Revision" to establish public institutions, rewards, and immunities, for the promotion of agriculture, commerce, trade, and manufactures." The committee never reported on it. Journ. of Convention, p. 261.

2 The above arguments and reasoning have been gathered, as far as

§ 1076. The reasoning of those, who maintain the doctrine, that congress has authority to apply the power to regulate commerce to the purpose of protecting and encouraging domestic manufactures, is to the following effect.

The power to regulate commerce, being in its terms unlimited, includes all means appropriate to the end, and all means, which, have been usually exerted under the power. No one can doubt or deny, that a power to regulate trade involves a power to tax it. It is a familiar mode, recognised in the practice of all nations, and was known and admitted by the United States, while they were colonies, and has ever since been acted upon without opposition or question. The American colonies wholly denied the authority of the British parliament to tax them, except as a regulation of commerce; but they admitted this exercise of power, as legitimate and unquestionable. The distinction was with difficulty maintained in practice between laws for the regulation of commerce by way of taxation, and laws, which were made for mere monopoly, or restriction, when they incidentally produced revenue.1 And it is certain, that the main and admitted object of parliamentary regulations. of trade with the colonies was the encouragement of manufactures in Great-Britain.

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could be, from documents admitted to be of high authority by those, who maintain the restrictive doctrine. See the Exposition and Protest of the South Carolina legislature, in Dec. 1828, attributed to Mr. Vice President Calhoun; the Address of the Free Trade Convention at Philadelphia, in Oct. 1831, attributed to Mr. Attorney General Berrien; the Oration of the Hon. Mr. Drayton, on the 4th of July, 1831; and the Speech of Mr. Senator Hayne, 9th of Jan. 1832 -- See also 4 Jefferson's Corresp. 421.

1 See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; Mr. Verplanck's Letter to Col. Drayton, in 183 1; Address of the New-York Convention in favour of Domestic Industry, November, 1831, p. 12, 13, 14 9 Wheat. K. 202; 1 Pitk. Hist. ch. 3, p. 93 to 106.

Other nations have, in like manner, for like purposes, exercised the like power. So, that there is no novelty in the use of the power, and no stretch in the range of the power.

§ 1077. Indeed, the advocates of. the opposite doctrine admit, that the power may be applied, so as incidentally to give protection to manufactures, when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of Foreign powers, when there is no design of revenue. These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered per se. If this be true, then other objects may enter into commercial regulations; and if so, what restraint is there, as to the nature or extent of the objects, to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted, that a power, given for one purpose, cannot be perverted to purposes wholly opposite, or beside its legitimate scope. But what perversion is there in applying a power to the very purposes, to which it has been usually applied? Under such circumstances, does not the grant of the power without restriction concede, that it may be legitimately applied to such purposes? If a different intent had existed, would not that intent be manifested by some corresponding limitation?

§ 1078. Now it is well known, that in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures. It is believed, that not a single exception can be named. So, in an especial manner, the power has always been understood in Great-Britain, from which we derive our parentage, our laws, our language, and

our notions upon commercial subjects. Such was confessedly the notion of the different states in the Union under the confederation, and before the formation of the present constitution. One known object of the policy of the manufacturing states then was, the protection and encouragement of their manufactures by regulations of commerce.1 And the exercise of this power was a source of constant difficulty and discontent; not because improper of itself; but because it bore injuriously upon the commercial arrangements of other states. The want of uniformity in the regulations of commerce was a source of perpetual strife and dissatisfaction, of inequalities, and rivalries, and retaliations among the states. When the constitution was framed, no one ever imagined, that the power of protection of manufactures was to be taken away from all the states, and yet not delegated to the Union. The very suggestion would of itself have been fatal to the adoption of the constitution. The manufacturing states would never have acceded to it upon any such terms; and they never could, without the power, have safely acceded to it; for it would have sealed their ruin. The same reasoning would apply to the agricultural states; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures, which had, at the time of the adoption of the con-

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1 1 American Museum, 16.

stitution, an unequivocal preponderance throughout the Union. It is manifest from contemporaneous documents, that one object of the constitution was, to encourage manufactures and agriculture by this very use of the power.1

§ 1079. The terms, then, of the constitution are sufficiently large to embrace the power; the practice of other nations, and especially of Great-Britain and of the American states, has been to use it in this manner; and this exercise of it was one of the very grounds, upon which the establishment of the. constitution was urged and vindicated. The argument, then, in its favour would seem to be absolutely irresistible under this aspect. But there are other very weighty considerations, which enforce it.

§ 1080. In the first place, if congress does not possess the power to encourage domestic manufactures by regulations of commerce, the power is annihilated for the whole nation. The states are deprived of it. They have made a voluntary surrender of it; and yet it exists not in the national government. It is then a mere nonentity. Such a policy, voluntarily adopted by a free people, in subversion of some of their dearest rights and interests, would be most extraordinary in itself, without any assignable motive or reason for so great a sacrifice, and utterly without example in the history of the world. No man can doubt, that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce. No

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1 1 Elliot's Debates, 74, .75, 76, 77, 115; 3 Elliot's Debates, 31,3'2, 33; 2 Amer. Museum, 371, 372, 373; 3 Amer. Museum, 62, 554, 556, 557; The Federalist, No. 12, 41; 1 Tuck. Black. Comm. App. 237, 238; 1 American Museum, 16, 282, 289, 429, 432; Id. 434, 436; Hamilton's Report on Manufactures, in 1791; 4 Elliot's Debates, App. 351 to 354.

man can doubt, that it is the most usual, and generally the most efficient means of producing those results. No man can question, that in these great objects the different states of America have as deep a stake, and as vital interests, as any other nation. Why, then, should the power be surrendered and annihilated? It would produce the most serious mischiefs at home; and would secure the most complete triumph over us by foreign nations. It would introduce and perpetuate national debility, if not national ruin. A foreign nation might, as a conqueror, impose upon us this restraint, as a badge of dependence, and a sacrifice of sovereignty, to subserve its own interests; but that we should impose it upon ourselves, is inconceivable. The achievement of our independence was almost worthless, if such a system was to be pursued. It would be in effect a perpetuation of that very system of monopoly, of encouragement of foreign manufactures, and depression of domestic industry, which was so much complained of during our colonial dependence; and which kept all America in a state of poverty, and slavish devotion to British interests. Under such circumstances, the constitution would be established, not for the purposes avowed in the preamble, but for the exclusive benefit and advancement of foreign nations, to aid their manufactures, and sustain their agriculture. Suppose cotton, rice, tobacco, wheat, corn, sugar, and other raw materials could be, or should hereafter be, abundantly produced in foreign countries, under the fostering hands of their governments, by bounties and commercial regulations, so as to become cheaper with such aids than our own; are all our markets to be opened to such products without any restraint, simply because we may not want revenue, to the ruin of our products and industry? Is

America ready to give every thing to Europe, without any equivalent; and take in return whatever Europe may choose to give, upon its own terms? The most servile provincial dependence could not do more evils. Of what consequence would it be, that the national. government could not tax our exports, if foreign governments might tax them to an unlimited extent, so as to favour their own, and thus to supply us with the same articles by the overwhelming depression of our own by foreign taxation? When it is recollected, with what extreme discontent and reluctant obedience the British colonial restrictions were enforced in the manufacturing and navigating states, while they were colonies, it is incredible, that they should be willing to adopt a government, Which should, or might entail upon them equal evils in perpetuity. Commerce itself would ultimately be as great a sufferer by such a system, as the other domestic interests. It would languish, if it did not perish. Let any man ask himself, if New-England, or the Middle states would ever have consented to ratify a constitution, which would afford no protection to their manufactures or home industry. If the constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers?

§ 1081. It is idle to say, that with the consent of congress, the states may lay duties on imports or exports, to favour their own domestic manufactures. In the first place, if congress could constitutionally give such consent for such a purpose, which has been doubted;1 they would have a fight to refuse such consent,

1 See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Debates, App. 345.

and would certainly refuse it, if the result would be what the advocates of free trade contend for. In the next place, it would be utterly impracticable with such consent to protect their manufactures by any such local regulations. To be of any value they must be general, and uniform through the nation. This is not a matter of theory. Our whole experience under the confederation established beyond all controversy the utter local futility, and even the general mischiefs of independent state legislation upon such a subject. It furnished one of the strongest grounds for the establishment of the constitution.1

§ 1082. In the next place, if revenue be the sole legitimate object of an impost, and the encouragement of domestic manufactures be not within the scope of the power of regulating trade, it would follow, (as has been already hinted,) that no monopolizing or unequal regulations of foreign nations could be counteracted. Under such circumstances, neither the staple articles of subsistence, nor the essential implements for the public safety, could be adequately ensured or protected at home by our regulations of commerce. The duty might be wholly unnecessary for revenue; and incidentally, it might even check revenue. But, if congress may, in arrangements for revenue, incidentally and designedly protect domestic manufactures, what ground is there to suggest, that they may not incorporate this design through the whole system of duties, and select and arrange them accordingly? There is no constitutional measure, by which to graduate, how much shall be assessed for revenue, and how much for encouragement of home industry. And no system ever yet

1 Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Debates, App. 345.

adopted has attempted, and in all probability none hereafter adopted will attempt, wholly to sever the one object from the other. The constitutional objection in this view is purely speculative, .regarding only future possibilities.

§ 1083. But if it be conceded, (as it is,) that the power to regulate commerce includes the power of laying duties to countervail the regulations and restrictions of foreign nations, then, what limits are to be assigned to this use of the power?1 If their commercial regulations, either designedly or incidentally, do promote their own agriculture and manufactures, and injuriously affect ours, why may not congress apply a remedy coextensive with the evil? If congress have, as cannot be denied, the choice of the means, they may countervail the regulations, not only by the exercise of the lex talionis in the same way, but in any other way conducive to the same end. If Great Britain by commercial regulations restricts the introduction of our staple products and manufactures into her own territories, and levies prohibitory duties, why may not congress apply the Same rule to her staple products and manufactures, and secure.the same market to ourselves? The truth is, that as soon as the right to retaliate foreign restrictions or foreign policy by commercial regulations is admitted, the question, in what manner, and to what extent, it shall ,be applied, is a matter of legislative discretion, and not of constitutional authority. Whenever commercial restrictions and regulations shall cease all over the world, so far as they favour the nation adopting them, it will be time enough to consider, what America ought to do in her own regulations of commerce, which are designed to protect her own

1 See the Federalist, No. 11, 12.

industry and counteract such favoritism. It will then become a question, not of power, but of policy. Such a state of things has never yet existed. In fact the concession, that the power to regulate commerce may embrace other objects, than revenue, or even than commerce itself, is irreconcilable with the foundation of the argument on the other side.

§ 1084. Besides; the power is to regulate commerce. And in what manner regulate it? Why does the power involve the right to lay duties? Simply, because it is a common means of executing the power. If so, why does not the same right exist as to all other means equally common and appropriate? Why does the power involve a right, not only to lay duties, but to lay duties for revenue, and not merely for the regulation and restriction of commerce, considered per se? No other answer can be given, but that revenue is an incident to such an exercise of the power. It flows from, and does not create the power. It may constitute the motive for the exercise of the power, just as any other cause may; as for instance, the prohibition of foreign trade, or the retaliation of foreign monopoly; but it does not constitute the power.

§ 1085. Now, the motive of the grant of the power is not even alluded to in the constitution. It is not even stated, that congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no man ever yet doubted the right of congress to lay duties to promote and encourage domestic navigation, whether in the form of tonnage duties, or other preferences and privileges, either in the foreign trade, or

coasting trade, or fisheries.1 It is as certain, as any thing human can be, that the sole object of congress, in securing the vast privileges to American built ships, by such preferences, and privileges, and tonnage duties, was, to encourage the domestic manufacture of ships, and all the dependent branches of business.2 It speaks out in the language of all their laws, and has been as constantly avowed, and acted on, as any single legislative policy ever has been. No one ever dreamed, that revenue constituted the slightest ingredient in these laws. They were purely for the encouragement of home manufactures, and home artisans, and home pursuits. Upon what grounds can congress constitutionally apply the power to regulate commerce to one great class of domestic manufactures, which does not involve the right to encourage all? If it be said, that navigation is a part of commerce, that is true. But a power to regulate navigation no more includes a power to encourage the manufacture of ships by tonnage duties, than any other manufacture. Why not extend it to the encouragement of the growth and manufacture of cotton and hemp for sails and rigging; of timber, boards, and masts; of tar, pitch, and turpentine; of iron and wool; of sheetings and shirtings; of artisans and mechanics, however remotely connected with it? There are many products of agriculture and manufactures, which are connected with the prosperity of commerce as intimately, as domestic ship building. If the one may be encouraged, as a primary motive in regulations of commerce, why may not the others? The truth is, that the encouragement of domestic ship building is within

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1 See Mr. Jefferson's Report on the Fisheries, 1st Feb. 1791, 10 Amer. Mus. App. 1, &c., 8, &c.

2 See Mr. Williamson's Speech in Congress, 8 Amer. Mus. 140.

the scope of the power to regulate commerce, simply, because it is a known and ordinary means of exercising the power. It is one of many, and may be used like all others. according to legislative discretion. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power.

§ 1086. Here, then, is a case of laying duties, an ordinary means used in executing the power to regulate commerce; how can it be deemed unconstitutional? If it be said, that the motive is not to collect revenue, what has that to do with the power? When an act is constitutional, as an exercise of a power, can it be unconstitutional from the motives, with which it is passed? If it can, then the constitutionality of an act must depend, not upon the power, but upon the motives of the legislature. It will follow, as a consequence, that the same act passed by onelegislature will be constitutional, and by another unconstitutional. Nay, it might be unconstitutional, as well from its omissions as its enactments, since if its omissions were to favour manufactures, the motive would contaminate the whole law. Such a doctrine would be novel and absurd. It would confuse and destroy all the tests of constitutional rights and authorities. Congress could never pass any law without an inquisition into the motives of every member; and even then, they might be re-examinable. Besides; what possible means can there be of making such investigations? The motives of many of the members may be, nay must be utterly.unknown, and incapable of ascertainment by any judicial or other inquiry: they may be mixed up in various manners and degress; they may be opposite to, or wholly independent of each other. The constitution would thus depend upon processes utterly vague, and incomprehensible; and the

written intent of the legislature upon its words and acts, the lex scripta, would be contradicted or obliterated by conjecture, and parol declarations, and fleeting reveries, and heated imaginations. No government on earth could rest for a moment on such a foundation. It would be a constitution of sand heaped up and dissolved by the flux and reflux of every tide of opinion. Every act of the legislature must therefore be judged of from its object and intent, as they are embodied in its provisions; and if the latter are within the scope of admitted powers, the act must be constitutional, whether the motive for it were wise, or just, or otherwise. The manner of applying a power may be an abuse of it; but this does not prove, that it is unconstitutional.

§ 1087. Passing by these considerations, let the practice of the government and the doctrines maintained by those, who have administered it, be deliberately examined; and they will be found to be in entire consistency with this reasoning. The very first congress, that ever sat under the constitution, composed in a considerable degree of those, who had framed, or assisted in the discussion of its provisions in the state conventions, deliberately adopted this

view of the power. And what is most remarkable, upon a subject of deep interest and excitement, which at the time occasioned long and vehement debates, not a single syllable of doubt was breathed from any quarter against the constitutionality of protecting agriculture and manufactures by laying duties, although the intention to protect and encourage them was constantly avowed.1 Nay, it was

1 See 1 Lloyd's Deb. 17, 19, 22, 23, 24, 26, 27, 28, 31, 34, 39, 43, 46, 47, 50, 51, 52, 55, 64 to 69, 71, 72, 74 to 83, 94, 95, 97. 109, 116, 145, 160, 161, 211, 212, 243, 244, 254; Id. 144, 183, 194, 206, 207. See also 5 Marshall's Wash. ch. 3, p. 189, 190.

contended to be a paramount duty, upon the faithful fulfilment of which the constitution had been adopted, and the omission of which would be a political fraud, without a whisper of dissent from any side.1 It was demanded by the people from various parts of the Union; and was resisted by none.2 Yet, state jealousy was never more alive than at this period, and state interests never more actively mingled in the debates of congress. The two great parties, which afterwards so much divided the country upon the question of a liberal and strict construction of the constitution, were then distinctly formed, and proclaimed their opinions with firmness and freedom. If, therefore, there had been a point of doubt, on which to hang an argument, it cannot be questioned, but that it would have been brought into the array of opposition. Such a silence, under such circumstances, is most persuasive and convincing.

§ 1088. The very preamble of this act3 (the second passed by congress) is, "Whereas it is necessary for the support of the government, for the discharge of the debts of the United States, and the encouragement and protection ofmanufactures, that duties be laid on goods, wares, and merchandises imported, Be it enacted," &c.4 Yet, not a solitary voice was raised against it. The right, and the duty, to pass such laws was, indeed, taken so much for granted, that in some of the most elaborate expositions of the government upon

1 See 1 Lloyd's Deb. 24, 160, 161, 243, 244; 4 Elliot's Deb. App. 351, 351.

2 See Grimke's Speech, in Dec. 1828, p. 58, 59, 63.

3 Act. of 4th July, 1789.

4 It is not a little remarkable, that the culture of cotton was just then beginning in South Carolina; and her statesmen then thought. a protecting duty to aid agriculture was in all respects proper, tad constitutional. 1 Lloyd's Deb. 79; Id. 210, 211, 212, 244.

the subject of manufactures, it was scarcely alluded to.1 The Federalist itself, dealing with every shadow of objection against the constitution, never once alludes to such a one; but incidentally commends this power, as leading to beneficial results on all domestic interests.2 Every successive congress since that time has constantly acted upon the system through all the changes of party and local interests. Every successive executive has sanctioned laws on the subject; and most of them have actively recommended the encouragement of manufactures to congress.3 Until a very recent period, no person in the public councils seriously relied upon any constitutional difficulty. And even now, when the subject has been agitated, and discussed with great ability and zeal throughout the Union, not more than five states have expressed an opinion against the constitutional right, while it has received an unequivocal sanction in the others with an almost unexampled degree of unanimity. And this too, when in, most other respects these states have been in strong opposition to each other upon the general system of politics pursued by the government.

§ 1089. If ever, therefore, contemporaneous exposition, and the uniform and progressive operations of the government itself, in all its departments, can be of any weight to settle the construction of the constitution, there never has been, and there never can be more decided evidence in favour of the power, than is furnished by the history of our national laws for the encouragement of domestic agriculture and manufactures. To resign an exposition so sanctioned, would be to de-

1 Hamilton's Report on Manufacturers, in 1791.

2 The Federalist, No. 10, 35, 41.

3 See 4 Elliot's Debates, App. 353, 354.

liver over the country to interminable doubts; and to make the constitution not a written system of government, but a false and delusive text, upon which every successive age of speculatists and statesmen might build any system, suited to their own views and opinions. But if it be added to this, that the constitution gives the power in the most unlimited terms, and neither assigns motives, nor objects for its exercise; but leaves these wholly to the discretion of

the legislature, acting for the common good, and the general interests; the argument in its favour becomes as absolutely irresistible, as any demonstration of a moral or political nature ever can be. Without such a power, the government would be absolutely worthless, and made merely subservient to the policy of foreign nations, incapable of self-protection or self-support;1 with it, the country will have a fight to assert its equality, and dignity, and sovereignty among the other nations of the earth.2

§ 1089. In regard to the rejection of the proposition in the convention "to establish institutions, rewards, and immunities for the promotion of agriculture, commerce, trades, and manufactures,"3 it is manifest, that it has no bearing on the question. It was a power much

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1 4 Jefferson's Correspondence, 280, 281; 1 Pitkin's Hist. ch. 3, p. 93 to 106.

2 The foregoing summary has been principally abstracted from the Letter of Mr. Madison to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Deb. 345; Mr. Grimke's Speech in Dec. 1898, in the South Carolina senate; Mr. Huger's Speech in the South Carolina legislature, in Dec. 1830; Address of the New York Convention of the Friends of Domestic Industry, in Oct. 1831; Mr. Verplanck's Letter to Col. Drayton, in 1831; Mr. Clay's Speech in the senate, in Feb. 1839; Mr. Edward Everett's Address to the American Institute, in Oct. 1831; Mr. Hamilton's Report on Manufactures, in 1791; Mr. Jefferson's Report on the Fisheries, in 1791. See, also, 4 Jefferson's Correspondence, 280, 281.

3 Journal of convention, p. 961.

more broad in its extent and objects, than the power to encourage manufactures by the exercise of another granted power. It might be contended with quite as much plausibility, that the rejection was an implied rejection of the right to encourage commerce, for that was equally within the scope of the proposition. In truth, it involved a direct power to establish institutions, rewards, and immunities for all the great interests of society, and was, on that account, deemed too broad and sweeping. It would establish a general, and not a limited power of government.

§ 1090. Such is a summary (necessarily imperfect) of the reasoning on each side of this contested doctrine. The reader will draw his own conclusions; and these Commentaries have no further aim, than to put him in possession of the materials for a proper exercise of his judgment.

§ 1091. When the subject of the regulation of commerce was before the convention, the first draft of the constitution contained an article, that "no navigation act shall be passed, without the assent of two thirds of the members present in each house."'1 This article was afterwards recommended in a report of a committee to be stricken out. In the second revised draft it was left out; and a motion, to insert such a restriction to have effect until the year 1808, was negatived by the vote of seven states against three.2 Another proposition, that no act, regulating the commerce of the United States with foreign powers, should be passed without the assent of two thirds of the mem-

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1 Journal of Convention, p. 222.

2 Journal of Convention, 222. 285, 286, 293, 358, 387. See, also, 3 American Museum, 62, 419, 420; 2 American Museum, 553; 2 Pitkin's Hist. 261.

bers of each house, was rejected by the vote of seven states against four.1 The rejection was, probably, occasioned by two leading reasons. First, the general impropriety of allowing the minority in a government to control, and in effect to govern all the legislative powers of the majority. Secondly, the especial inconvenience of such a power in regard to regulations of commerce, where the proper remedy for grievances of the worst sort might be withheld from the navigating and commercial states by a very small minority of the other states.2 A similar proposition was made, after the adoption of the constitution, by some of the states; but it was never acted upon.3

§ 1092. The power of congress also extends to regulate commerce with the Indian tribes. This power was not contained in the first draft of the constitution. It was afterwards referred to the committee on the constitution (among other propositions) to consider the propriety of giving to congress the power "to regulate affairs with the Indians, as well within, as without the limits of the United States." And, in the revised draft, the committee reported the clause, "and with the Indian Tribes," as it now stands.4

§ 1093. Under the confederation, the continental congress were invested with the sole and exclusive right and power "of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided, that the legislative right of any state within its own limits be not infringed or violated."5

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1 Journal of Convention, 306.

2 See The Federalist, No. 22; 1 Tucker's Black. Comm. App. 253, 375.

3 1 Tucker's Black. Comm. App. 253, 375.
4 Journal of Convention, 220, 260, 356.
5 Art. 9.

§ 1094. Antecedently to the American Revolution the authority to regulate trade and intercourse with the Indian tribes, whether they were within, or without the boundaries of the colonies, was understood to belong to the prerogative of the British crown.1 And alter the American Revolution, the like power would naturally fall to the federal government, with a view to the general peace and interests of all the states.2 Two restrictions, however, upon the power were, by the above article, incorporated into the confederation, which occasioned endless embarrassments and doubts. The power of congress was restrained to Indians, not members of any of the states; and was not to be exercised, so as to violate or infringe the legislative right of any state within its own limits. What description of Indians were to be deemed members of a state was never settled under the confederation; and was a quest ion of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a state, yet residing within its legislative jurisdiction, was to be regulated by an external authority, without so far intruding on the internal rights of legislation, was absolutely incomprehensible. In this case, as in some other cases, the articles of confederation inconsiderately endeavoured to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.3 The constitution has wisely disembarrassed the

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1 Worcester v. State of Georgia, 6 Peters's R. 515; Johnson v. McIntosh, 8 Wheat. R. 543; Journal of Congress, 3 August, 1787, 12th vol. p. 81 to 86.
2 Ibid.
3 The Federalist, No. 42; 1 Tuck. Black. Comm. App. 253; 12 Jour. of Congress, 3 August, 1787, p. 81 to 84.

power of these two limitations; and has thus given to congress, as the only safe and proper depositary, the exclusive power, which belonged to the crown in the ante-revolutionary times; a power indispensable to the peace of the states, and to the just preservation of the rights and territory of the Indians.1 In the former illustrations of this subject, it was stated, that the Indians, from the first settlement of the country, were always treated, as distinct, though in some sort, as dependent nations. Their territorial rights and sovereignty were respected. They were deemed incapable of carrying on trade or intercourse with any foreign nations, or of ceding their territories to them. But their right of self-government was admitted; and they were allowed a national existence, under the protection of the parent country, which exempted them from the ordinary operations of the legislative power of the colonies. During the revolution and afterwards they were secured in the like enjoyment of their rights and property, as separate communities.2 The government of the United States, since the constitution, have always recognised the same attributes of dependent sovereignty, as belonging to them, and claimed the same right of exclusive regulation of trade and intercourse with them, and the same authority to protect and guarantee their territorial possessions, immunities, and jurisdiction.3

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1 Worcester v. The State of Georgia, 6 Peters's R. 515; 12 Journ. of Congress, 3 August, 1787, p. 81 to 84.
2 Johnson v. M'Intosh, 8 Wheat. R. 543; Fletcher v. Peck, 6 Cranch, 146, 147, per Johnson J.; The Cherokee Nation v. Georgia, 5 Peters's R 1; Worcester v. The State of Georgia, 6 Peters's R. 515; Jackson v. Goodell, 20 Johnson's R. 193; 3 Kent's Comm. Lect. 50, p. 303 to 318.
3 Worcester v. State of Georgia, 6 Peters's R. 515; Journ. of Congress, 3 August, 1787, vol. 12, p. 81 to 84. -- Mr. Blunt, in his valuable Historical Sketch of the Formation of the Confederacy, &c. has given a vary full

§ 1095. The power, then, given to congress to regulate commerce with the Indian tribes, extends equally to tribes living within or without the boundaries of particular states, and within or without the territorial limits of the United States. It is (says a learned commentator) wholly immaterial, whether such tribes continue seated within the boundaries of a state, inhabit part of a territory, or roam at large over lands, to which the United States have no claim. The trade with them is, in all its forms, subject exclusively to the regulation of congress. And in this particular, also, we trace the wisdom of the constitution. The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear.1

§ 1096. It has lately been made a question, whether an Indian tribe, situated within the territorial boundaries of a state; but exercising the powers of government, and national sovereignty, under the guarantee of the general government, is a foreign state in the sense of the constitution, and as such entitled to sue in the courts of the United States. Upon solemn argument, it has been held, that such a tribe is to be deemed politically a state; that is, a distinct political society, capable of self-government; but it is not to be deemed a foreign state, in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe

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view of the ante-revolutionary, as well as post-revolutionary authority exercised in regard to the Indian tribes. See Blunt's Historical Sketch, &c. (New-York, 1825.) Mr. Jefferson's opinion was, that the United States had no more than a right of pre-emption of the Indian lands, not amounting to any dominion, or jurisdiction, or permanent authority whatever; and that the Indians possessed a full, undivided, and. independent sovereignty. 4 Jefferson's Corresp. 478.

1 Rawle on the Constitution, ch. 9, p. 84. See also 1 Tuck. Black. Comm. App. 254; 1 Kent's Comm. Lect..50, p. 508 to 318.

may properly be deemed in a state of pupillage; and its relation to the United States resembles that of a ward to a guardian.1 *

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1 The Cherokee Nation v. Georgia, 5 Peters's R. 1, 16, 17; Jackson v. Goodell, 20 John. R. 193; 3 Kent's Comm. Lect. 50. p. 308 to 318.In the first volume of Bioren & Duane's edition of the laws of the United Staten, there will be found a history of our Indian Treaties and Laws regulating Intercourse and Trade with the Indians. 1 United States Laws, 597 to 620.

*** While this sheet was passing through the press, President Jackson's Proclamation of the 10th of December, 1832, concerning the recent Ordinance of South-Carolina on the subject of the tariff, appeared. That document contains a most elaborate view of several questions, which have been discussed in this and the preceding volume, especially respecting the supremacy of the laws of the Union; the right of the judiciary to decide upon the constitutionality of those laws; and the total repugnancy to the constitution of time modern doctrine of nullification asserted in that ordinance. As a state paper it is entitled to very high praise for the clearness, force, and eloquence, with which it has defended the rights and powers of the national government. I gladly copy into these pages some of its important passages, as among time ablest commentaries ever offered upon the constitution.**

"Whereas, a convention assembled in the state of South-Carolina have passed an ordinance, by which they declare, 'That the several acts and parts of acts of the congress of time United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and more especially,' twoacts for the same purpose passed on the 29th of May, 1828, and on the 14th of July, 1832, are unauthorized by the constitution of the United States, and violate the true meaning and intent thereof, and are null and void, and no law,' nor binding on the citizens of that state or its officers: and by the said ordinance, it is further declared to be unlawful for any of the constituted authorities of the state, or of the United States, to enforce the payment of the duties imposed by the said acts within the same state, and that it is the duty of the legislature to pass such laws, as may be necessary to give full effect to the said ordinance:

"And whereas, by the said ordinance, it is further ordained, that in no ease of law or equity, decided in the courts of said state, wherein shall be drawn in question the validity of the said ordinance, or of the acts of the legislature, that may be passed to give it effect, or of the said laws of the United States, no appeal shall be allowed to the Supreme Court of the United States, nor shall any copy of the record be

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permitted or allowed for that purpose, and that any person attempting to take such appeal shall be punished as for a contempt of court: "And, finally, the said ordinance declares, that the people of SouthCarolina will maintain the said ordinance at every hazard; and that they will consider the passage of any act by congress, abolishing or closing the ports of the said state, or otherwise obstructing the tree ingress or egress of vessels to and from the said ports, or any other act of the federal government to coerce the state, shut up her ports, destroy or harass her commerce, or to enforce the said acts otherwise, than through the civil tribunals of the country, as inconsistent with the longer continuance of South-Carolina in the Union; and that the people of the said state will thenceforth hold themselves absolved

from all further obligation to maintain or preserve their political connexion with the people of the other states, and will forthwith proceed to organize a separate government, and do all ether acts and things, which sovereign and independent states may of right do:

"And whereas, the said ordinance prescribes to the people of SouthCarolina a course of conduct, in direct violation of their duty, as citizens of the United States, contrary to the laws of their country, subversive of its constitution, and having for its object the destruction of the Union, -- that Union, which, coeval with our political existence, led our fathers, without any other ties to unite them, than those of patriotism and a common cause, through a sanguinary struggle to a glorious independence,--that sacred Union, hitherto inviolate, which, perfected by our happy constitution, has brought us, by the favour of Heaven, to a state of prosperity at home, and high consideration abroad, rarely, if ever, equalled m the history of nations. To preserve this bond of our political existence from destruction, to maintain inviolate this state of national honour and prosperity, and to justify the confidence my fellow-citizens have reposed in me, I, Andrew Jackson, President of the United States, have thought proper to issue this my Proclamation, stating my views of the constitution and laws, applicable to the measures adopted by the convention of South-Carolina, and to the reasons they have put forth to sustain them, declaring the course, which duty will require me to pursue, and, appealing to the understanding end patriotism of the people, warn them of the consequences, that must inevitably result from an observance of the dictates of the convention.

"Strict duty would require of me nothing more, than the exercise of those powers, with which I am now, or may hereafter be, invested, for preserving the peace of the Union, and for the execution of the laws. But the imposing aspect, which opposition has assumed in this case, by clothing itself with state authority, and the deep interest, which the people of the United States must all feel in preventing a resort to stronger measures, while there is a hope, that any thine, will be yielded to reasoning and remonstrance, perhaps demand, and will certainly justify, a full exposition to South-Carolina end the nation of the views I entertain

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of this important question, as well as a distinct enunciation of the course, which my sense of duty will require me to pursue.

"The ordinance is founded, not on the indefeasible right of resisting acts, which are plainly unconstitutional and too oppressive to be endured; but on the strange position, that any one state may not only declare an act of congress void, but prohibit its execution, -- that they may do this consistently with the constitution, -- that the true construction of that instrument permits a state to retain its place in the Union, and yet be bound by no other of its laws, than those it may choose to consider as constitutional. It is true, they add, that to justify this abrogation of a law, it must be palpably contrary to the constitution; but it is evident, that to give the right of resisting laws of that description, coupled with the uncontrolled right to decide, what laws deserve that character, is to give the power of resisting all laws. For, as by the theory there is no appeal, the reasons alleged by the state, good or bad, must prevail. If it should be said, that public opinion is a sufficient check against the abuse of this power, it may be asked, why it is not deemed a sufficient guard against the passage of an unconstitutional act by congress. There is, however, a restraint in this last case, which makes the assumed power of a state more indefensible, and which does not exist in the other. There are two appeals from an unconstitutional act passed by congress, -- one to the judiciary, the other to the people, and the states. There is no appeal from the state decision in theory, and the practical illustration shows, that the courts ere closed against an application to review it, both judges and jurors being sworn to decide in its favour. But reasoning on this subject is superfluous, when our social compact in express terms declares, that the laws of the United States, the constitution, and treaties made under it, are the supreme law of the land; and for greater caution adds, 'that the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.' And it may be asserted without fear of refutation, that no federative government could exist without a similar provision. Look for a moment to the consequence. If South-Carolina considers the revenue laws unconstitutional, and has a right to prevent their execution in the pert of Charleston, there would be a clear constitutional objection to their collection in every other port, and no revenue could be collected any where; for all imposts must be equal. It is no answer to repeat, that an unconstitutional law is no law, so long as the question of its legality is to be decided by the

state itself; for every law, operating injuriously upon any local interest, will be perhaps thought, and certainly represented, as unconstitutional, and, as has been shown, there is no appeal.

"If this doctrine had been established at an earlier day, the Union would have been dissolved in its infancy. The excise law in Pennsylvania; the embargo and non-intercourse law in the Eastern states; the carriage tax in Virginia, were all deemed unconstitutional, and were

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more unequal in their operation, than say or the laws now complained or; but fortunately none or those states discovered, that they had the right now claimed by South-Carolina. The war, into which we were forced, to support the dignity or the nation and the right or our citizens, might have ended in defeat and disgrace, instead or victory and honour, "If the states, who supposed it a ruinous and unconstitutional measure, had thought they possessed the right of nullifying the act, by which it was declared, and denying supplies for its prosecution. Hardly and unequally, as those measures bore upon several members of the Union, to the legislatures of none did this efficient and peaceable remedy, as it is called, suggest itself. The discovery of this important feature in our constitution was reserved to the present day. To the statesmen or South-Carolina belongs the invention; and upon the citizens of that state will unfortunately fail the evils of reducing it to practice.

"If the doctrine of a state veto upon the laws of the Union carries with it internal evidence or its impracticable absurdity our constitutional history will also afford abundant proof, that it would have been repudiated with indignation, had it been proposed to form a feature in our government.

"In our colonial state, although dependent on another power, we very early considered ourselves, as connected by common interest with each other. Leagues were formed for common defence, and before the Declaration of Independence we were known in our aggregate character, as The United Colonies of America. That decisive and important step was taken jointly. We declared ourselves a nation by at joint, not by several acts; and when the terms of our confederation were reduced to form, it was in that of a solemn league of several states, by which they agreed, that they would collectively form one nation, for the purpose of conducting some certain domestic concerns, and all foreign relations in the instrument forming that union is found an article, which declares, that 'every state shall abide by the determinations of congress on all questions, which by that confederation should be submitted to them.'

"Under the confederation, then, no state could legally annul a decision of the congress, or refuse to submit to its execution; but no provision was made to enforce these decisions. Congress made requisitions, but they were not complied with. The government could not operate on individuals. They had no judiciary; no means of collecting revenue.

"But the defects of the confederation need not be detailed. Under its operation we could scarcely be called a nation. We had neither prosperity at home, nor consideration abroad. This state of things could not be endured; and our present happy constitution was formed, but formed in vain, if this fatal doctrine prevails. It was formed for important objects, that are announced in the preamble, made in the name and by the authority or the people of the United States, whose delegates framed, and whose conventions approved it. The most important among these objects, that. which is placed first in rank, on which all the others rest,

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is, 'form a more perfect Union.' Now, is it possible, that even if there were no express provision giving supremacy to the constitution and laws of the United States over those of the states, it can be conceived, that an instrument, made for the purpose of 'forming a more perfect Union,' than that of the confederation, could be so constructed by the assembled wisdom of our country, as to substitute for that confederation a form of government dependent for its existence on the local interest, the party spirit of a state, or of a prevailing faction in a state? Every man of plain. unsophisticated understanding, who hears the question, will give such an answer, as will preserve the Union. Metaphysical subtlety, in pursuit of an impracticable theory, could alone have devised one, that is calculated to destroy it.

"I consider, then, the power to annul a law or the United States, assumed by one state, incompatible with the existence of the Union; contradicted expressly by the letter of the constitution; unauthorized by its spirit; inconsistent with every principle, on which it was founded; and destructive of the great object, for which it was formed.

"After this general view of the leading principle, we must examine the particular application of it, which is made in the Ordinance.

"The preamble rests its justification on these grounds: -- It assumes as a fact, that the obnoxious laws, although they purport to be laws for raising revenue, were, in reality, intended for the protection of manufactures, which purpose it asserts to be unconstitutional; that the operation of these laws is unequal; that the amount raised by them is greater than is required by the wants of the government; and finally, that the proceeds are to be applied to objects unauthorized by the constitution. These are the only causes alleged to justify an open opposition; to the laws of the country, and a threat of seceding from the Union, if any attempt should be made to enforce them. The first virtually acknowledges, that the law in question was passed under a power expressly given by the constitution, to lay and collect imposts; but its constitutionality is drawn in question from the motives of those, who passed it. However apparent this purpose may be in the present case, nothing can be more dangerous, than to admit the position, that an unconstitutional purpose, entertained by the members, who assent to a law enacted under a constitutional power, shall make that law void; for how is that purpose to be ascertained? Who is to make abe scrutiny? How often may bad purposes be falsely imputed ? in how many cases are they concealed by false professions? in how many is no declaration of motive made? Admit thin doctrine, and you give to the states an uncontrolled fight to decide; and every law may be annulled under this pretext. If, therefore, the absurd and dangerous doctrine should be admitted. that a state may annul an unconstitutional law, or one that it deems such, it will not apply to the present case.

"The next objection is, that the laws in question operate unequally. This objection may be made, with truth, to every law that has been or

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can he passed. The wisdom of man never yet contrived a system of taxation, that would operate with perfect equality. If the unequal operation of a law makes it unconstitutional, and if all laws of that description may be abrogated by any state for that cause, then, indeed, is the federal constitution unworthy of the slightest. effort for its preservation. We have hitherto relied on it, as the perpetual bond of our union. We have received it, as the work of the assembled wisdom of the nation. We have trusted to it, as the sheet-anchor of our safety in the stormy times of conflict with a foreign or domestic foe. We have looked to it with sacred awe, as the palladium of our liberties, and with all the solemnities of religion have pledged to each other our lives and fortunes here, and our hopes of happiness hereafter, in its defence and support. Were we mistaken, my countrymen, in attaching this importance to the constitution of our country? Was our devotion paid to the wretched, inefficient, clumsy contrivance, which this new doctrine would make it? Did we pledge ourselves to the support of an airy nothing, a bubble, that must be blown away by the first breath of disaffection? Was this self-destroying, visionary theory, the work of the profound statesmen, the exalted patriots, to whom the task of constitutional reform was entrusted?

"Did the name of Washington sanction, did the states deliberately ratify such an anomaly in the history of fundamental legislation? No. We were not mistaken. The letter of this great instrument is free from this radical fault: its language directly contradicts the imputation: its spirit, its evident intent, contradicts it. No, we did not err! Our constitution does not contain the absurdity of giving power to make laws, anti another power to resist them. The sages, whose memory will always be reverenced, have given us a practical, and, as they hoped, a permanent constitutional compact. The father of his country did not affix his revered name to so palpable an absurdity. Nor did the states, when they severally ratified it, do so under the impression, that a veto on the laws of the United States was reserved to them, or that they could exercise it by implication. Search the debates in all their conventions, examine the speeches of the most zealous opposers of federal authority; look at the amendments, that were proposed; they are all silent; not a syllable uttered, not a vote given, not a motion made to correct the explicit supremacy given to the laws of the Union over those of the states, or to show that implication, as is now contended, could defeat it. No; we have not erred! The constitution is still the object of our reverence, the bond of our Union, our defence in danger, and the source of our prosperity in peace. It shall descend, as we have received it, uncorrupted by sophistical construction, to our posterity; and the sacrifices of local interest, of state prejudices, of personal animosities, that were made to bring it into existence, will again be patriotically offered for its support.

"The two remaining objections made by the Ordinance to these laws are, that the sums intended to be raised by them are greater, than are required, and that the proceeds will be unconstitutionally employed.
"The constitution has given expressly to congress the right of raising revenue, and of determining the sum the public exigencies will require. The states have no control over the exercise of this right, other than that, which results from the power of changing the representatives, who abuse it, and thus procure redress. Congress may undoubtedly abuse this discretionary power, but the same may be said of others, with which they are vested. Yet the discretion must exist somewhere. The constitution has given it to the representatives of all the people, checked by the representatives of the states, and by the executive power. The South-Carolina construction gives it to the legislature or the convention of a single state, where neither the people of the different states, nor the states in their separate capacity, nor the chief magistrate elected by the people, have any representation. Which is the most discreet disposition of the power? I do not ask you, fellow citizens, which is the constitutional disposition; that instrument speaks a language not to be misunderstood. But if you were assembled in general convention, which would you think the safest depository of this discretionary power in the last resort? Would you add a clause, giving it to each or the states, or would you sanction the wise provisions already made by your constitution? If this should be the result of your deliberations, when providing for the future, are you, can you be ready to risk all, that we hold dear, to establish, for a temporary and a local purpose, that, which you must acknowledge to be destructive and even absurd, as a general provision? Carry out the consequences of this right vested in the different states, and yes must perceive, that the crisis your conduct presents at this day would recur, whenever any law of the United States displeased any of the states, and that we should soon cease to be a nation.
"The Ordinance, with the same knowledge of the future, that characterizes a former objection, tells you, that the proceeds of the tax will be unconstitutionally applied. If this could be ascertained with certainty, the objection would, with more propriety, be reserved for the law so applying the proceeds; but surely cannot be urged against the laws levying the duty.
"These are the allegations contained in the Ordinance. Examine them seriously, my re]low citizens, -- judge for yourselves. I appeal to you to determine, whether they are so clear, so convincing, as to leave no doubt of their correctness; and even if you should come to this conclusion, how far they justify the reckless, destructive course, which you are directed to pursue. Review these objections, and the conclusions drawn from them, once more. What are they? Every law, then, for raising revenue, according to the South-Carolina Ordinance, may be rightfully annulled, unless it be so framed, as no law ever will or can

be framed. Congress have a right to pass law for raising revenue, and each.state has a right to oppose their execution, two rights directly opposed to each other;--and yet is this absurdity supposed to be contained in an instrument, drawn for the express purpose of avoiding collisions between the states and the general government, by an assembly of the most enlightened statesmen and purest. patriots ever embodied for a similar purpose.
"In vain have these sages declared, that congress shall have power to lay and collect taxes, duties, imposts, and excises; in vain have they provided, that they shall have power to pass laws, which shall be necessary and proper to carry those powers into execution; that those laws and that constitution shall be the 'supreme law of the land, and that the judges in every state shall be bound thereby, any thing in the constitution and law, of any state to the contrary notwithstanding.' In vain have the people of the several states solemnly sanctioned these provisions, made them their paramount law, End individually sworn to support them whenever they were called on to execute any office. Vain provisions! ineffectual restrictions! vile profanations of oaths! miserable mockery of legislation! if the bare majority of the voters in any one state may, On a real or supposed knowledge of the intent, with which a law has been passed, declare themselves free from its operation, -- say here it gives too little, there too much, and operates unequally, -- here it suffers articles to be free, that ought to be taxed,.-- there it taxes those, that ought to be free in this case the proceeds are intended to be applied to purposes, which we do not approve, in that the amount raised is more than is wanted. Congress, it is true, are invested by the constitution with the right or deciding these questions according to their sound discretion; congress is composed of the representatives of all the states, and of all the people of all the states; but we, part of the

people of one state, to whom the constitution has given no power on the subject, from whom it has expressly taken it away, -- we, who have solemnly agreed, that this constitution shall be our law, -- we. most of whom have sworn to support it,-- we now abrogate this law, and swear, and force others to swear, that it shall not be obeyed; -- and we do this, not because congress have no right to pass such laws; this we do not allege; but because they have passed them with improper views. They are unconstitutional, from the motives of those, who passed them. which we can never with certainty know, from their unequal operation, although it is impossible, from the nature of things, that they should be equal, and from the disposition which we presume may be made of their proceeds, although that disposition has not been declared. This is the plain meaning of the ordinance in relation to laws, which it abrogates for alleged unconstitutionality. But it does not stop there. It repeals, in express terms, an important part of the constitution itself, and of laws passed to give it effect, which have never been alleged to be unconstitutional. The constitution declares, that the judicial powers of

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the United States extend to cases arising under the laws of the United State, and that such laws, the constitution and treaties, shall be paramount to the state constitutions and laws. The judiciary act prescribes the mode, by which the cue may be brought before a court of the United States by appeal, when a state tribunal shall decide against this provision of the constitution. The ordinance declares, that there shall be no appeal -- makes the state law paramount to the constitution and laws of the United States -- forces judges and jurors to swear, that they will disregard their provisions; and even makes it penal in a suitor to attempt relief by appeal. It further declares, that it shall not be lawful for the authorities of the United States, or of that state, to enforce the payment of duties imposed by the revenue laws within its limits.

"Here is a law of the United States, not even pretended to be unconstitutional, repealed by the authority of a small majority of the voters of a single state. Here is a provision of the constitution, which is solemnly abrogated by the same authority.

"On such expositions and reasonings, the ordinance grounds not only an assertion of the right to annul the laws, of which it complains, but to enforce it by threat of seceding from the Union, if any attempt is made to execute them.

"This right to secede is deduced from the nature of the constitution, which they say is a compact between sovereign states, who have preserved their whole sovereignty, and therefore are subject to no superior; that because they made the compact, they can break it, when, in their opinion, it has been departed from by the other states. Fallacious as this course of reasoning is, it enlists state pride, and finds advocates in the honest prejudices of those, who have not studied the nature of our government sufficiently to see the radical error, on which it rests.

"The people of the United States formed the constitution, acting through the state legislatures in making the compact, to meet and discuss its provisions, and acting in separate conventions, when they ratified those provisions; but the terms used in its construction, show it to be a government, in which the people of all the states collectively are represented. We are one People in the choice of president and vice-president. Here the states have no other agency, than to direct the mode, in which the votes shall be given. The candidates having the majority of all. the votes are chosen. The electors of a majority of states may have given their votes for one candidate, and yet another may be chosen. The people, then, and not the states, are represented in the executive branch.

"In the house of representatives there is this difference, that the people of one state do not, as in the case of president and vice-president, all vote for the same officers. The people of all the states do not vote for all the members, each state electing its own representatives. But this creates no material distinction. When chosen, they are all representatives or the United States, not representatives of the particular

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state from whence they come. They are paid by the United States, not by the state; nor are they accountable to it for any act done in the performance or their legislative functions; and however they may in practice, as it is their duty to do, consult and prefer the interests of their particular constituents, when they come in conflict with any other partial or local interest, yet it is their first and highest duty, as representatives of the United States, to promote the general good.

"The. constitution of the United States, then, forms a government, not a league; and whether it be formed by compact between the states or in any other manner, its character is the same. It is a government, in which all the people are represented, which operates directly on the people individually, not upon the states; they retained all the power they did not grant. But each state having expressly parted with so many powers, as to constitute jointly with the other states a single nation, cannot from that period possess any right to secede, because such secession does not break a league, but destroys the unity of a nation; and any injury to that unity is not only a breach, which would result from the contravention of a compact; but it is an offence against the whole Union To say, that any state may at pleasure secede from the Union, is to say, that the United States ere not a nation; because it would be a solecism to contend, that any part or a nation might dissolve its connexion with the other parts, to their injury or ruin, without committing any offence. Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right, is confounding the meaning of terms; and can only be done through gross error, or to deceive those, who are willing to assert a right, but would pause before 'they made a revolution, or incur the penalties consequent on a failure.

"Because the Union was formed by compact, it is said the parties to that compact may, when they feel themselves aggrieved, depart from it; but it is precisely because it is a compact, thai, they cannot. A compact is an agreement, or binding obligation. It may, by its terms, have a sanction or penalty for its breach, or it may not. If it contains no sanction, it may be broken with no other consequence, than moral guilt: if it have a sanction, then the breach incurs the designated or implied penalty. A league between independent nations, generally, has no sanction, other than a moral one; or, if it should contain a penalty, as there is no common superior, it cannot be enforced. A government, on the contrary, always has a sanction, express or implied; and in our case, it is both necessarily implied, and expressly given. An attempt by force of arms to destroy a government, is an offence, by whatever means the constitutional compact may have been formed; and such. government has the right, by the law of self-defence, to pass acts for punishing the offender, unless that right is modified, restrained, or resumed by the constitutional act. In our system, although it is modified in the case of treason, yet authority is expressly given to pass all laws necessary to

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carry its powers into effect, and under this grant provision has been made for punishing acts, which obstruct the due administration or the laws.

"It would seem superfluous to add any thing to show the nature of that Union, which connects us; but as erroneous opinions on this subject are the foundation of doctrines the most destructive to our peace, I must give some further development to my views on this subject. No one, fellow citizens, has a higher reverence for the reserved rights of the states, than the magistrate, who now addresses you. No one would make greater personal sacrifices, or official exertions to defend them from violation; but equal care must be taken to prevent, on their pert, an improper interference with, or resumption of the rights they have vested in the nation. The line has not been so distinctly drawn, as to avoid doubts in some cases of the exercise of power. Men of the best intentions, and soundest views may differ in their construction of some parts of the constitution; but there are others, on which dispassionate reflection can leave no doubt. Of this nature appears to be the assumed right of secession. It rests, as we have seen, on the alleged undivided sovereignty of the states, and on their having formed, in this sovereign capacity, a compact, which is called the constitution. From which, because they made it, they have the right to secede. Both of these positions are erroneous, and some of the arguments to prove them so have been anticipated.

"The states severally have not retained their entire sovereignty. It has been shown, that, in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty. The right to make treaties, declare war, levy taxes, exercise exclusive judicial and legislative powers, were all of them functions of sovereign power. The states, then, for all these important purposes, were no longer sovereign. The allegiance of their citizens was transferred, in the first instance, to the government of the United States; they became American citizens, and owed obedience to the constitution of the United Staten, and to laws made in conformity with the powers it vested in congress. This last position has not been, and cannot be denied. How, then. can that state be said to be sovereign and independent, whose citizens owe obedience to laws not made by it, and whose magistrates are sworn to disregard those

laws, when they come in conflict with those passed by another? What shows conclusively. that the states cannot be said to have reserved an undivided sovereignty, is, that they expressly ceded the right to punish treason; not treason against their separate power, but treason against the United States. Treason is an offence against sovereignty, and sovereignty must reside with the power to punish it. But the reserved rights of the states are not less sacred, because they have, for their common interest, made the general government the depositary of these powers.

"The unity our political character, (us has been shown for another

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purpose) commenced with its very existence. Under the royal government we had no separate character; our opposition to its oppressions began as United Colonies. We were the United States under the confederation, and the name was perpetuated, and the Union rendered more perfect by the Federal constitution. In none of these stages did we consider ourselves in any other light, than as forming one nation. Treaties and alliances were made in the name of all. Troops were raised for the joint defence. How, then, with all these proofs, that under all changes of our position we had, for designated purposes and with defined powers, created National governments; how is it, that the most perfect of those several modes of Union should now be considered as a mere league, that may he dissolved at pleasure? It is from an abuse of terms. 'Compact' is used, as synonymous with 'league,' although the true term is not employed, because it would at once show the fallacy of the reasoning. It would not do to say, that our constitution was only a league; but it is laboured to prove it a compact, (which in one sense it is,) and.then to argue, that, as a league is a compact, every compact between nations must of course he a league, and that from such an engagement every sovereign power has a right to recede. But it has been shown, that in this sense the states are not sovereign, and that even if they were, and the national constitution had been formed by compact, there would be no right in any one state to exonerate itself from its obligations.

"So obvious are the reasons, which forbid this secession, that it is necessary only to allude to them. The Union was Formed for the benefit of all. It was produced by mutual sacrifices of interests and opinions. Can those sacrifices be recalled? Can the states, who magnanimously surrendered their title to the territories of the West, recall the grant? Will the inhabitants of the inland states agree to pay the duties, that may be imposed without their assent, by those on the Atlantic or the Gulf, for their own benefit? Shall there be a free port in one state, and onerous duties in another? No one believes, that any right exists, in a single state, to involve the others in these and countless other evils, contrary to the engagements solemnly made. Every one must see, that the other states, in self-defence, must oppose at all hazards.

"These are the alternatives, that are presented by the convention: A repeal of all the acts for raising revenue, leaving the government without the means of support; or an acquiescence in the dissolution of our Union by the secession of one of its members. When the first was proposed, it was known, that it could not be listened to for a moment. It was known, if force was applied to oppose the execution of the laws, that it must be repelled by force; that congress could not, without involving itself in disgrace, and the country in ruin, accede to the proposition; and yet, if this is not done on a given day, or if any attempt is made to execute the laws, the state is, by the ordinance, declared to be out of the Union. The majority of a convention assembled for the purpose

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have dictated these terms, or rather this rejection of all terms, in the name of the people of South Carolina. It is true, that the governor of the state speaks of the submission of their grievances to a convention of all the states, which, he says, they 'sincerely and anxiously seek and desire.' Yet this obvious and constitutional mode of obtaining the sense of the other states, on the construction of the federal compact, and amending it, if necessary, has never been attempted by those, who have urged the state on to this destructive measure. The state right have proposed to call for a general convention to the other states; and congress, if a sufficient number of them concurred, must have called it. But the first magistrate of South Carolina, when he expressed a hope, that, 'on a review by congress and the functionaries of the general government of the merits of the controversy,' such a convention will be accorded to them, must have known, that neither congress, nor any functionary of the general government, has authority to call such a convention, unless it be demanded by two thirds of the states.

This suggestion, then, is another instance of the reckless inattention to the provisions of the constitution, with which this crisis has been madly hurried on; or of the attempt to persuade the people, that a constitutional remedy had been sought and refused. If the legislature of South Carolina 'anxiously desire' a general convention to consider their complaints, why have they not made application for it, in the way the constitution points out? The assertion, that they 'earnestly seek' it, is completely negatived by the omission."

COMMENTARIES.
CHAPTER XVI.
POWER OVER NATURALIZATION AND BANKRUPTCY.

§ 1097. The next clause is, that congress "shall have "power to establish an uniform rule of naturalization, "and uniform laws on the subject of bankruptcies "throughout the United States."

§ 1098. The propriety of confiding the power to establish an uniform rule of naturalization to the national government seems not to have occasioned any doubt or controversy in the convention. For aught that appears on the journals, it was conceded without objection.1 Under the confederation, the states possessed the sole authority to exercise the power; and the dissimilarity of the system in different states was generally admitted, as a prominent defect, and laid the foundation of many delicate and intricate questions. As the free inhabitants of each state were entitled to all the privileges and immunities of citizens in all the other states,2 it followed, that a single state possessed the power of forcing into every other state, with the

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1 Journ. of Convention, 220, 257. -- One of the grievances stated in the Declaration of Independence was, that the king had endeavoured to prevent the population of the states by obstructing the laws for naturalization of foreigners.

2 The Confederation, art. 4.

enjoyment of every immunity and privilege, any alien, whom it might choose to incorporate into its own society, however repugnant such admission might be to their polity, conveniences, and even prejudices. In effect every state possessed the power of naturalizing aliens in every other state; a power as mischievous in its nature, as it was indiscreet in its actual exercise. In one state, residence for a short time might, and did confer the rights of citizenship. In others, qualifications of greater importance were required. An alien, therefore, incapacitated for the possession of certain rights by the laws of the latter, might, by a previous residence and naturalization in the former, elude at pleasure all their salutary regulations for self-protection. Thus the laws of .a single state were preposterously rendered paramount to the laws of all the others, even within their own jurisdiction.1 And it has been remarked with equal truth and justice, that it was owing to mere casualty, that the exercise of this power under the confederation did not involve the Union in the most serious embarrassments.2 There is great wisdom, therefore, in confiding to the national government the power to establish a uniform rule of naturalization throughout the United States. It is of the deepest interest to the whole Union to know, who are entitled to enjoy the rights of citizens in each state, since they thereby, in effect, become entitled to the rights of citizens in all the states. If aliens might be admitted indiscriminately to enjoy all the rights of citizens at the will of a single state, the Union might itself be endangered by an influx of foreigners, hostile to its institutions, ignorant of its powers, and incapable of a due estimate of its privileges.

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1 The Federalist, No.,42.

2 Ibid.

§ 1099. it follows, from the very nature of the power, that to be useful, it must be exclusive; for a concurrent power in the states would bring back all the evils and embarrassments, which the uniform rule of the constitution was designed to remedy. And, accordingly, though there was a momentary hesitation, when the constitution first went into operation, whether the power might not still be exercised by the states, subject only to the control of congress, so far as the legislation of the latter extended, as the supreme law;1 yet the power is now firmly established to be exclusive.2 The Federalist, indeed, introduced this very case, as entirely clear, to illustrate the doctrine of an exclusive power by implication, arising from the repugnancy of a similar power in the states. "This power must necessarily be exclusive," say the authors; "because, if each state had power to prescribe a distinct rule, there could be no uniform rule." 3

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1 Collet v. Collar, 2 Dall. R. 294; United States v. Villato, 2 Dall. 270; Sergeant on Const. Law, ch. 28, [ch. 30, 2d. edit.]

2 See The Federalist, No. 32, 42; Chirac v. Chirac, 2 Wheat. R. 259, 269; Rawle on the Const. ch. 9, p. 84, 85 to 88; Houston v. Moore, 5 Wheat. R. 48, 49; Golden v. Prince, 3 Wash. Cir. Ct. R. 313, 322; 1 Kent's Comm. Lect. 19, p. 397; 1 Tuck. Black. Comm. App. 255 to 259; 12 Wheat. R. 277, per. Johnson J.; but see Id. 307, per Thompson J. - A question is often discussed under this head, how far a person has a right to throw off his national allegiance, and to become time subject of another country, without the consent of his native country. This is usually denominated the right of expatriation. It is beside the purpose of these Commentaries to enter into any consideration of this subject, as it does not properly belong to any constitutional inquiry. It may be stated, however, that there is no authority, which has affirmatively maintained the right, (unless provided for by the laws of the particular country,) and there is a very strong current of reasoning on the other side, independent of the known practice and claims of the nations of modern Europe. See Rawle on the Constitution, ch. 9, p. 85 to 101; Sergeant on Const. Law, oh. 98, [ch. 30.]; 2 Kent's Comm. Lect. 25, p. 35 to 42.

3 The Federalist, No. 32.

§ 1100. The power to pass laws on the subject of bankruptcies was not in the original draft of the constitution. The original article was committed to a committee together with the following proposition: "to establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills or exchange." The committee subsequently made a report in favour or incorporating the clause on the subject or bankruptcies into the constitution; and it was adopted by n vote or nine states against one.1 The brevity, with which this subject is treated by the Federalist, is quite remarkable. The only passage in that elaborate commentary, in which the subject is treated, is as follows: "The power of establishing uniform laws or bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds, where the parties or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn in question." 2

§ 1101. The subject, however, deserves a more exact consideration. Before the adoption of the constitution the states severally possessed the exclusive right as matter belonging to their general sovereignty, to pass laws upon the subject of bankruptcy and insolvency.3 Without stopping at present to consider, what is the precise meaning of each of these terms, as contradistinguished from the other; it may be stated, that the general object of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an ap-

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1 Journ. of Convention, 220, 305. 320, 321, 357.

2 The Federalists No. 42.

3 Sturgis v. Crowninshield, 4 Wheat. R. 122, 203, 204; Rawle on the Constitution, ch. 9, p. 101, 102.

propriation of the property of their debtors pro tanto to the discharge of their debts, whenever the latter are unable to discharge the whole amount; and, on the other hand, to relieve unfortunate and honest debtors from perpetual bondage to their creditors, either in the shape of unlimited imprisonment to coerce payment of their debts, or of an absolute right to appropriate and monopolize all their future earnings. The latter course obviously destroys all encouragement to industry and enterprize on the part of the unfortunate debtor, by taking from him all the just rewards of his labour, and leaving him a miserable pittance, dependent upon the bounty or forbearance of his creditors. Theformer is, if possible, more harsh, severe, and indefensible.1 It makes poverty and misfortune, in themselves sufficiently heavy burthens, the subject or the occasion of penalties and punishments. Imprisonment, as a civil remedy, admits of no defence, except as it is used to coerce fraudulent debtors to yield up their present property to their creditors, in discharge of their engagements. But when the debtors have no property, or have yielded up the whole to their creditors, to allow the latter at their mere pleasure to imprison them, is a refinement in cruelty, and an indulgence of private passions, which could hardly find apology in an enlightened despotism; and are utterly at war with all the rights and duties of free governments. Such a system of legislation is as unjust, as it is unfeeling. It is incompatible with the first precepts of Christianity; and is a living reproach to the nations of christendom, carrying them back to the worst ages of paganism.2

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1 See 1 Tuck. Black Comm. App. 259.

2 See 2 Black. Comm. 471, 472, 473. See also 1 Tuck. Black. Comm. App. 259.

One of the first duties of legislation, while it provides amply for the sacred obligation of contracts, and the remedies to enforce them, certainly is, pari passu, to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which cuts him off from, a fair enjoyment of the common benefits of society, and robs his family of the fruits of his labour, and the benefits of his paternal superintendence. A national government, which did not possess this power of legislation, would be little worthy of the exalted functions of guarding the happiness, and supporting the rights of a free people. It might guard against political oppressions, only to render private oppressions more intolerable, and more glaring.

§ 1109. But there are peculiar reasons, independent of these general considerations, why the government of the United States should be entrusted with this power. They result from the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the states. It is obvious, that if the power is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency, as best suits its own local interests, and pursuits. Under such circumstances no uniformity of system or operations can be expected. One state may adopt a system of general insolvency; another, a limited or temporary system; one may relieve from the obligation of contracts; another only from imprisonment; another may adopt a still more restrictive course of occasional relief; and another may refuse to act in any manner upon the subject. The laws of one state may give undue preferences to one class of creditors, as for instance, to creditors by bond, or

judgment; another may provide for an equality of debts, and a distribution pro rata without distinction among all. One may prefer creditors living within the state to all living without; securing to the former an entire priority of payment out of the assets. Another may, with a more liberal justice, provide for the equal payment of all, at home and abroad, without favour or preference. In short, diversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighbouring states. What is here stated, is not purely speculative. It has occurred among the American states in the most offensive forms, without any apparent reluctance or compunction on the part of the offending state. There will always be found in every state a large mass of politicians, who will deem it more safe to consult their own temporary interests and popularity, by a narrow system of preferences, than to enlarge the boundaries, so as to give to distant creditors a fair share of the fortune of a ruined debtor. There can be no other adequate remedy, than giving a power to the general government, to introduce and perpetuate a uniform system.1

§ 1103. In the next place it is clear, that no state can introduce any system, which shall extend beyond its own territorial limits, and the persons, who are subject to its jurisdiction. Creditors residing in other states cannot be bound by its laws; and debts contracted in other states are beyond the reach of its legislation. It can neither discharge the obligation of such contracts, nor touch the remedies, which relate to them in any other jurisdiction. So that the most meri-

1 See Mr. Justice Johnson's Opinion in Ogden v. Saunders, 12 Wheat. R. 274, 275.

totions insolvent debtor will be harassed by new suits, and new litigations, as often as he moves out of the state boundaries.1 His whole property may be absorbed by his creditors residing in a single state, and he may be left to the severe retributions of judicial process in every other state in the Union. Among a people, whose general and commercial intercourse must be so great, and so constantly increasing, as in the United States, this alone would be a most enormous evil, and bear with peculiar severity upon all the commercial states. Very few persons engaged in active business will be without debtors or creditors in many states in the Union. The evil is incapable of being redressed by the states. It can be adequately redressed only by the power of the Union. One of the most pressing grievances, bearing upon commercial, manufacturing, and agricultural interests at the present moment, is the total want of a general system of bankruptcy. It is well known, that the power has lain dormant, except for a short period, ever since the constitution was adopted; and the excellent system, then put into operation, was repealed, before it had any fair trial, upon grounds generally believed to be wholly beside its merits, and from causes more easily understood, than deliberately vindicated.2

1 2 Kent's Comm. Lect. 37, p. 323, 324: Sergeant on Const. Law, ch. 28, [ch. 30;] Mr. Justice Johnson in 12 Wheat. R. 273 to 275.

2 See the Debate on the Bankrupt Bill in the House of Representatives in the winter session of 1818; Webster's Speeches, p. 510, &c.- It is matter of regret, that the learned mind of Mr. Chancellor Kent should have attached so much importance to a hasty, if not a petulant, remark of Lord Eldon on this

subject. There is no commercial state in Europe, which has not, for a long period, possessed a system of bankrupt or insolvent laws. England has had one for more than three centuries. And at no time have the parliament or people shown any intention to abandon the system. On the contrary, by recent acts of parlia-

§ 1104. In the next place, the power is important in regard to foreign countries, and to our commercial credits and intercourse with them. Unless the general government were invested with authority to pass suitable laws, which should give reciprocity and equality in cases of bankruptcies here, there would be danger, that the state legislation might, by undue domestic preferences and favours, compel foreign countries to retaliate; and instead of allowing creditors in the United States to partake an equality of benefits in cases of bankruptcies, to postpone them to all others. The existence of the power is, therefore, eminently useful; first, as a check upon undue state legislation; and secondly, as a means of redressing any grievances sustained by foreigners in commercial transactions.

§ 1105. It cannot but be matter of regret, that a power so salutary should have hitherto remained (as has been already intimated) a mere dead letter. It is extraordinary, that a commercial nation, spreading its enterprise through the whole world, and possessing such an infinitely varied, internal trade, reaching almost to every cottage in the most distant states, should voluntarily surrender up a system, which has elsewhere enjoyed such general favour, as the best security of creditors against fraud, and the best protection of debtors against oppression.

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ment, increased activity and extent have been given to the bankrupt and insolvent laws. It is easy to exaggerate the abuses of the system, and point out its defects in glowing language. But the silent and potent influences of the system in its beneficent operations are apt to be overlooked, and are rarely sufficiently studied. What system of human legislation is not necessarily imperfect? Yet who would, on that account, destroy the fabric of society? -- 2 Kent's Comm. Lect. 37, p. 321 to 324, and note (b) id. (2d edit. p. 391, 392.)

§ 1106. What laws are to be deemed bankrupt laws within the meaning of the constitution has been a matter of much forensic discussion and argument. Attempts have been made to distinguish between bankrupt laws and insolvent laws. For example, it has been said, that laws, which merely liberate the person of the debtor, are insolvent laws, and those, which discharge the contract, are bankrupt laws. But it would be very difficult to sustain this distinction by any uniformity of laws at home or abroad. In some of the states, laws, known as insolvent laws, discharge the person only; in others, they discharge the contract. And if congress were to pass a bankrupt act, which should discharge the person only of the bankrupt, and leave his future acquisitions liable to his creditors, there would be great difficulty in saying, that such an act was not in the sense of the constitution a bankrupt act, and so within the power of congress.1 Again; it has been said, that insolvent laws act on imprisoned debtors only at their own instance; and bankrupt laws only at the instance of creditors. But, however true this may have been in past times, as the actual course of English legislation,2 it is not true, and never was true, as a distinction in colonial legislation. In England it was an accident in the system, and not a material ground to discriminate, who were to be deemed in a legal sense

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1 Sturgis v. Crowninshield, 4 Wheat. R. 122, 194, 202.

2 It was not true in England at the time of the American revolution; for under the insolvent act, commonly called the "Lords' Act of 32 Geo. 2, ch. 28," the creditors of the insolvent were equally with himself entitled to proceed to procure the benefit of the act ex parte. See 3 Black. Comm. 416, and note 3 of Mr. Christian. The present system of bankruptcy in England has been enlarged, so as now to include voluntary and concerted cases of bankruptcy. And the insolvent system is applied to all other imprisoned debtors, not within the bankrupt laws. See Petersdorft's Abridgment, titles, Bankrupt and Insolvent.

insolvents, or bankrupts. And if an act of congress should be passed, which should authorize a commission of bankruptcy to issue at the instance of the debtor, no court would on this account be warranted in saying, that the act was unconstitutional, and the commission a nullity.1 It is believed, that no laws ever were passed in America by the colonies or states, which had the technical denomination of "bankrupt laws." But insolvent laws, quite co-extensive with the English bankrupt system in their operations and objects, have not been unfrequent in colonial and state legislation. No distinction was ever practically, or even theoretically attempted to be made between bankruptcies and insolvencies. And an historical review of the colonial and state legislation will abundantly show, that a bankrupt

law may contain those regulations, which are generally found in insolvent laws; and that an insolvent law may contain those, which are common to bankrupt laws.2

§ 1107. The truth is, that the English system of bankruptcy, as well as the name, was borrowed from the continental jurisprudence, and derivatively from the Roman law. "We have fetched," says Lord Coke, "as well the name, as the wickedness of bankrupts, from foreign nations; for banque in the French is mensa, and a banquer or eschanger is mensarius; and route is a sign or mark, as we say a cart route is the sign or mark, where the cart hath gone. Metaphorically it is taken for him, that hath wasted his estate, and removed his bank, so as there is left but a mention thereof. Some say it should be derived from banque and rurnpue, as he that

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1 Sturgis v. Crowninshield, 4 Wheat. R. 122, 194.

2 Sturgis v. Crowninshield, 4 Wheat R. 122, 194, 198, 203; 2 Kent's Comm. Lect. 37, p. 321, &c.

hath broken his bank or state.1 Mr. Justice Blackstone inclines strongly to this latter intimation, saying, that the word is derived from the word bancus, or banque, which signifies the table or counter of a tradesman, and ruptus, broken; denoting thereby one, whose shop or place of trade is broken and gone. It is observable, that the first statute against bankrupt, is 'against such persons, as do make bankrupt,' (34 Hen. 8, ch. 4,) which is a literal translation of the French idiom, qui font banque rouge."2

§ 1108. The system of discharging persons, who were unable to pay their debts, was transferred from the Roman law into continental jurisprudence at an early period. To the glory of Christianity let it be said, that the law of cession (cessio bonorum) was introduced by the Christian emperors of Rome, whereby, if a debtor ceded; or yielded up all his property to his creditors, he was secured from being dragged to gaol, omni quoque corporaIi cruciatu semoto; for as the emperor (Justinian) justly observed, inhumanum erst spoliatum fortunis suis in solidum damnari;3 a noble declaration, which the American republics would do well to follow, and not merely to praise. Neither by the Roman, nor the continental law, was the cessio bonorum confined to traders, but it extended to all persons. It may be added, that the cessio bonorum of the Roman law, and that, which at present prevails in most parts of the continent of Europe, only exempted the debtor from imprison-

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1 4 Inst. ch. 63.

2 2 Black. Comm. 472, note; Cooke's Bankr. Laws, Introd. ch. 1.-- The modern French phrase in the Code of Commerce is la banqueroute. "Tout commercant failli, &c. est en etat de banqueroute." Art. 438.

3 2 Black. Comm. 472, 473; Cod. Lib. 7, tit, 71, per toturn, Ayliffe's Pandects, B. 4 tit. 14.

ment. It did not release or discharge the debt, or exempt the future acquisitions of the debtor from execution for the debt. The English statute, commonly called the "Lords' Act," went no farther, than to discharge the debtor's person. And it may be laid down, as the law of Germany, France, Holland, Scotland, and England, that their insolvent laws are not more extensive in their operation, than the cessio bonorum of the civil law. In some parts of Germany, we are informed by Huberus and Heineccius, a cessio bonorum does not even work a discharge of the debtor's person, and much less of his future effects.1 But with a view to the advancement of commerce, and the benefit of creditors, the systems, now commonly known by the name of "bankrupt laws," were introduced; and allowed a proceeding to be had at the instance of the creditors against an unwilling debtor, when he did not choose to yield up his property; or, as it is phrased in our law, bankrupt laws were originally proceedings in inviturn. In the English system the bankrupt laws are limited to persons, who are traders, or connected with matters of trade and commerce, as such persons are peculiarly liable to accidental losses, and to an inability of paying their debts without any fault of their own.2 But this is a mere matter of policy, and by no means enters into the nature of such laws. There is nothing in the nature, or reason of such laws to prevent their being applied to any other class of unfortunate and meritorious debtors.3

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1 1 Kent's Comm. Lect. 19, p. 336; 1 Domat, B. 4, tit. 5, § 1, 2.

2 2 Black. Comm. 473, 474.

3 See Debate on the Bankr. Bill in the House of Representatives, Feb. 1818, 4 Elliot's Debates, 282 to 284. -- Perhaps as satisfactory a description of a bankrupt law, as can be framed, is, that it is a law for the

§ 1109. How far the power of congress to pass uniform laws on the subject of bankruptcies supersedes the authority of state legislation on the same subject, has been a matter of much elaborate forensic discussion. It has been

strenuously. maintained by some learned minds, that the power in congress is exclusive of that of the states; and, whether exerted or not, it supersedes state legislation.1 On the other hand, it has been maintained, that the power in congress is not exclusive; that when congress has acted upon the subject, to the extent of the national legislation the power of the states is controlled and limited; but when unexerted, the states are at liberty to exercise the power in its full extent, unless so far as they are controlled by other constitutional provisions. And this latter opinion is now firmly established by judicial decisions.2 As this doctrine seems now to have obtained a general acquiescence, it does not seem necessary to review the reasoning, on which the different opinions are founded; although, as a new question, it is probably as much open

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benefit and relief of creditors and their debtors, in cases, in which the latter are unable, or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the constitution, is a law making provisions for cases of persons failing to pay their debts. An amendment was proposed by the state of New-York to the constitution at the time of adopting it, that the power of passing uniform bankrupt laws should extend only to merchants and other traders; but it did not meet general favour.*

1 See Golden v. Prince, 3 Wash. Circ. R. 313; Ogden v. Saunders, 12 Wheat. R. 264, 267 to 270, per Washington J. It is well known, that Mr. Justice Washington was not alone in the Court in this opinion in the original case, (Sturgis v. Crowninshield, 4 Wheat. R. 122,) in which it was first decided.

2 Sturgis v. Crowninshield, 4 Wheat. R. 122, 191 to 196; Id. 198 to 202; Ogden v. Saunders, 12 Wheat. R. 273, 275, 280, 306, 310, 314, 335, 369.

*** Journal of Convention, Supplement, p. 436.**

to controversy, as any one, which has ever given rise to judicial argumentation. But upon all such subjects it seems desirable to adopt the sound practical maxim, Interest reipublicae, ut finis sit litium.

§ 1110. It is, however, to be understood, that although the states still retain the power to pass insolvent and bankrupt laws, that power is not unlimited, as it was before the constitution. It does not, as will be presently seen, extend to the passing of insolvent or bankrupt acts, which shall discharge the obligation of antecedent contracts. It can discharge such contracts only, as are made subsequently to the passing of such acts, and such, as are made within the state between citizens of the same state. It does not extend to contracts made with a citizen of another state within the state, nor to any contracts made in other states.1

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1 Ogden v. Saunders, 12 Wheat. R. 122, 369; Boyle v. Zacharie, 6 Peters's R. 348; 2 Kent. Comm. Lect. 37, p. 323, 324; Sergeant on Const. Law, ch. 28, p. 309, [.ch. 30, p. 322;] Rawle on the Constitution, ch. 9, p. 101, 102.

CHAPTER XVII.

POWER TO COIN MONEY AND FIX THE STANDARD OF WEIGHTS AND MEASURES.

§ 1111. THE next power of congress is "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

§ 1112. Under the confederation, the continental congress had delegated to them, "the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the states," and "fixing the standard of weights and measures throughout the United States." It is observable, that, under the confederation, there was no power given to regulate the value of foreign coin, an omission, which in a great measure would destroy any uniformity in the value of the current coin, since the respective states might, by different regulations, create a different value in each.1 The constitution has, with great propriety, cured this defect; and, indeed, the whole clause, as it now stands, does not:seem to have attracted any discussion in the convention.2 It has been justly remarked, that the power "to coin money" would, doubtless, include that of regulating its value, had the latter power not been expressly inserted. But the constitution abounds with pleonasms and repetitions of this nature.3

§ 1113. The grounds, upon which the general power to coin money, and regulate the value of foreign and

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1 The Federalist, No. 42.

2 Journ. of Convention, 220, 257, 357.

3 Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

domestic coin, is granted to the national government, cannot require much illustration in order to vindicate it. The object of the power is to produce uniformity of value throughout the Union, and thus to preclude us from the embarrassments of a perpetually fluctuating and variable currency. Money is the universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or, it is a sign, which represents the respective values of all commodities.1 It is, therefore, indispensable for the wants and conveniences of commerce, domestic as well as foreign. The power to coin money is one of the ordinary prerogatives of sovereignty, and is almost universally exercised in order to preserve a proper circulation of good coin of a known value in the home market In order to secure it from debasement it is necessary, that it should be exclusively under the control and regulation of the government; for if every individual were permitted to make and circulate, what coin he should please, there would be an opening to the grossest frauds and impositions upon the public, by the use of base and false coin. And the same remark applies with equal force to foreign coin, if allowed to circulate freely in a country without any control by the government. Every civilized government, therefore, with a view to prevent such abuses, to facilitate exchanges, and thereby to encourage all sorts of industry and commerce, as well as to guard itself against the embarrassments of an undue scarcity of currency, injurious to its own interests and credits, has found it necessary to coin money, and affix to it a public stamp and value, and to regulate the introduction and use of foreign coins.2 In England, this

1 1 Black. Comm. 276.

2 Smith's Wealth of Nations, 1, ch. 4.

prerogative belongs to the crown; and, in former ages, it was greatly abused; for base coin was often coined and circulated by its authority, at a value far above its intrinsic worth; and thus taxes of a burthensome nature were laid indirectly upon the people.1 There is great propriety, therefore, in confiding it to the legislature, not only as the more immediate representatives of the public interests, but as. the more safe depositaries of the power.2

§ 1114. The only question, which could properly arise under our political institutions, is, whether it should be confided to the national, or to the state government. It is manifest, that the former could alone give it complete effect, and secure a wholesome and uniform currency throughout the Union. The varying standards and regulations of the different states would introduce infinite embarrassments and vexations in the course of trade; and often subject the innocent to the grossest frauds. The evils of this nature were so extensively felt, that the power was unhesitatingly confided by the articles of confederation exclusively to the general government,3 notwithstanding the extraordinary jealousy, which pervades every clause of that instrument. But the concurrent power thereby reserved to the states, (as well as the want of a power to regulate the value of foreign coin,) was, under that feeble pageant of sovereignty, soon found to destroy the whole importance of the grant. The floods of depreciated paper money, with which most of the states of the Union, during the last war, as well. as the revolutionary war with England, were inundated, to the dismay of the traveller and

1 1 Black. Comm. 278; Christian's note, 21; Darien's Rep. 48; 1 Hale's PI. Cr. 192 to 196.

2 1 Tucker's Black. Comm. App. 261.

3 Art. 9.

the ruin of commerce, afford a lively proof of the mischiefs of a currency exclusively under the control of the states.1

§ 1115. It will be hereafter seen, that this is an exclusive power in congress, the states being expressly prohibited from coining money. And it has been said by an eminent statesman,2 that it is difficult to maintain, on the face of the constitution itself and independent of long continued practice, the doctrine, that the states, not being at liberty to coin money, can authorize the circulation of bank paper, as currency, at all. His reasoning deserves grave consideration, and is to the following effect. The states cannot coin money. Can they, then, coin that, which becomes the actual and almost universal substitute for money? Is not the right of issuing paper, intended for circulation in the place, and as the representative of metallic currency, derived merely from the power of coining and regulating the metallic currency? Could congress, if it did not possess the power of coining money and regulating the value of foreign coins, create a bank with the power to circulate bills? It would be difficult to make it out. Where, then, do the states, to whom all control over the metallic currency is altogether prohibited, obtain this power? It is true, that in other countries, private

1 During the late war with Great Britain, (1812 to 1814,) in consequence of the banks of the Middle, and Southern, and Western states having suspended specie payments for their bank notes, they depreciated aa low as 95 per cent. discount from their nominal value. The duties on imports were, however, paid and received in the local currency; and the consequence was, that goods imported at Baltimore paid 20 per cent. less duty, than the same goods paid, when imported into Boston. This was a plain practical violation of the provision of the constitution, that all duties, imports, and excises shall be uniform.

2 Mr. Webster's Speech on the Bank of the United State., 25th and 28th of May, 1832.

bankers, having no legal authority over the coin, issue notes for circulation. But this they do always with the consent of government, express or implied; and government restrains and regulates all their operations at its pleasure. It would be a startling proposition in any other part of the world, that the prerogative of coining money, held by government, was liable to be defeated, counteracted, or impeded by another prerogative, held in other hands, of authorizing a paper circulation. It is further to be observed, that the states cannot issue bills of credit; not that they cannot make them a legal tender; but that they cannot issue them at all. This is a dear indication of the intent of the constitution to restrain the states, as well from establishing a paper circulation, as from interfering with the metallic circulation. Banks have been created by states with no capital whatever, their notes being put in circulation simply on the credit of the state. What are the issues of such banks, but bills of credit issued by the state?1

§ 1116. Whatever may be the force of this reasoning, it is probably too late to correct the error, if error there be, in the assumption of this power by the states, since it has an inveterate practice in its favour through a very long period, and indeed ever since the adoption of the constitution.

§ 1117. The other power, "to fix the standard of weights and measures," was, doubtless, given from like motives of public policy, for the sake of uniformity, and the convenience of commerce.2 Hitherto, however, it has remained a dormant power, from the many

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1 This opinion is not peculiar to Mr. Webster. It was maintained by the late Hon. Samuel Dexter, one of the ablest statesmen and lawyers, who have adorned the annals of our country.

2 The Federalist, No. 49.

difficulties attendant upon the subject, although it has been repeatedly brought to the attention of congress in most elaborate reports.1 Until congress shall fix a standard, the understanding seems to be, that the states possess the power to fix their own weights and measures;2 or, at least, the existing standards at the adoption of the constitution remain in full force. Under the confederation, congress possessed the like exclusive power.3 In England, the power to regulate weights and measures is said by Mr. Justice Blackstone to belong to the royal prerogative.4 But it has been remarked by a learned commentator on his work, that the power cannot, with propriety, be referred to the king's prerogative; for, from Magna Charta to the present time, there are above twenty acts of parliament to fix and establish the standard and uniformity of weights and measures.5

§ 1118. The next power of congress is, "to provide for the punishment of counterfeiting the securities and "current coin of the United States." This power would naturally flow, as an incident, from the antecedent powers to borrow money, and regulate the coinage; and, indeed, without it those powers would be without any adequate sanction. This power would seem to be exclusive of that of the states, since it grows out of the constitution, as an appropriate means to carry into effect other delegated powers, not antecedently existing in the states.6

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1 Among these. none are more elaborate and exact, than that of Mr. Jefferson and Mr. J. Q. Adams, while they were respectively st the head of the department of state.

2 Rawle on the Constitution, ch. 9, p. 102.

3 Art. 9.

4 1 Black. Comm. 276.

5 1 Black. Comm. 276; Christian's note, (16.)

6 See Rawle on Constitution, ch. 9, p. 103; The Federalist, No. 49.

CHAPTER XVIII.

POWER TO ESTABLISH POST-OFFICES AND POST-ROADS.

§ 1119. The next power of confess is, "to establish post-offices and post-roads." The nature and extent of this power, both theoretically and practically, are of great importance, and have given rise to much ardent controversy. It

deserves, therefore, a deliberate examination. It was passed over by the Federalist with a single remark, as a power not likely to be disputed in its exercise, or to be deemed dangerous by its scope. The "power," says the Federalist, "of establishing post-roads must, in every view, be a harmless power; and may, perhaps, by judicious management, become productive of great public conveniency. Nothing, which tends to facilitate the intercourse between the states, can be deemed unworthy of the public care."1 One cannot but feel, at the present time, an inclination to smile at the guarded caution of these expressions, and the hesitating avowal of the importance of the power. It affords, perhaps, one of the most striking proofs, how much the growth and prosperity of the country have outstripped the most sanguine anticipations of our most enlightened patriots.

§ 11920. The post-office establishment has already become one of the most beneficent, and useful establishments under the national government.2 It circulates intelligence of a commercial, political, intellectual, and

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1 The Federalist, No. 42.

2 1 Tuck. Black. Comm. App. 265; Rawle on the Const. ch. 9, p. 103.

private nature, with incredible speed and regularity. It thus administers, in a very high degree, to the comfort, the interests, and the necessities o! persons, in every rank and station of life. It brings the most distant places and persons, as it were, in contact with each other; and thus softens the anxieties, increases the enjoyments, and cheers the solitude of millions of hearts. It imparts a new influence and impulse to private intercourse; and, by a wider diffusion o! knowledge, enables political rights and duties to be performed with more uniformity and sound judgment. It is not less effective, as an instrument of the government in its own operations. In peace, it enables it without ostentation or expense to send its orders, and direct its measures for the public good, and transfer its funds, and apply its powers, with a facility and promptitude which, compared with the tardy operations, and imbecile expedients of former times, seem like the wonders of magic. In war it is, if possible, still more important and useful, communicating intelligence vital to the movements of armies and navies, and the operations and duties of warfare, with a rapidity, which, if it does not always ensure victory, at least, in many instances, guards against defeat and ruin. Thus, its influences have become, in a public, as well as private view, of incalculable value to the permanent interests of the Union. It is obvious at a moment's glance at the subject, that the establishment in the hands of the states would have been wholly inadequate to these objects; and the impracticability of a uniformity of system would have introduced infinite delays and inconveniences; and burthened the mails with an endless variety of vexatious taxations, and regulations. No one, accustomed to the retardations of the post in passing through inde-

pendent states on the continent of Europe, can fail to appreciate the benefits of a power, which pervades the Union. The national government is that alone, which can safely or effectually execute it, with. equal promptitude and cheapness, certainty and uniformity. Already the post-office establishment realizes a revenue exceeding two millions of dollars, from which it defrays all its own expenses, and transmits mails in various directions over more than one hundred and twenty thousand miles. It transmits intelligence in one day to distant places, which, when the constitution was first put into operation, was scarcely transmitted through the same distance in the course of a week.1 The rapidity of its movements has been in a general view doubled within the last twenty years. There are now more than eight thousand five hundred post-offices in the United States; and at every session of the legislature new routes are constantly provided for, and new post-offices established. It may, therefore, well be deemed a most benefi-

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1 In the American Almanac and Repository published at Boston, in 1830, (a very valuable publication,) there is, at page 217, a tabular view of the number of post-offices, and amounts of postage, and net revenue and extent of roads in miles travelled by the mail for a large number Of years between 1790 and 1828. In 1790 there were seventy-five postoffices, and the amount of postage was $37,935. and the number of miles travelled was 1875. In 1828 there were 7530 post-offices, and the amount of postage was $1,659,915, and the number of miles travelled was 115,176. See also American Almanac for 1839, p. 134. And from Dr. Lieber's Encyclopedia Americana, (article Posts,) it appears, that in 1831, the amount of postage was $1,997,811, and the number of miles travelled 15,468,692. The first post-office, ever established in America, seems to have been under an act of parliament, in 1710. Dr. Lieber's Encyc. Amer. article Posts.

In Mr. Professor Malkin's introductory Lecture on History, before the London University, in March, 1830, he states, (p. 14,) "It is understood, that in England the first mode adopted for a proper and

regular conveyance of letters was in 1649, weekly, and on horseback to every part of the kingdom. The present improved system by mail-coaches w-not introduced until 1782." .

cent power, whose operations can scarcely he applied, except for good, and accomplish in an eminent degree some of the high purposes set forth in the preamble of the constitution, forming a more perfect union, providing for the common defence, and promoting the general welfare.

§ 1121. Under the confederation, (art. 9,) congress was invested with the sole and exclusive power of "establishing and regulating post-offices from one state to another throughout the United States, and exacting such postage on the papers passing through the same, as may be requisite to defray the expenses of the said office."1 How little was accomplished under it will be at once apparent from the fact, that there were but seventy-five post-offices established in all the United States in the year 1789; that the whole amount of postage in 1790 was only $37,935; and the number of miles travelled by the mails only 1875.2 This may be in part attributable to the state of the country, and the depression of all the commercial and other interests of the country. But the power itself was so crippled by the confederation, that it could accomplish little. The national government did not possess any power, except to establish post-offices from state to state, (leaving perhaps, though not intended, the whole interior postoffices in every state to its own regulation,) and the postage, that could be taken, was not allowed to be be-

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1 There is, in Bioren and Duane's Edition of the Law of the United States, (Vol. 1, p. 649, &c.) an account of the post-office establishment, during the revolution and before the constitution was adopted. Dr. Franklin was appointed in July, 1775, the first Postmaster General. The act of 1782 directed, that a mail should be carried at least once in every week to and from each stated post-office.

2 American Almanac, 1830, p. 217; Dr. Lieber's Encyc. Amer. article Posts, ante, vol. iii. p. 24, note.

yond the actual expenses; thus shutting up the avenue to all improvements. In short, like every other power under the confederation, it perished from a jealousy, which required it to live, and yet refused it appropriate nourishment and sustenance.1

§ 1122. In the first draft of the constitution, the clause stood thus, "Congress shall have power to establish post-offices." It was subsequently amended by adding the words "and post-roads," by the vote of six states against five; and then, as amended, it passed without opposition.2 It is observable, that the confederation gave only the power to establish and regulate post-offices; and therefore the amendment introduced a new and substantive power, unknown before in the national government.

§ 1123. Upon the construction of this clause of the constitution, two opposite opinions have been expressed. One maintains, that the power to establish postoffices and post-roads can intend no more, than the power to direct, where post-offices shall be kept, and on what roads the mails shall be carried.3 Or, as it has been on other occasions expressed, the power to establish post-roads is a power to designate, or point out, what roads shall be mail-roads, and the right of passage or way along them, when so designated.4 The other maintains, that although these modes of exercising the power are perfectly constitutional; yet they are not the whole of the power, and do not exhaust it. On the contrary, the power comprehends the right to make, or construct any roads, which congress may deem proper

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1 See Sergeant on Const. Introduction, p. 17, 12d Edition.)

2 Journal of Convention. 220, 256, 257, 261, 357.

3 4 Elliot's Debates, 279.

4 4 Elliot's Debates, 354; Ibid. 233.

for the conveyance of the mail, and to keep them in due repair for such purpose.

§ 1124. The grounds of the former opinion seem to be as follows. The power given under the confederation never practically received any other construction. Congress never undertook to make any roads, but merely designated those existing roads, on which the mail should pass. At the adoption of the constitution there is not the slightest evidence, that a different arrangement, as to the limits of the power, was contemplated. On the contrary, it was treated by the Federalist, as a harmless power, and not requiring any comment.1 The practice of the government, since the adoption of the constitution, has conformed to this view. The first act passed by congress, in 1799, is entitled "an act to establish post-offices and post-roads." The tint section of this act established many post-offices as well as postroads. It was continued, amended, and finally repealed, by a series of acts from 1792 to 1810; all of which acts have the same title, and the same provisions declaring certain roads to be post-roads. From all of which it is manifest, that the legislature supposed, that they had established post-roads in the sense of the constitution, when

they declared certain roads, then in existence, to be post-roads, and designated the routes, along which the mails were to pass. As a farther proof upon this subject, the statute book contains many acts passed at various times, during a period of more than twenty years, discontinuing certain post-roads.2 A strong argument is also derivable from the practice of continental Europe, which must be presumed to have been known to the framers of the constitution. Different

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1 The Federalist, No. 42.

2 4 Elliot's Debates, 354.

nations in Europe have established posts, and for mutual convenience have stipulated a free passage for the posts arriving on their frontiers through their territories. It is probable, that the constitution intended nothing more by this provision, than to enable congress to do by law, without consulting the states, what in Europe can be done only by treaty or compact. It was thought necessary to insert an express provision in the constitution, enabling the government to exercise jurisdiction over ten miles square for a seat of government, and of such places, as should be ceded by the states for forts, arsenals, and other similar purposes. It is incredible, that such solicitude should have been expressed for such inconsiderable spots, and yet, 'that at the same time, the constitution intended to convey by implication the power to construct roads throughout the whole country, with the consequent right to use the timber and soil, and to exercise jurisdiction over them. It may be said, that, unless congress have the power, the mailroads might be obstructed, or discontinued at the will of the state authorities. But that consequence does not follow; for when a road is declared by law to be a mail-road, the United States have a right of way over it; and, until the law is repealed, such an interest in the use of it, as that the state authorities could not obstruct it.1 The terms of the constitution are perfectly satisfied by this limited construction, and the power of congress to make whatever roads they may please, in any state, would be a most serious inroad upon the rights and jurisdiction of the states. It never could have been contemplated.2

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1 4 Elliot's Debates, 354, 355.

2 Aware of the difficulties attendant upon this extremely strict construction, another has been attempted, which is more liberal, but which

§ 1125. The grounds, upon which the other opinion is maintained, are as follows: This is not a question of implied power; but of express power. We are

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it has been thought (us will be hereafter seen) to surrender the substance of the argument. It will be most satisfactory to give it in the very words of its most distinguished advocate:

"The first of these grants is in the following words: 'Congress shall have power to establish post-offices and post-roads.' What is the just import of these words, and the extent of the grant? The word 'establish' is the ruling term; 'post-offices and post-roads' are the subjects, on which it nets. The question, therefore, is, what power is granted by that word? The sense, in which words are commonly used, is that, in which they are to be understood in all transactions between public bodies and individuals. The intention of the parties is to prevail, and there is no better way of ascertaining it, than by giving to the terms used their ordinary import. If we were to ask any number of our most enlightened citizens, who had no connexion with public affairs, and whose minds were unprejudiced, what was the import of the word, establish,' and the extent of the grant, which it controls, we do not think, that there would be any difference of opinion among them. We are satisfied, that all of them would answer, that a power was thereby given to congress to fix on the towns, court-houses, and other places, throughout our Union, at which there should be post-offices; the routes, by which the mails should be carried from one post-office to another so as to diffuse intelligence as extensively, and to make the institution as useful, as possible; to fix the postage to be paid on every letter and packet thus carried to support the establishment; and to protect the post-offices and mails from robbery, by punishing those, who should commit the offence. The idea of a right to lay off the roads of the United States, on a general scale of improvement; to take the soil from the proprietor by force; to establish turnpikes end tolls, and to punish offenders in the manner stated above. would never occur to any such person. The use of the existing road, by the stage, mail-carrier, or post-boy, in passing over it. as others do, is all, that would be thought of; the jurisdiction and soil remaining to the state, with a right in the state, or those authorized by its legislature, to change the road at pleasure.

"The intention of the parties is supported by other proof, which ought to place it beyond all doubt. In the former act of government, (the confederation,) we find a grant for the same purpose, expressed in the following words: "The United States, in congress assembled, shall have the sole and exclusive right and power of establishing and regulating post-offices from one state to another, throughout the United States, and of exacting such postage on the papers passing through the same as

not now looking to what are properly incidents, or means to carry into effect given powers; but are to construe the terms of an express power. The words of

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may be requisite to defray the expenses of the said post-office.' The term 'establish' was likewise the ruling one in that instrument and was evidently intended. and understood to give a power simply and solely to fix where there should be post-offices. By transferring this term from the confederation into the constitution it was doubtless intended. that it should be understood in the same sense in the latter that it was in the former instrument and to be applied alike to post-offices and post-roads. In whatever sense it is applied to post-offices it most be applied in the same sense to post-roads. But it may be asked, if such was the intention, why were not all the other terms of the grant transferred with it? The reason is obvious. The confederation being a bond of union between independent states, it was necessary, in granting the powers, which were to be exercised over them. to be very explicit and minute in defining the powers granted. But the constitution, to the extent of its powers, having incorporated the states into one government. like the government of the states. individually, fewer words, in defining the powers granted by it, were not only adequate, but perhaps better adapted to the purpose. We find, that brevity is a characteristic of the instrument. Had it been intended to convey a more enlarged power in the constitution, than had been granted in the confederation, surely the same controlling term would not have been used; or other words would have been added, to show such intention, and to mark the extent, to which the power should be carried. It is a liberal construction of the powers granted in the constitution by this term, to include in it all the powers, that were granted in the confederation by terms, which specifically defined, and (as was supposed) extended their limits. It would be absurd to say, that, by omitting from the constitution any portion of the phraseology, which was deemed important in the confederation. the import of that term was enlarged, and with it the powers of the constitution, in a proportional degree, beyond what they were in the confederation. The right to exact postage and to protect the post-offices and mails from robbery by punishing the offenders, may fairly be considered, as incidents to the grant, since, without it, the object of the grant might be defeated. Whatever is absolutely necessary to the accomplishment of the object of the grant, though not specified, may fairly be considered as included in it. Beyond this the doctrine of incidental power cannot be carried.

"If we go back to the origin of our settlements and institutions, and trace their progress down to the Revolution, we shall see, that it was in this sense and in none other, that the power was exercised by all our

the constitution are, "Congress shall have power to "establish post-offices and post-roads." What is the true meaning of these words? There is no such known

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colonial governments. Post offices were made for the country, and not the country for them. They are the offspring of improvement. They never go before it. Settlements are first made; after which the progress is uniform and simple, extending to objects in regular order, most necessary to the comfort of man; schools, places of public worship, court-houses, and markets; post-offices follow. Roads may, indeed, be said to he coeval with settlements. They lead to all the places mentioned, and to every other, which the various and complicated interests of society require.

"It is believed that not one example can be given, from the first settlement of our country to the adoption of this constitution, of a postoffice being established, without a view to existing roads; or of a single road having been made by pavement, turnpike. &c. for the sole purpose of accommodating a post-office. Such, too, is the uniform progress of all societies. In granting then this power to the United States, it was, undoubtedly, intended by the framers and ratifiers of the constitution, to convey it in the sense and extent only, in which it had been understood and exercised by the previous authorities of the country.

"This conclusion is confirmed by the object of the grant and the manner of its execution. The object is the transportation of the mail throughout the United States, which may be done on horse-buck, and was

so done, until lately, since the establishment of stages. Between the great towns, and in other places, where the population is dense, stages are preferred, because they afford an additional opportunity to make a profit from passengers. But where the population is sparse, and on cross roads. it is generally carried on horseback. Unconnected with passengers and other objects, it cannot be doubted, that the mail itself may be carried in every part of our Union, with nearly as much economy, and greater despatch, on horseback, than in a stage; and in many parts with much greater. In every part of the Union in which stages can be preferred, the roads are sufficiently good provided those. which serve for every other purpose, will accommodate them. In every other part, where horses alone are used, if other people pass them on horseback, sarely the mail carrier can. For an object so simple and so easy in the execution, it would, doubtless, excite surprise if it should be thought proper to appoint commissioners to lay off the country on a great scheme of improvement, with the power to shorten distances, reduce heights, level mountains, and pave surfaces.

"If the United States possessed, the power contended for under this grant, might they not, in adopting the roads of the individual states for

sense of the word "establish," as to "direct," "designate," or "point out." And if there were, it does not follow, that a special or peculiar sense is to be given to the words, not conformable to their general meaning, unless that sense be required by the context, or, at least, better harmonizes with the subject matter, and objects of the power, than any other sense. That cannot be pretended in the present case. The received general meanings, if not the only meanings of the word "establish," are, to settle firmly, to confirm, to fix, to form or modify, to found, to build firmly, to. erect permanently.1 And it is no small objection to any construction, that it requires the word to be deflected from its received and usual meaning; and gives it a meaning unknown to, and unacknowledged by lexicographers. Especially is it objectionable and inadmissible, where the received and common meaning harmonizes with the subject matter; and if the very end were required, no more exact expression could ordinarily be used. In legislative acts, in state papers, and in the constitution itself, the word is found with the same general sense now insisted on; that is, in the sense of, to create, to form, to make, to construct, to settle, to build up with a view to permanence. Thus, our treaties speak of establishing reg-

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the carriage of the mail, as has been done, assume jurisdiction over them, and preclude a right to interfere with or alter them? Might they not establish turnpikes, and exercise all the other acts of sovereignty, above stated, over such roads, necessary to protect them from injury, and defray the expense of repairing them? Surely, if the right exists, these consequences necessarily followed, as soon as the road was established. The absurdity of such a pretension must be apparent to all, who examine it. In this way, a large portion of the territory of every state might be taken from it; for there is scarcely a road in any state, which will not be used for the transportion of the mail. A new field for legislation and internal government would thus be opened." President Monroe's Message, of 4th May, 1822, p. 24 to 27.

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1 Johnson's Dict. ad verb.; Webster's Dict. ibid.

ulatrions of trade. Our laws speak of establishing navy-hospitals, where land is to be purchased, work done, and buildings erected; of establishing trading-houses with the Indians, where houses are to be erected and other things done. The word is constantly used in a like sense in the articles of confederation. The authority is therein given to congress of establishing rules in cases of captures; of establishing courts of appeal in cases of capture; and, what is directly in point, of establishing and regulating post-offices. Now, if the meaning of the word here was simply to point out, or designate post-offices, there would have been an end of all further authority, except of regulating the postoffices, so designated and pointed out. Under such circumstances, how could it have been possible under that instrument (which declares, that every power not expressly delegated shall be retained by the states) to find any authority to carry the mail, or to make contracts for this purpose? much more to prohibit any other persons under penalties from conveying letters, despatches, or other packets from one place to another of the United States? The very first act of the continental congress on this subject was, "for establishing a post," (not a post office;) and it directed, "that a line of posts be appointed under the direction of the postmaster general, from Falmouth, in New-England; to Savannah, in Georgia, with as many cross-posts, as he shall think fit;" and it directs the necessary expenses of the "establishment" beyond the revenue to be paid out by the United Colonies.1 Under this, and other supplementary acts, the establishment continued until October, 1782, when, under the articles of confederation,

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1 Ordinance of 26th July 1775; 1 Journal of Congress, 177, 178.

the establishment was re-organized, and, instead of a mere appointment and designation of post-offices, provision was made, "that a continued communication of posts throughout the United States shall be established and maintained," &c.; and many other regulations were made wholly incompatible with the narrow construction of the words now contended for.1

§ 1126. The constitution itself also uniformly uses the word "establish" in the general sense, and never in this peculiar and narrow sense. It speaks in the preamble of one motive being, "to establish justice," and that the people do ordain and establish this constitution. It gives power to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies. Does not this authorize congress to make, create, form, and construct laws on these subjects? It declares, that the judicial power shall be vested in one supreme court and in such inferior courts, as congress may, from time to time, ordain and establish. Is not a power to establish courts a power to create, and make, and regulate them? It declares, that the ratification of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.2 And in one of the amendments, it provides, that congress shall make no law respecting an establishment of religion. It is plain, that to construe the word in any of these cases, as equivalent to designate, or point out, would be absolutely absurd. The clear import of the word is, to create, and form, and fix in a settled manner. Referring it to the subject matter, the sense, in no instance, can be mistaken. To

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1 Ordinance, 18 Oct. 1782; 1 U. S. Laws, (Bioren & Duane,) 651; 7 Journ. of Congress, 503.

2 See 4 Elliot's Debates, 356.

establish courts is to create, and form, and regulate them. To establish rules of naturalization is to frame and confirm such rules. To establish laws on the subject of bankruptcies is to frame, fix, and pass them. To establish the constitution is to make, and fix, and erect it, as a permanent form of government. In the same manner, to establish post-offices and post-roads is to frame and pass laws, to erect, make, form, regulate, and preserve them. Whatever is necessary, whatever is appropriate to this purpose, is within the power.

§ 1127. Besides; upon this narrow construction, what becomes of the power itself? If the power be to point out, or designate post-offices, then it supposes, that there already exist some offices, out of which a designation can be made. It supposes a power to select among things of the same nature. Now, if an office does not already exist at the place, how can it be designated, as a post-office? If you cannot create a post-office, you can do no more, than mark out one already existing. In short, these rules of strict construction might be pressed still farther; and, as the power is only given to designate, not offices, but postoffices, the latter must be already in existence; for otherwise the power must be read, to designate what offices shall be used, as post-offices, or at what places post-offices shall be recognised; either of which is a departure from the supposed literal interpretation.

§ 1128. In the next place, let us see, what upon this narrow interpretation becomes of the power in another aspect. It is to establish post-offices. Now, the argument supposes, that this does not authorize the purchase or erection of a building for an office; but it does necessarily suppose the authority to erect or create an office; to regulate the duties of the officer; and to fix

a place, (officina) where his business is to be performed. It then unavoidably includes, not merely a power to designate, but a power to create the thing intended, and to do all other acts to make the thing effectual; that is, to create the whole system appropriate to a postoffice establishment. Now, this involves a plain departure from the very ground of the argument. It is no longer a power to designate a thing, or mark out a route; but it is a power to create, and fix every other thing necessary-and appropriate to post-offices. The argument, therefore, resorts to implications in order to escape from its own narrow interpretation; and the very power to designate becomes a power to create offices and frame systems, and institute penalties, and raise revenue, and make contracts. It becomes, in fact, the very thing, which the other argument supposes to be the natural sense, viz. the power to erect, and maintain a post-office establishment.

§ 1129. Under any other interpretation, the power itself would become a mere nullity. If resort be had to a very strict and critical examination of the words, the power "to establish post-offices" imports no more, than the power to create the offices intended;-that done, the power is exhausted; and the words are satisfied. The power to create the office does not necessarily include the power to carry the mail, or regulate the conveyance of letters, or employ carriers. The one may exist independently of the other. A state might without absurdity possess the right to carry the mail, while the United States might possess the right to designate the post-offices, at which it should be opened, and

provide the proper officers; or the converse powers might belong to each. It would not be impracticable, though it would be extremely inconvenient and

embarrassing. Yet, no man ever imagined such a construction to be justifiable. And why not? Plainly, because constitutions of government are not instruments to be scrutinized, and weighed, upon metaphysical or grammatical niceties. They do not turn upon ingenious subtleties; but are adapted to the business and exigencies of human society; and the powers given are understood in a large sense, in order to secure the public interests. Common sense becomes the guide, and prevents men from dealing with mere logical abstractions. Under the confederation, this very power to establish post-offices was construed to include the other powers already named, and others far more remote. It never entered into the heads of the wise men of those days, that they possessed a power to create post-offices, without the power to create all the other things necessary to make post-offices of some human use. They did not dream of post-offices without posts, or mails, or routes, or carriers. It would have been worse than a mockery. Under the confederation, with the strict limitation of powers, which that instrument conferred, they put into operation a large system for the appropriate purposes of a post-office establishment.1 No man ever doubted, or denied the constitutionality of this exercise of the power. It was largely construed to meet the obvious intent, for which it was delegated. The words of the constitution are more extensive, than those of the confederation. In the latter, the words to establish "post-roads" are not to be found. These words were certainly added for some purpose. And if any, for what other purpose, than to enable congress to lay out and make roads?2

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1 See Act of 18th of October, 1782.

2 4 Elliot's Debates, 356.

§ 1130. Under the constitution congress has, without any questioning, given a liberal construction to the power to establish post-offices and post-roads. It has been truly said, that in a strict sense, "this power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road from one postoffice to another. And from this implied power has been again inferred the right to punish those, who steal letters from the post-office, or rob the mail. It may be said with some plausibility, that the right to carry the mail, and to punish those, who rob it, is not indispensably necessary to the establishment of a post-office and a post-road. This right is indeed essential to the beneficial exercise of the power; but not indispensably necessary to its existence."1

§ 1131. The whole practical course of the government upon this subject, from its first organization down to the present time, under every. administration, has repudiated the strict and narrow construction of the words above mentioned.2 The power to establish postoffices and post-roads has never been understood to include no more, than the power to point out and designate post-offices and post-roads. Resort has been constantly had to the more expanded sense of the word "establish;" and no other sense can include the objects, which the post-office laws have constantly included. Nay, it is not only not true, that these laws have stopped short of an exposition of the words sufficiently broad to justify the making of roads; but they have included exercises of power far more remote from the

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1 M'Culloch v. Maryland, 4 Wheat. R. 316, 417.

2 See the laws referred to in Post-Master. General v. Early, 12 Wheat.R. 136, 144, 145.

immediate objects. If the practice of the government is, therefore, of any weight in giving a constitutional interpretation, it is in favour of the liberal interpretation of the clause.

§ 1132. The fact, if true, that congress have not hitherto made any roads for the carrying of the mall, Would not affect the right, or touch the question. It is not doubted, that the power has been properly carried into effect, by making certain state roads post-roads. When congress found those roads suited to the purpose, there could be no constitutional reason for refusing to establish them, as mail-routes. The exercise of authority was clearly within the scope of the power. But the argument would have it, that, because this exercise of the power, clearly within its scope, has been hitherto restrained to making existing roads post-roads, therefore congress cannot proceed constitutionally to make a post-road, where no road now exists. This is clearly what lawyers call a non sequitur. It might with just as much propriety be urged, that, because congress had not hitherto used a particular means to execute any other given power, therefore it could not now do it. If, for instance, congress had never provided a ship for the navy, except by purchase, they could not now authorize ships to be built for a navy, or a converso. If they

had not laid a tax on certain goods, it could not now be done. If they had never erected a custom-house, or court-house, they could not now do it. Such a mode of reasoning would be deemed by all persons wholly indefensible.

§ 1133. But it is not admitted, that congress have not exercised this very power with reference to this very object. By the act of 21st of April, 1806, (ch. 41,) the president was authorized to cause to be opened a

road from the frontier of Georgia, on the route from Athens to New-Orleans; and to cause to be opened a road or roads through the territory, then lately ceded by the Indians to the United States, from the river Mississippi to the Ohio, and to the former Indian boundary line, which was established by the treaty of Greenville; and to cause to be opened a road from Nashville, in the state of Tennessee, to Natchez, in the Mississippi territory. The same remark applies to the act of 29th of March, 1806, (ch. 19,) "to regulate the laying out and making a road from Cumberland, in the state of Maryland, to the state of Ohio." Both of these acts were passed in the administration of President Jefferson, who, it is well known, on other occasions maintained a strict construction of the constitution.

§ 1134. But passing by considerations of this nature, why does not the power to establish post-offices and post-roads include the power to make and construct them, when wanted, as well 'as the power to establish a navy-hospital, or a custom-house, a power to make and construct them? The latter is not doubted by any persons; why then is the former? In each case, the sense of the ruling term "establish" would seem to be the same; in each, the power may be carried into effect by means short of constructing, or purchasing the things authorized. A temporary use of a suitable site or buildings may possibly be obtained with, or without hire. Besides; why may not congress purchase, or erect a post-office building, and buy the necessary land, if it be in their judgment advisable? Can there be a just doubt, that a power to establish post-offices includes this power, just as much, as a power to establish custom-houses would to build the latter? Would it not be a strange construction to say, that the abstract

office might be created, but not the officina, or place, where it could be exercised? There are many places peculiarly fit for local post-offices, where no suitable building might be found. And, if a power to construct post-office buildings exists, where is the restraint upon constructing roads?

§ 1135. It is said, that there is no reason, why congress should be invested with such a power, seeing that the state roads may, and will furnish convenient routes for the mail. When the state-roads do furnish such routes, there can certainly be no sound policy in congress making other routes. But there is a great difference between the policy of exercising a power, and the right of exercising it. But, suppose the state-roads do not furnish (as in point of fact they did not at the time of the adoption of the constitution, and as hereafter, for many exigencies of the government in times of war and otherwise, they may not) suitable routes for the mails, what is then to be done? Is the power of the general government to be paralyzed? Suppose a nail-road is out of repair and founderous, cannot congress authorize the repair of it? If they can, why then not make it originally? Is the one more a means to an end, than the other? If not, then the power to carry the mails :nay be obstructed; nay, may be annihilated by the neglect of a state.1 Could it have been the intention of the constitution, in the exercise of this most vital power, to make it dependent upon the will, or the pleasure of the states?

§ 1136. It has been said, that when once a stateroad is made a post-road by an act of congress, the national government have acquired such an interest in

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1 4 Elliot's Debates 356.

the use of it, that it is not competent for the state authorities to obstruct it. But how can this be made out? If the power of congress is merely to select or designate the mail-roads, what interest in the use is acquired by the national government any more, than by any travellers upon the road? Where is the power given to acquire it? Can it be pretended, that a state may not discontinue a road, after it has been once established, as a mail-road? The power has been constantly exercised by the states ever since the adoption of the constitution. The states have altered, and discontinued, and changed such roads at their pleasure. It wou ld be a most truly alarming inroad upon state sovereignty to declare, that a state-road could never be altered or discontinued after it had once become a mail-road, That would be to supersede all state authority over their own roads. If the states can discontinue their roads, why not obstruct them? Who shall compel them to repair them, when discontinued, or to keep them at any time in good repair? No one ever yet contended, that the national government possessed any such compulsive authority. If, then, the states may alter or discontinue their roads, or suffer them to go out of repair, is it not obvious, that the power to carry the mails may be retarded or defeated in a great measure by this constitutional exercise of state power? And, if it be the right and duty of congress to provide adequate means for the transportation of the mails, wherever the public good requires it, what limit is there to these means, other than that they are appropriate to the end?1

1 4 Elliot's Debates, 356.

§ 1137. In point of fact, congress cannot be said, in any exact sense, to have yet executed the power to establish post-roads, if by that power we are to understand the designation of particular state-roads, on which the mails shall be carried. The general course has been to designate merely the towns, between which the mails shall be carried, without ascertaining the particular roads at all. Thus, the Act of 20th of February, 1799., ch. 7, (which is but a sample of the other acts,) declares, that "the following roads be established, as postroads, namely, from Wiscasset in the District of Maine to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester," &c. &c.; without pointing out any road between those places, on which it should be carried. There are different roads from several of these places to the others. Suppose one of these roads should be discontinued, could the mail-carriers insist upon travelling it?

§ 1138. The truth is, that congress have hitherto acted under the power to a very limited extent only; and will forever continue to do so from principles of public policy and economy, except in cases of an extraordinary nature. There can be no motive to use the power, except for the public good; and circumstances may render it indispensable to carry it out in particular cases to its full limits. It has already occurred, and may hereafter occur, that post-roads may be important and necessary for the purpose of the Union, in peace as well as in war, between places, where there is not any good state-road, and where the amount of travel would not justify any state in an expenditure equal to the construction of such a state-

road.1 In such cases, as the benefit is for the Union, the burthen ought to be borne by the Union. Without any invidious distinction, it may be stated, that the winter mail-route between Philadelphia, and Baltimore, and Washington, by the way of the Susquehannah and Havre de Grace, has been before congress under this very aspect. There is no one, who will doubt the importance of the best post-road in that direction; (the nearest between the two cities;) and yet it is obvious, that the nation alone can be justly called upon to provide the road.

§ 1139. Let a case be taken, when state policy or state hostility shall lead the legislature to close up, or discontinue a road, the nearest and the best between two great states, rivals perhaps for the trade and intercourse of a third state, shall it be said, that congress has no right to make, or repair a road for keeping open for the mail the best means of communication between those states? May the national government be compelled to take the most inconvenient and indirect routes for the mail?2 In other words, have the states a power to say, how, and upon what roads the mails shall, and shall not travel? If so, then in relation to post-roads, the states, and not the Union, are supreme.

§ 1140. But it is said, that it would be dangerous to allow any power in the Union to lay out and construct post-roads; for then the exercise of the power would supercede the state jurisdiction. This is an utter mistake. If congress should lay out and construct a postroad in a state, it would still be a road within the ordinary territorial jurisdiction of the state. The state could not, indeed, supercede, or obstruct, or discon-

1 See Rawle on the Constitution, ch. 9, p. 103, 104.

2 4 Elliot's Debates, 356.

tinue it, or prevent the Union from repairing it, or the mails from travelling on it. But subject to these incidental rights, the right of territory and jurisdiction, civilly and criminally, would be complete and perfect in the state. The power of congress over the road would be limited to the mere right of passage and preservation. That of the state would be general, and embrace all other objects. Congress undoubtedly has power to purchase lands in a state for any public purposes, such as forts, arsenals, and dock-yards. So, they have a right to erect hospitals, custom-houses, and courthouses in a state. But no person ever imagined, that these places were thereby removed from the general jurisdiction of the state. On the contrary, they are universally understood for all other purposes, not inconsistent with the constitutional rights and uses of the Union, to be subject to state authority and rights.

§ 1141. The clause respecting cessions of territory for the seat of government, and for forts, arsenals, dockyards, &c. has nothing to do with the point. But if it had, it is favourable to the power. That clause was necessary for the purpose of ousting the state jurisdiction in the specified cases, and for vesting an exclusive jurisdiction in the general government. No general or exclusive jurisdiction is either required, or would be useful in regard to post-roads. It would be inconvenient for congress to assemble in a place, where it had not exclusive jurisdiction. And an exclusive jurisdiction would seem indispensable over forts, arsenals, dock-yards, and other places of a like nature. But surely it will not be pretended, that congress could not erect a fort, or magazine, in a place within a state, unless the state should cede the territory. The only effect would be, that the jurisdiction in such a

case would not be exclusive. Suppose a state should prohibit a sale of any of the lands within its boundaries by its own citizens, for any public purposes indispensable for the Union, either military or civil, would not congress possess a constitutional right to demand, and appropriate land within the state for such purposes, making a just compensation? Exclusive jurisdiction over a road is one thing; the right to make it is quite another. A turnpike company may. be authorized to make a road; and yet may have no jurisdiction, or at least no exclusive jurisdiction over it.

§ 1142. The supposed silence of the Federalist1 proves nothing. That work was principally designed to meet objections, and remove prejudices. The postoffice establishment in its nature, and character, and purposes, was so generally deemed useful and convenient, and unexceptionable, that it was wholly unnecessary to expound its value, or enlarge upon its benefits.

§ 1143. Such is a summary of the principal reasoning on each side of this much contested question. The reader must decide for himself, upon the preponderance of the argument.

§ 1144. This question, as to the right to lay out and construct post-roads, is wholly distinct from that of the more general power to lay out and make canals, and military and other roads. The latter power may not exist at all; even if the former should be unquestionable. The latter turns upon a question of implied power, as incident to given powers.2 The former turns upon the true interpretation of words of express grant. Nobody doubts, that the words "establish post-roads," may, without violating their re-

1 No. 42.

2 See Rawle on the Constitution, ch. 9, p. 104.

ceived meaning in other cases, be construed so, as to include the power to lay out and construct roads. The question is, whether that is the true sense of the words, as used in the constitution. And here, if ever, the rule of interpretation, which requires us to look at the nature of the instrument, and the objects of the power, as a national power, in order to expound its meaning, must come into operation.

§ 1145. But whatever be the extent of the power, narrow or large, there will still remain another inquiry, whether it is an exclusive power, or concurrent in the. states. This is not, perhaps, a very important inquiry, because it is admitted on all sides, that it can be exercised only in subordination to the power of congress, if it be concurrent in the states. A learned commentator deems it concurrent, inasmuch as there seems nothing in the constitution, or in the nature of the thing itself, which may not be exercised by both governments at the same time, without prejudice or interference; but subordinate, because, whenever any power is expressly granted to congress, it is to be taken for granted, that it is not to be contravened by the authority of any particular state. A state might, therefore, establish a post-road, or postoffice, on any route, where congress had not established any.1 On the other hand, another learned commentator is of opinion, that the power is exclusive in congress, so far as relates to the conveyance of letters, &c.2 It is highly improbable, that any state will attempt any exercise of the power, considering the difficulty of carrying it into effect, without the co-operation of congress.

1 1 Tuck. Black. Comm. App. 265.

2 Rawle on the Constitution, ch. 9, p. 103, 104,

CHAPTER XX.

POWER TO PUNISH PIRACIES AND FELONIES.

§ 1152. The next power of congress is. "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations."

§ 1153. By the confederation the sole and exclusive power was given to congress "of appointing courts for the trial of piracies and felonies committed on the high seas."1 But there was no power expressly given to define and punish piracies and felonies.2 Congress, however, proceeded to pass an ordinance for the erection of a court for such trials, and prescribed the punishment of death upon conviction of the offence.3 But they never undertook to define, what piracies or felonies were. It was taken for granted, that these were sufficiently known and understood at the common law; and that resort might, in all such cases, be had to that law, as the recognised jurisprudence of the Union.4

§ 1154. If the clause of the constitution had been confined to piracies, there would not have been any necessity of conferring the power to define the crime,

1 Art. 9.

2 The Federalist, No. 42.

3 See Ordinance for trial of piracies and felonies, 5th April, 1781; 7 Journ. Con S. 76,

4 A motion was made in Congress to amend the articles of confederation, by inserting in lien of the words, as they stand in the instrument, the following, "declaring what acts committed on the high seas shall be deemed piracies and felonies. It was negatived by the vote of nine states against two. The reason, probably, was the extreme reluctance of congress to admit any amendment after the project had been submit* ted to the states.*

*** 1 Secret Journals of Congress 384, June 25, 1778.**

since the power to punish would necessarily be held to include the power of ascertaining and fixing the definition of the crime. Indeed, there would not seem to be the slightest reason to define the crime at all; for piracy is perfectly well known and understood in the law of nations, though it is often found defined in mere municipal codes.1 By the law of nations, robbery or forcible depredation upon the sea, anirno furandi, is piracy. The common law, too, recognises, and punishes piracy as an offence, not against its own municipal code, but as an offence against the universal law of nations; a pirate being deemed an enemy of the human race.2 The common law, therefore, deems piracy to be robbery on the sea; that is, the same crime, which it denominates robbery, when committed on land.3 And if congress had simply declared, that piracy should be punished with death, the crime would have been sufficiently defined. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term; for that is certain, which, by reference, is made certain. If congress should declare murder a felony, no body would doubt, what was intended by murder. And, indeed, if congress should proceed to declare, that homicide, "with malice aforethought," should be deemed murder, and a felony; there would still be the same necessity

1 The Federalist, No. 42; Rawle on Coast. ch. 9. p. 107; 2 Elliot's Debates, 389, 390.

2 4 Black. Comm. 71 to 73.

3 Mr. East says, "The offence of piracy, by the common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there." * In giving this definition he has done no more than follow the language of preceding writers on the common law.+

*** 2 East, P.C. 796.**

+ 4 Black. Comm. 71 to 73.

of ascertaining, from the common law, what constituted malice aforethought. So, that there would be no end to difficulties or definitions; for each successive definition might involve some terms, which would still require some new explanation. But the true intent of the constitution in this part, was, not merely to define piracy, as known to the law of nations, but to enumerate what crimes in the national code should be deemed piracies. And so the power has been practically expounded by congress.1

§ 1155. But the power is not merely to define and punish piracies, but felonies, and offences against the law of nations; and on this account, the power to define, as well as to punish, is peculiarly appropriate. It has been remarked, that felony is a term of loose signification, even in the common law; and of various import in the statute law of England.2 Mr. Justice Blackstone says, that felony, in the general acceptation of the English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods. This most frequently happens in those crimes, for which.a capital punishment either is, or was liable to be inflicted. All offences now capital by the English law are felonies; but there are still some offences, not capital, which are yet felonies, (such as suicide, petty larceny, and homicide by chance medley;3) that is, they subject the committers of them to some forfeiture, either of lands or goods.4 But the idea of capital punishment has now become so associated, in the English law, with the idea of felony, that if an act of parliament makes a new offence felony, the

1 United States v. Smith, 5 Wheat R. 153, 158 to 163.

2 The Federalist, No. 42; 2 Elliot's Deb. 389, 390.

3 Co. Litt. 391.

4 4 Black. Comm. 93 to 98.

law implies, that it shall be punished with death, as well as with forfeiture.1

§ 1156. Lord Coke has given a somewhat different account of the meaning of felony; for he says "ez vi terraini significat quodlibet capitale crimen felleo animo perpetratum;" (that is, it signifies every capital offence committed with a felonious intent;) "in which sense murder is said to be done per feloniam, and is so appropriated by law, as that felonice cannot be expressed by any other word.2 This has been treated as a fanciful derivation, and not as correct, as that of Mr. J. Blackstone, who has followed out that of Spelman.3

§ 1157. But whatever may be the true import of the word felony at the common law, with reference to municipal offences, in relation to offences on the high seas, its meaning is necessarily somewhat indeterminate; since the term is not used in the criminal jurisprudence of the Admiralty in the technical sense of the common law.4 Lord Coke long ago stated, that a pardon of felonies would not pardon piracy, for "piracy or robbery on the high seas was no felony, whereof the common law took any knowledge, &c.; but was only punishable by the civil law, &c.; the attainder by which law wrought no forfeiture of lands or corruption of blood."5 And he added, that the statute of 98 Henry 8, ch. 15, which created the High Commission Court for the trial of "all treasons, felonies, robberies, murders, and confederacies, committed in or upon the high sea, &c.," did not alter

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1 4 Black. Comm. 98; See also 1 Hawk. P.C. ch. 37, (Curwood's Edit. ch. 7.)

2 Co. Litt. 391; 1 Hawk. P.C. ch. 37.

3 See 1 Curwood's Hawk. P.C. ch. 7, note p, 71.

4 United States v. Smith, 5 Wheat. R. 153, 159.

5 3 Inst. 112.

the offence, or make the offence felony, but left the offence as it was before the act, viz. felony only by the civil law.1

§ 1158. Offences against the law of nations are quite as important, and cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognized by the common consent of nations, In respect, therefore, as well to felonies on the high seas, as to offences against the law of nations, there is a peculiar fitness in giving to congress the power to define, as well as to punish. And there is not the slightest reason to doubt, that this consideration had very great weight with the convention, in producing thephraseology of the clause.2 On either subject it would have been inconvenient, if not impracticable, to have referred to the codes of the states, as well from their imperfection, as their different enumeration of the offences. Certainty,. as well as uniformity, required, that the power to define and punish should reach over the whole of these classes of offences.3

§ 1159. What is the meaning of "high seas" within the intent of this clause does not seem. to admit of any serious doubt. The phrase embraces not only the waters of the ocean, which are out of sight of land, but the waters on the sea coast below low water mark, whether within the territorial boundaries of a foreign nation, or of a domestic state.4 Mr. Justice Blackstone has remarked, that the main sea or high sea begins at the low water mark. But between the high water

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1 3 inst. 112; Co. Lect. 391, a.

2 United States v. Smith, 5 Wheat. R. 153, 159.

3 The Federalist, No. 42; Sergeant on Const. ch. 28, (ch. 30;) Rawle on Const. ch. 9, p. 107.

4 United Stales v. Pirates, 5 Wheat. R. 184, 200, 204, 206; United States v. Willberger, 5 Wheat. R. 76, 94.

mark and the low water mark, where the tide ebbs and flows, the common law and the admiralty have divisum imperium, an alternate jurisdiction, one upon the water, when it is full sea; the other upon the land, when it is an ebb.1 He doubtless here refers to the waters of the ocean on the sea-coast, and not in creeks and inlets, Lord Hale says, that the sea is either that, which lies within the body of the county or without. That, which lies without the body of a county, is called the main sea, or ocean.2 So far, then, as regards the states of the Union, "high seas" may be taken to mean that part of the ocean, which washes the sea-coast, and is without the body of any county, according to the common law; and, so far as regards foreign nations, any waters on their sea-coast, below low-water mark.3

§ 1160. Upon the propriety of granting this power to the national government, there does not seem to have been any controversy; or if any, none of a serious nature. It is obvious, that this power has an intimate connexion and relation with the power to regulate commerce and intercourse with foreign nations, and the rights and duties of the national government in peace and war, arising out of the law of nations. As the United States are responsible to foreign

governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nations, congress ought to possess the power to define and

1 1 Black. Comm. 110; Constable's case, 5 Co. R. 106; 3 Inst. 113; 2 East's P.C. 802, 803.

2 Hale in Harg. Law Tracts, ch. 4, p. 10; 1 Hale P.C. 423, 494.

3 See Rawle on the Const. ch. 9, p. 107; Sergeant on the Const. ch. 28, [ch. 30;] 1 Kent's Comm. Lect. 17, p. 342, &e.; United States v. Grush, 5 Mason's R. 290.

punish all such offences, which may interrupt our intercourse and. harmony. with, and our duties to them.1

§ 1161. Whether this power, so far as it concerns the law of nations, is an exclusive one, has been doubted by a learned commentator.2 As, Up to the present time, that question may be deemed for most purposes to be a mere speculative question, it is not proposed to discuss it, since it may be better reasoned out, when it shall require judicial decision.

§ 1162. The clause, as it was originally reported in the first draft of the constitution, was in substance, though not in language, as it now stands. It was subsequently amended; and in the second draft stood in its present terms.3 There is, however, in the Supplement to the Journal, an obscure statement of a question put, to strike out the word "punish," seeming to refer to this clause, which was carried in the affirmative by the vote of six states against five.4 Yet the constitution itself bears testimony, that it did not prevail.

1 See 1 Tucker's Black. Comm. App. 268, 269; Rawle on Coast. ch. 9, p. 108.

2 Rawle on Const. ch. 9, p. 108.

3 Journal of Convention, 221, 257 to 259, 357.

4 Journal of Convention, p. 375, 376.

CHAPTER XXI.

THE POWER TO DECLARE WAR AND MAKE CAPTURES.

§ 1163. THE next power of congress is to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

§ 1164. A similar exclusive power was given to congress by the confederation.1 That such a power ought to exist in the national government, no one will deny, who believes, that it ought to have any powers whatsoever, either for offence or defence, for the common good, or for the common protection. It is, therefore, wholly superfluous to reason out the propriety of granting the power.2 It is self-evident, unless the national government is to be a mere mockery and shadow. The power could not be left without extreme mischief, if not absolute ruin, to the separate authority of the several states; for then it would be at the option of any one to involve the whole in the calamities and burthens of warfare.3 In the general government it is safe, because there it can be declared only by the majority of the states.

§ 1165. The only practical question upon this subject would seem to be, to what department of the national government it would be most wise and safe to confide this high prerogative, emphatically called the last resort of sovereigns, ultima ratio regum. In Great Britain it is the exclusive prerogative of the crown;4 and in

1 Art. 9; The Federalist, .No. 41.

2 See The Federalist, No. 23, 41.

3 1 Tucker's Black. Comm. App. 271.

4 1 Black. Comm. 257, 258.

other countries, it is usually, if not universally confided to the executive department. It might by the constitution have been confided to the executive, or to the senate, or to both conjointly.

§ 1166. In the plan offered by an eminent statesman in the convention, it was proposed, that the senate should have the sole power of declaring war.1 The reasons, which may be urged in favour of such an arrangement, are, that the senate would be composed of representatives of the states, of great weight, sagacity, and experience, and that being a small and select body, promptitude of action, as well as wisdom, and firmness, would, as they ought, accompany the possession of the power. Large bodies necessarily move slowly; and where the co-operation of different bodies is required, the retardation of any measure must be proportionally increased. In the ordinary course of legislation this may be no inconvenience. But in the exercise of such a prerogative, as declaring war, despatch, secrecy, and

vigour are often indispensable, and always useful towards success. On the other hand it may be urged in reply, that the power of declaring war is not only the highest Sovereign prerogative; but that it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a

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1 Mr. Hamilton's Plan, Journal of Convention, p. 131.

nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead; and in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger, that war will find it both imbecile in defence, and eager for contest. Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace. The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted, as to its propriety and necessity. The executive is to carry it on, and therefore should be consulted, as to its time, and the ways and means of making it effective. The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others. Indeed, there might be a propriety even in enforcing still greater restrictions, as by requiring a concurrence of two thirds of both houses.1

§ 1167. This reasoning appears to have had great weight with the convention, and to have decided its choice. Its judgment has hitherto obtained the unqualified approbation of the country.2

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1 Several of the states proposed an amendment to the constitution to this effect. But it was never adopted by a majority.* Under the confederation, the assent of nine states was necessary to a declaration of war, (Art. 9.)

2 1 Tucker's Black. Comm. App. 269 to 272; Rawle on the Const. ch. 9, p. 109.

*** 1 Tucker's Black. Comm. App. 271, 272, 374.**

§ 1168. In the convention, in the first draft of the constitution, the power was given merely "to make war." It was subsequently, and not without some struggle, altered to its present form.1 It was proposed to add the power "to make peace;" but this was unanimously rejected;2 upon the plain ground, that it more properly belonged to the treaty-making power. The experience of congress, under the confederation, of the difficulties, attendant upon vesting the treaty-making power in a large legislative body, was too deeply felt to justify the hazard of another experiment.3

§ 1169. The power, to declare war may be exercised by congress, not only by authorizing general hostilities, in which case the general laws of war apply to our situation; or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed.4 The former course was resorted to in our war with Great Britain in 1812, in which congress enacted, "that war be, and hereby is declared to exist, between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories."5 The latter course was pursued in the qualified war of 1798 with France, which was-regulated by divers acts of congress, and of course was confined to the limits prescribed by those acts.6

§ 1170. The power to declare war would of itself carry the incidental power to grant letters of marque

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1 Journal of Convention, 221,258, 259, 327, 328.

2 Ibid, 259.

3 The Federalist, No. 64. See also Rawle on the Const. ch. 9, p. 110; North Amer; Rev. Oct. 1827, p. 263.

4 Talbot v. Seeman, 1 Cranch's R. 1, 28; Bas v. Tingey, 4 Dall. 37.

5 Act of 1812, ch. 102.

6 Rawle on the Const. ch. 9, p. 109; Sergeant on Const. ch. 28, [ch. 30;] Bas v. Tingey, 4 Dall. R. 37.

and reprisal, and make rules concerning captures. It is most probable, that an extreme solicitude to follow out the powers enumerated in the confederation occasioned the introduction of these clauses into the Constitution. In the former instrument, where all powers, not expressly delegated, were prohibited, this enumeration was peculiarly appropriate. But in the latter, where incidental powers were expressly contemplated, and provided for, the same

necessity did not exist. As has been already remarked in another place, and will abundantly appear from the remaining auxiliary clauses to the power to declare war, the constitution abounds with pleonasms and repetitions, sometimes introduced from caution, sometimes from inattention, and sometimes from the imperfections of language.1

§ 1171. But the express power "to grant letters of marque and reprisal" may not have been thought wholly unnecessary, because it is often a measure of peace, to prevent the necessity of a resort to war. Thus, individuals of a nation sometimes suffer from the depredations of foreign potentates; and yet it may not be deemed either expedient or necessary to redress such grievances by a general declaration of war. Under such circumstances the law of nations authorizes the sovereign of the injured individual to grant him this mode of redress, whenever justice is denied to him by the state, to which the party, who has done the injury, belongs. In this case the letters of marque and reprisal (words used as synonymous, the latter (reprisal) signifying, a taking in return, the former (letters of marque) the passing the frontiers in order to such taking,) contain an authority to seize the bodies or goods of the subjects of the offending state, wherever they may

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1 See Mr. Madison's LeRer to Mr. Cabell., 18th Sept. 1828.

be found, until satisfaction is made for the injury.1 This power of reprisal seems indeed to be a dictate almost of nature itself, and is nearly related to, and plainly derived from that of making war. It is only an incomplete state of hostilities, and often ultimately leads to a formal denunciation of war, if the injury is unredressed, or extensive in its operations.2

§ 1172. The power to declare war is exclusive in congress; and (as will be hereafter seen,) the states are prohibited from engaging in it, unless in cases of actual invasion or imminent danger thereof. It includes the exercise of all the ordinary rights of belligerents; and congress may therefore pass suitable laws to enforce them. They may authorize the seizure and condemnation of the property of the enemy within, or without the territory of the United States; and the confiscation of debts due to the enemy. But, until laws have been passed upon these subjects, no private citizens can enforce any such rights; and the judiciary is incapable of giving them any legitimate operation.3

§ 1173. The next power of congress is." to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years."

§ 1174. The power to raise armies is an indispensable incident to the power to declare war; and the latter would be literally brutum fulmen without the former, a means of mischief without a power of defence.4 Under the confederation congress possessed no power whatsoever to raise armies; but only "to

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1 1 Black. Comm. 258, 2.59.

2 1 Black: Comm. 258, 259; Bynkershoek on War, ch. 24, p. 182, by Duponceau; Valin Traite des Prises, p. 223, 321; 1 Tuck. Black. Comm. App. 271; 4 Elliot's Deb. 251.

3 Brown v. United States, 8 Cranch's R. 1.

4 4 Elliot's Deb. 220, 221.

agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state;" which requisitions were to be binding; and thereupon the legislature of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States.1 The experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition. It was equally at war with economy, efficiency, and safety.2 It gave birth to a competition between the states, which created a kind of auction of men. In order to furnish the quotas required of them, they outbid each other, till bounties grew to an enormous and insupportable size. On this account many persons procrastinated their enlistment, or enlisted only for short periods. Hence, there were but slow and scanty levies of men in the most critical emergencies of our affairs; short enlistments at an unparalleled expense; and continual fluctuations in the troops, ruinous to their discipline, and subjecting the public safety frequently to the perilous crisis of a disbanded army. Hence also arose those oppressive expedients for raising men, which were occasionally practised, and which nothing, but the enthusiasm of liberty, could have induced the people to endure.3 The burthen was also very

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1 Art. 9; Art. 7.

2 1 American Museum, 270, 273, 283; 5 Marshall's Life of Washington, App. note 1.

3 The Federalist, No. 22, 23. -- The difficulties connected with this subject will appear still more striking

in a practical view from the letters of General Washington, and other public documents at the period. See 5 Marshall's Life of Washington, ch. 3, p. 125, 126; ch. 5, p. 212 to 220; ch. 6, p. 238 to 248. See 6 Journals of Congress in 1780 passim. Circular Letter of Congress, in May, 1779; 5 Jour. of Cong. 224 to 231.

unequally distributed. The states near the seat of war, influenced by motives of self-preservation, made efforts to furnish their quotas, which even exceeded their abilities; while those at a distance were exceedingly remiss in their exertions. In short, the army was frequently composed of three bodies of men; first, raw recruits; secondly, persons, who were just about completing their term of service; and thirdly, of persons, who had served out half their term, and were quietly waiting for its determination. Under such circumstances, the wonder is not, that its military operations were tardy, irregular, and often unsuccessful; but, that it was ever able to make head-way. at all against an enemy, possessing a fine establishment, well appointed, well armed, well clothed, and well paid.1 The appointment, too, by the states, of all regimental officers, had a tendency to destroy all harmony and subordination, so necessary to the success of military life.

§ 1175. There is great wisdom and propriety in relieving the government from the ponderous and unwieldy machinery of the requisitions and appointments under the confederation. The present system of the Union is general and direct, and capable of a uniform organization and action. It is essential to the common defence, that the national government should possess the power to raise armies; build and equip fleets; prescribe rules for the government of both; direct their operations; and provide for their support.2

§ 1176. The clause, as originally reported, was "to raise armies;" and subsequently it was, upon the report of a committee, amended, so as .to stand in its present

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1 The Federalist, No. 22, 23.

2 The Federalist, No. 23; 2 Elliot's Debates, 92, 91.

form; and as amended it seems to have encountered no opposition in the convention.1 It was, however, afterwards assailed in the state conventions, and before the people, with incredible zeal and pertinacity, as dangerous to liberty, and subversive of the state governments. Objections were made against the general and indefinite power to raise armies, not limiting the number of troops; and to the maintenance of them in peace, as well as in war.

§ 1177. It was said, that congress, having an unlimited power to raise and support armies, might, if in their opinion the general welfare required it, keep large armies constantly on foot, and thus exhaust the resources of the United States. There is no control on congress, as to numbers, stations, or government of them. They may billet them on the people at pleasure. Such an unlimited authority is most dangerous, and in its principles despotic; for being unbounded, it must lead to despotism. We shall, therefore, live under a government of military force.2 In respect to times of peace, it was suggested, that there is no necessity for having a standing army, which had always been held, under such circumstances, to be fatal to the public rights and political freedom.3

§ 1178. To these suggestions it was replied, with equal force and truth, that to be of any value, the power must be unlimited. It is impossible to foresee, or define the extent and variety of national exigencies, and the correspondent extent and variety of the national means necessary to satisfy them. The power must be co-extensive with all possible combinations of circurn-

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1 Journal of Convention, 221, 327, 328.

2 2 Elliot's Debates, 285, 286, 307, 308, 430.

3 2 Elliot's Debates, 307, 308, 430.

stances, and under the direction of the councils entrusted with the common defence. To deny this would be to deny the means, and yet require the end. These must, therefore, be unlimited in every matter essential to its efficacy, that is, in the formation, direction, and support of the national forces.1 This was not doubted under the confederation; though the mode adopted to carry it into effect was utterly inadequate and illusory.2 There could be no real danger from the exercise of the power. It was not here, as in England, where the executive possessed the power to raise armies at pleasure; which power, so far as respected standing armies in time of peace, it became necessary to provide by the bill of rights, in 1688, should not be exercised without the consent of parliament.3 Here the power is exclusively confined to the legislative body, to the representatives of the states, and of the people of the states. And to suppose it will not be safe in their hands, is to suppose, that no powers of government, adapted to national exigencies, can ever be safe in any political body.4 Besides, the power is limited by the necessity (as will be seen)

of biennial appropriations.5 The objection, too, is the more strange, because there are but two constitutions of the thirteen states, which attempt in any manner to limit the power; and these are rather cautions for times of peace, than prohibitions.6 The confederation itself contains no prohibition or limitation of the power.7 Indeed, in regard to times of war, it seems utterly preposterous to impose any limit-

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1 The Federalist, No. 23; 2 Elliot's Debates, 92, 93, 438.

2 2 Elliot's Debates, 438.

3 1 Black. Comm. 262, 413.

4 The Federalist, No. 23, 26.

5 The Federalist, No. 24, 25.

6 The Federalist, No. 24, and note; Id. No. 26.

7 The Federalist, No. 24; 2 Elliot's Debates, 438.

ations upon the power; since it is obvious, that emergencies may arise, which would require the most various, and independent exercises of it. The country would otherwise be in danger of losing both its liberty and its sovereignty, from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest, than to domestic rule.

§ 1179. But in times of peace the power may be at least equally important, though not so often required to be put in full exercise. The United States are surrounded by the colonies and dependencies of potent foreign governments, whose maritime power may furnish them with the means of annoyance, and mischief, and invasion. To guard ourselves against evils of this sort, it is indispensable for us to have proper forts and garrisons, stationed at the weak points, to overawe or check incursions. Besides; it will be equally important to protect our frontiers against the Indians, and keep them in a state of due submission and control.1 The garrisons can be furnished only by occasional detachments of militia, or by regular troops in the pay of the government. The first would be impracticable, or extremely inconvenient, if not positively pernicious. The militia would not, in times of profound peace, submit to be dragged from their occupations and families to perform such a disagreeable duty. And if they would, the increased expenses of a frequent rotation in the service; the loss of time and labour; and the breaking up of the ordinary employments of life; would make it an extremely ineligible scheme of military power. The true and proper recourse should, there-

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1 The Federalist, No. 24, 25; 2 Elliot's Debates, 292, 293.

fore, be to a permanent, but small standing army for such purposes.1 And it would only be, when our neighbours should greatly increase their military force, that prudence and a due regard to our own safety would require any augmentation of our own.2 It would be wholly unjustifiable to throw upon the states the defence of their own frontiers, either against the Indians, or against foreign foes. The burthen would often be disproportionate to their means, and the benefit would often be largely shared by the neighbouring states. The common defence should be provided for out of the common treasury. The existence of a federal government, and at the same time of military establishments under state authority, are not less at variance with each other, than a due supply of the federal treasury, and the system of quotas and requisitions.3

§ 1180: It is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. If a prohibition should be imposed upon the United States against raising armies in time of peace, it would present the extraordinary spectacle to the world of a nation incapacitated by a constitution of its own choice from preparing for defence before an actual invasion. As formal denunciations of war are in modern times often neglected, and are never necessary, the presence of an enemy within our territories would be required, before the government would be warranted to begin levies of men for the protection of the state. The blow must be received, before any attempts could be made to ward it off, or to return it. Such a course of conduct would at all times invite aggression and insult; and enable a formidable rival or secret enemy to seize upon

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1 The Federalist, No. 24; 2 Elliot's Debates, 292, 293.

2 The Federalist, No. 24, 41.

3 Id. No. 25.

the country, as a defenseless prey; or to drain its resources by a levy of contributions, at once irresistible and ruinous.1 It would be in vain to look to the militia for an adequate. defence under such circumstances. This reliance

came very near losing us our independence, and was the occasion of the useless expenditure of many millions. The history of other countries, and our past experience, admonish us, that a regular force, well disciplined and well supplied, is the cheapest, and the only effectual means of resisting the inroads of a well disciplined foreign army.2 In short, under such circumstances the constitution must be either violated. (as it in fact was by the states under the confederation,3 or our liberties must be placed in extreme jeopardy. Too much precaution often leads to as many difficulties, as too much confidence. How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations 'and establishments of every hostile nation? The means of security can be only regulated by the means and the danger of attack. They will, in fact, ever be determined by these rules, and no other. It will be in vain to oppose constitutional barriers to the impulse of selfpreservation.4

§ 1181. But the dangers from abroad are not alone those, which are to be guarded against in the structure of the national government. Gases may occur, and indeed are contemplated by the constitution itself to occur, in which military force may be indispensable to enforce the laws, or to suppress domestic insurrections. Where the resistance is confined to a few insurgents, the sup-

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1 The Federalist, No. 25; 2 Elliot's Debates, 92, 93.

2 The Federalist, No. 25, 41.

3 Id. 25.

4 The Federalist, No. 41; 3 Elliot's Debates, 305.

pression may be ordinarily, and safely confided to time militia. But where it is extensive, and especially if it should pervade one, or more states, it may become important and even necessary to employ regular troops, as at once the most effective, and the most economical force.1 Without the power to employ such a force in time of peace for domestic purposes, it is plain, that the government might be in danger of being overthrown by the combinations of a single faction.2

§ 1182. The danger of an undue exercise of the power is purely imaginary. It can never be exerted, but by the representatives of the people of the states; and it must be safe there, or there can be no safety at all in any republican form of government.3 Our notions, indeed, of the dangers of standing armies in time of peace, are derived in a great measure from the principles and examples of our English ancestors. In England, the king possessed the power of raising armies in the time of peace according to his own good pleasure. And this prerogative was justly esteemed dangerous to the public liberties. Upon the revolution of 1688, parliament wisely insisted upon a bill of rights, which should furnish an adequate security for the future. But how was this done? Not by prohibiting standing armies altogether in time of peace; but (as has been already seen) by prohibiting them without the consent of parliament.4 This is the very proposition contained in the constitution; for congress can alone raise armies; and may put them down, whenever they choose.

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1 The Federalist, No. 28, 26.

2 2 Elliot's Debates, 92, 93.

. 3 The Federalist, No. 98, 26, 98.

4 The Federalist, No. 26; 1 Black. Comm. 413.

§ 1183. It may he admitted, that standing armies may prove dangerous to the state. But it is equally true, that the want of them may also prove dangerous to the state. What then is to be done? The true course is to check the undue exercise of the power, not to withhold it.1 This the constitution has attempted to do by providing, that "no appropriation of money to that use shall be for a longer term than two years." Thus, unless the necessary supplies are voted by the representatives of the people every two years, the whole establishment must fall. Congress may indeed, by an act for this purpose, disband a standing army at any time; or vote the supplies only for one year, or for a shorter period. But the constitution is imperative, that no appropriation shall prospectively reach beyond the biennial period. So that there would seem to be every human security against the possible abuse of the power.2

§ 1184. But, here again it was objected, that the executive might keep up a standing army in time of peace, notwithstanding no supplies should be voted. But how can this possibly be done? The army cannot go without supplies; it may be disbanded at the pleasure of the legislature; and it would be absolutely impossible for any president, against the will of the nation, to keep up a standing army in terrorem populi.3

§ 1185. It was also asked, why an appropriation should not be annually made, instead of biennially, as is the case in the British parliament.4 The answer is, that congress may in their pleasure limit the appropriation

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1 The Federalist, No. 41; 2 Elliot's Debates, 93, 308, 309.

2 The Federalist, No. 26, 41.

3 The Federalist, No. 26.

4 1 Tucker's Black. Comm, App. 272; 1 Black. Comm. 414, 415.

to a single year; but exigencies may arise, in which, with a view to the advantages of the public service and the pressure of war, a biennial appropriation might be far more expedient, if not absolutely indispensable. Cases may be supposed, in which it might be impracticable for congress, in consequence of public calamities, to meet annually for the despatch of business. But the supposed example of the British parliament proves nothing. That body is not restrained by any constitutional provision from voting supplies for a standing army for an unlimited period. It is the mere practice of parliament, in the exercise. of its own discretion, to make an annual vote of supplies. Surely, if there is no danger in confiding an unlimited power of this nature to a body chosen for seven years, there can be none in confiding a limited power to an American congress, chosen for two years.1

§ 1186. In some of the state conventions an amendment was proposed, requiring, that no standing army, or regular forces be kept up in time of peace, except for the necessary protection and defence of forts, arsenals, and dockyards, without the consent of two thirds of both houses of congress.2 But it was silently suffered to die away with the jealousies of the day. The practical course of the government on this head has allayed all fears of the people, and fully justified the opinions of the friends of the constitution. It is remarkable, that scarcely any power of the national government was at the time more strongly assailed by

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1 The Federalist, No. 41.

2 1 Tucker's Black. Comm. App. 271, 272, 379. -- An attempt was also made in the convention, to insert a clause, limiting the number of the army in time of peace to a -- number; but it was negatived. Journal of Convention, p. 262.

appeals to popular prejudices, or vindicated with more full and masculine discussion. The Federalist gave it a most elaborate discussion, as one of the critical points of the constitution.1 In the present times the subject attracts no notice, and would scarcely furnish a topic, even for popular declamation. Ever since the constitution was put into operation, congress have restrained their appropriations to the current year; and thus practically shown the visionary nature of these objections.

§ 1187. Congress in 1798, in expectation of a war with France, authorized the president to accept the services of any companies of volunteers, who should associate themselves for the service, and should be armed, clothed, and equipped at their own expense, and to commission their officers.2 This exercise of power was complained of at the time, as a virtual infringement of the constitutional authority of the states in regard to the militia; and, as such, it met with the disapprobation of a learned commentator.3 His opinion does not, however, seem since to have received the deliberate assent of the nation. During the late war with Great Britain, laws were repeatedly passed, authorizing the acceptance of volunteer corps of the militia under their own officers; and eventually, the president was authorized, with the consent of the senate, to commission officers for such volunteer corps. These laws exhibit the decided change of the public opinion on this subject; and they deserve more attention, since the measures were promoted and approved under the auspices of the very

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1 The Federalist, No. 24 to 29.

2 Act of 28th of May, 1798, ch. 64; Act of 22d of June, 1798, ch. 74; Act of 2d of March, 1799, ch. 187.

3 1 Tucker's Black. Comm. App. 273, 274, 329, 330. See also Virginia Report and Resolutions, 9th of January, 1800, p. 53 to 56.

party, which had inculcated an opposite opinion.1 It is proper to remark, that the Federalist maintained, that the disciplining and effective organization or the whole militia would be impracticable; that the attention or the government ought particularly to be directed to the formation or a select corps of moderate size, upon such principles, as would really fit them for service in case or need; and that such select corps would constitute the best substitute for a large standing army, and the most formidable check upon any undue military powers; since it would be composed or citizens well disciplined, and well instructed in their rights and duties.2

§ 1188. The next power or congress is "to provide and maintain a navy."

§ 1189. Under the confederation congress possessed the power "to build and equip a navy."3 The same language was adopted in the original draft of the constitution; and it was amended by substituting the present words,

apparently without objection, as more broad and appropriate.4 In the convention, the propriety or granting the power seems not to have been questioned. But it was assailed in the: state conventions as dangerous. It was said, that commerce and navigation are the principal sources or the wealth or the maritime powers or Europe; and if we engaged in commerce, we should soon become their rivals. A navy would soon be

1 See Act of 8th of Feb. 1812, ch. 22; Act of 6th of July, 1812, ch. 538; Act of 24th of Feb. 1814, ch. 75; Act of 30th of March, 1814, ch. 96; Act of 27th of Jan. 1815, ch. 178. See also Act of 24th of Feb. 1807, ch. 70.

2 The Federalist, No. 29.

3 Art. 9.

4 Journ. of Convention, 221, 262.

thought indispensable to protect it. But the attempt on our part to provide a navy would provoke these powers, who would not suffer us to become a naval power. Thus, we should be immediately involved in wars with them. The expenses, too, of maintaining a suitable navy would be enormous; and wholly disproportionate to our resources. If a navy should be provided at all, it ought to be limited to the mere protection of our trade.1 It was further urged, that the Southern states would share a large portion of the burthens of maintaining a navy, without any corresponding advantages.2

§ 1190. With the nation at large these objections were not deemed of any validity. The necessity of a navy for the protection of commerce and navigation was not only admitted, but made a strong ground for the grant of the power. One of the great objects of the constitution was the encouragement and protection of navigation and trade. Without a navy, it would be utterly impossible to maintain our right to the fisheries, and our trade and navigation on the lakes, and the Mississippi, as well as our foreign commerce. It was one of the blessings of the Union, that it would be able to provide an adequate support and protection for all these important objects. Besides; a navy would be absolutely indispensable to protect our whole Atlantic frontier, in case of a war with a foreign maritime power. We should otherwise be liable, not only to the invasion of strong regular forces of the enemy; but to the attacks and incursions of every predatory adventurer. Our maritime towns might all be put under contribution; and even the entrance and departure from our

1 2 Elliot's Deb. 224, 319, 320.

2 2 Elliot's Deb. 319, 320.

own ports be interdicted at the caprice, or the hostility of a foreign power. It would also be our cheapest, as well as our best defence; as it would save us the expense of numerous forts and garrisons upon the seacoast, which, though not effectual for all, would still be required for some purposes. In short, in a maritime warfare without this means of defence, our commerce would be driven from the ocean, our ports would be blockaded, our sea-coast infested with plunderers, and our vital interests put at hazard.1

§ 1191. Although these considerations were decisive with the people at large in favour of the power, from its palpable necessity and importance to all the great interests of the country, it is within the memory of all of us, that the same objections for a long time prevailed with a leading party in the country,2 and nurtured a policy, which was utterly at variance with our duties, as well as our honour. It was not until during the late war with Great Britain, when our little navy, by a gallantry and brilliancy of achievement almost without parallel, had literally fought itself into favour, that the nation at large began to awake from its lethargy on this subject, and to insist upon a policy, which should at once make us respected and formidable abroad, and secure protectionand honour at home.3 It has been proudly said

1 The Federalist, No. 11, 24, 41. See also 1 Tucker's Black. Comm. App. 272.

2 See 5 Marshall's Life of Washington, ch. 7, p. 523 to 531.

3 Lest it should be supposed, that these remarks are not well founded, the following passage is extracted from the celebrated Report and Resolutions of the Virginia legislature, of 7th and 11th Jan. 1800, which formed the text-book of many political opinions for a long period. "With respect to the navy, it may be proper to remind you, that whatever may be the proposed object of its establishment, or whatever the prospect of temporary advantages resulting therefrom, it is demonstrated. by the experience of all nations, who have adventured far into naval

by a learned commentator on the laws of England, that the royal navy of England hath ever been its greatest defence and ornament. It is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can be apprehended to liberty.1 Every American citizen ought to cherish the same sentiment, as applicable to the navy of his own country.

§ 1192. The next power of congress is "to make rules for the government and regulation of the land and naval forces." This is a natural incident to the preceding powers to make war, to raise armies, and to provide and maintain a navy. Its propriety, therefore, scarcely could be, and never has been denied, and need not now be insisted on. The clause was not in the original draft of the constitution; but was added without objection by way of amendment.2 It was without question borrowed from a corresponding clause in the articles of confederation,3 where it was with more propriety given, because there was a prohibition of all implied powers. In Great Britain, the king, in his capacity of generalissimo of the whole kingdom, has the sole power of regulating

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policy, that such prospect is ultimately delusive; and that a navy has ever in practice been known more as an instrument of power, a source of expense, and an occasion of collisions and wars with other nations, than as an instrument of defence, of economy, or of protection to commerce. Nor is there any nation, in the judgment of the general assembly, to whose circumstances this remark is more applicable, than to the United States." p. 57, 58. And the senators and representatives were instructed and requested by one of the resolutions "to prevent any augmentation of the navy, and to promote any proposition for reducing it, as circumstances will permit, within the narrowest limits compatible with the protection of the sea-coasts, ports, and harbours of the United States." p. 59.

1 1 Black. Comm. 418.

2 Journal of Convention, p. 221, 262.

3 Art. 9.

fleets and armies.1 But parliament has repeatedly interposed; and the regulation of both is now in a considerable measure provided for by acts of parliament.2 The whole power is far more safe in the hands of congress, than of the executive; since otherwise the most summary and severe punishments might be inflicted at the mere will of the executive.

§ 1193. It is a natural result of the sovereignty over the navy of the United States, that it should be exclusive. Whatever crimes, therefore, are committed on board of public, ships of war of the United States, whether they are in port or at sea, they are exclusively cognizable and punishable by the government of the United States. The public ships of sovereigns, wherever they may be, are deemed to be extraterritorial, and enjoy the immunities from the local jurisdiction belonging to their sovereign.3

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1 1 Black. Comm. 262, 421.

2 1 Black. Comm. 413, 414, 415, 420, 421.

3 See United States v. Bevans, 3 Wheaton's R. 336, 390. The Schr. Exchange, 7 Cranch's R. 116.

CHAPTER XXII.

POWER OVER THE MILITIA.

§ 1194. THE next power of congress is "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

§ 1195. This clause seems, after a slight amendment, to have passed the convention without opposition.1 It cured a defect severely felt under the confederation, which contained no provision on the subject.

§ 1196. The power of regulating the militia, and of commanding its services to enforce the laws, and to suppress insurrections, and repel invasions, is a natural incident to the duty of superintending the common defence, and preserving the internal peace of the nation. In short, every argument, which is urged, or can be urged against standing armies in time of peace, applies forcibly to the propriety of vesting this power in the national government. There is but one of two alternatives, which can be resorted to in cases of insurrection, invasion, or violent opposition to the laws; either to employ regular troops, or to employ the militia to suppress them. In ordinary cases, indeed, the resistance to the laws may be put down by the posse comitatus, or the assistance of the common magistracy. But cases may occur, in which such a resort would be utterly vain, and even mischievous; since it might encourage the factious to more rash measures, and prevent the application of a force, which would at once destroy the hopes, and crush the efforts of the disaffected. The

1 Journal of Convention. 212, 283.

general power of the government to pass all laws necessary and proper to execute its declared powers, would doubtless authorize laws to call forth. the posse comitatus, and employ the common magistracy, in cases, where such measures would suit the emergency.1 But if the militia could not be called in aid, it would be absolutely indispensable to the common safety to keep up a strong regular force in time of peace.2 The latter would certainly not be desirable, or economical; and therefore this power over the militia is highly salutary to the public repose, and at the same time an additional security to the public liberty. In times of insurrection or invasion, it would be natural and proper, that the militia of a neighbouring state should be marched into another to resist a common enemy, or guard the republic against the violence of a domestic faction or sedition. But it is scarcely possible, that in the exercise of the power the militia should ever be called to march great distances, since it would be at once the most expensive and the most inconvenient force, which the government could employ for distant expeditions.3 The regulation of the whole subject is always to be in the power of congress; and it may from time to time be moulded so, as to escape from all dangerous abuses.

§ 1197. Notwithstanding the reasonableness of these suggestions, the power.was made the subject of the most warm appeals to the people, to alarm their fears, and surprise their judgment.4 At one time it was said,

1 2 Elliot's Debates, 300, 304, 305, 308, 309.

2 The Federalist, No. 29; 2 Elliot's Debates, 292, ,293, 294, 308, 309.

3 The Federalist, No. 29; 2 Elliot's Deb. 92, 107, 108, 292, 293, 294, 308, 109; 3 Elliot's Deb. 305, 306.

4 2 Elliot's Deb. 66, 67, 307, 310, 314, 315; The Federalist, No. 29; Luther Martin's Address, Yates's Minutes; 4 Elliot's Deb. 31, 34.

that the militia under the command of the national government might be dangerous to the public liberty; at another, that they might be ordered to the most distant places, and burthened with the most oppressive services; and at another, that the states might thus be robbed of their immediate means of defence.1 How these things could be accomplished with the consent of both houses of congress, in which the states and the people of the states are represented, it is difficult to conceive. But the highly coloured and impassioned addresses, used on this occasion, produced some propositions of amendment in the state conventions,2 which, however, were never duly ratified, and have long since ceased to be felt, as matters of general concern.

§ 1198. The next power of congress is, "to provide for organizing, arming, and disciplining the militia, and for governing such part of them, as may be employed in the service of the United States; reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress."

§ 1199. This power has a natural connexion with the preceding, and, if not indispensable to its exercise, furnishes the only adequate means of giving it promptitude and efficiency in its operations. It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia will be attended with the most beneficial effects, whenever they are called into active service. It will enable them to discharge the duties of the camp and field with mutual intelligence and concert, an advantage of peculiar

1 See the Federalist, No. 29; 2 Elliot's Deb. ,285, 286, 287, 289, 307, 310.

2 1 Tucker's Black. Comm. App. 273.

moment in the operations of an army; and it will enable them to acquire, in a much shorter period, that degree of proficiency in military functions, which is essential to their usefulness. Such an uniformity, it is evident, can be attained only through the superintending power of the national government.1

§ 1200. This clause was nor in the original draft of the constitution; but it was subsequently referred to a committee, who reported in favour of the power; and after considerable discussion it was adopted in its present shape by a decided majority. The first clause in regard to organizing, arming, disciplining, and governing the militia, was passed by a vote of nine states against two; the next, referring the appointment of officers to the states, after an ineffectual effort to amend it by confining the appointment to officers under the rank of general officers, was passed without a division; and the last, referring the authority to train the militia according to the discipline prescribed by congress, was passed by a vote of seven states against four.2

§ 1201. It was conceived by the friends of the constitution, that the power thus given, with the guards, reserving the appointment of the officers, and the training of the militia to the states, made it not only wholly unexceptionable, but in reality an additional security to the public liberties.3 It was nevertheless made a topic of serious alarm and powerful objection. It was suggested, that it was indispensable to the states, that they should possess the control and discipline of the militia.

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1 The Federalist, No. 4, 29; 1 Tucker's Black. Comm. App. 273, 274; 5 Marshall's Life of Washington, ch. 1, p. 51. See Virginia Report and Resolutions, 7 Jan. 1800, p. 51 to 57.

2 Journal of Convention, 221, 263, 272, 280, 281, 282, 357, 376, 377.

3 2 Elliot's Deb. 92, 301, 310, 312, 314, 317.

Congress might, under pretence of organizing and disciplining them, inflict severe and ignominious punishments on them.1 The power might be construed to be exclusive in congress. Suppose, then, that congress should refuse to provide lot arming or organizing them, the result would be, that the states would be utterly without the means of defence, and prostrate at the feet of the national government.2 It might also be said, that congress possessed the exclusive power to suppress insurrections, and repel invasions, which would take from the states all effective means of resistance.3 The militia might be put under martial law, when not under duty in the public service.4

§ 1202. It is difficult fully to comprehend the influence of such objections, urged with much apparent sincerity and earnestness at such an eventful period. Theanswers then given seem to have been in their structure and reasoning satisfactory and conclusive. But the amendments proposed to the constitution (some of which have been since adopted 5) show, that the objections were extensively felt, and sedulously cherished. The power of congress over the militia (it was urged) was limited, and concurrent with that of the states. The right of governing them was confined to the single case of their being in the actual service of the United States, in some of the cases pointed out in the constitution. It was then, and then only, that they could be subjected by the general government to

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1 2 Elliot's Debates, 101, 307, 310, 312.

2 2 Elliot's Debates, 145, 290, 310, 311, 312; Luther Martin's Address, Yates's Minutes; 4 Elliot's Debates, 34, 35.

3 2 Elliot's Debates, 310, 311, 312, 314, 315, 316, 317, 318.

4 2 Elliot's Debates, 287, 288, 294.

5 1 Tuck. Black. Comm. App. 273.

martial law.1 If congress did not choose to arm, organize, or discipline the militia, there would be an inherent fight in the states to do it.2 All, that the constitution intended, was, to give a power to congress to ensure uniformity, and thereby efficiency. But, if congress refused, or neglected to perform the duty, the states had a perfect concurrent right, and might act upon it to the utmost extent of sovereignty.3 As little pretence was there to say, that congress possessed the exclusive power to suppress insurrections and repel invasions. Their power was merely competent to reach these objects; but did not, and could not, in regard to the militia, supersede the ordinary rights of the states. It was, indeed, made a duty of congress to provide for such cases; but this did not exclude the co-operation of the states.4 The idea of congress inflicting severe and ignominious punishments upon the militia in times of peace was absurd.5 It presupposed, that the representatives had an interest, and would intentionally take measures to oppress them, and alienate their affections. The appointment of the officers of the militia was exclusively in the states; and how could it be presumed, that such men would ever consent to the destruction of the rights or privileges of their fellow-citizens.6 The power to discipline and

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1 2 Elliot's Debates, 299, 311.

2 2 Elliot's Debates, 293, 294, 312, 313, 311, 326, 327, 439; 1 Tuck. Black. Comm. App. 272, 273; Rawle on the Constitution, ch. 9, p. 111, 112; Houston v. Moore, 5 Wheat. R. 1, 21, 45, 48 to 52.

3 Houston v. Moore, 5 Wheat. R. 1, 16, 17, 21, 22, 24, 32, 51, 52, 56; 3 Sergeant & Rawle, 169.

4 2 Elliot's Debates, 312, 313, 316, 317, 318, 368; Rawle on the Constitution, ch. 9, p. 111.

5 2 Elliot's Debates, 304, 309.

6 2 Elliot's Debates, 368; Rawle on the Constitution, ch. 9, p. 112.

train the militia, except when in the actual service of the United States, was also exclusively vested in the states; and under such circumstances, it was secure against any serious abuses.1 It was added, that any project of disciplining

the whole militia of the United States would be so utterly impracticable and mischievous, that it would probably never be attempted. The most, that could be done, would be to organize and discipline select corps; and these for all general purposes, either of the states, or of the Union, would be found to combine all, that was useful or desirable in militia services.

§ 1203. It is hardly necessary to say, how utterly without any practical justification have been the alarms, so industriously spread upon this subject at the time, when the constitution was put upon its trial. Upon two occasions only has it been found necessary on the part of the general government, to require the aid of the militia of the states, for the purpose of executing the laws of the Union, suppressing insurrections, or repelling invasions. The first was to suppress. the insurrection in Pennsylvania in 1794;3 and the other, to repel the enemy in the recent war with Great Britain. On other occasions, the militia has indeed been called into service to repel the incursions of the Indians; but in all such cases, the injured states have led the way, and requested the co-operation of the national government. In regard to the other power of organizing, arming, and disciplining the militia, congress passed an act in 1792,4 more effectually to

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1 See The Federalist, No. 29; 1 Tucker's Black. Comm. App. 274; Rawle on the Constitution, ch. 9, p. 112.

2 The Federalist, No. 29.

3 5 Marsh. Life of Washington, ch. 8, p. 576 to 592; 2 Pitk. Hist. ch. 23, p. 421 to 428.

4 Act of 8th May, 1792, ch. 13.

provide for the national defence, by establishing a uniform militia throughout the United States. The system provided by this act, with the exception of that portion, which established the rules of discipline and field service, has ever since remained in force. And the militia are now governed by the same general system of discipline and field exercise, which is observed by the regular army of the United States.1 No jealousy of military power, and no dread or severe punishments are now indulged. And the whole militia system has been as mild in its operation, as it has been satisfactory to the nation.

§ 1204. Several questions of great practical importance have arisen under the clauses of the constitution respecting the power over the militia, which deserve mention in this place. It is observable, that power is given to congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Accordingly, congress in 1795, in pursuance of this authority, and to give it a practical operation, provided by law, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the president to call forth such number of the militia of the state, or states most convenient to the place of danger, or scene of action, as he may judge necessary, to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia, as he shall think proper." Like provisions are made for the other cases stated in the constitution.2 The constitutionality of this act has not

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1 Act of 1820, ch. 97; Act of 1821, ch. 68.

2 Act of 1795, ch. 101.

een questioned,1 although it provides for calling forth the militia, not only in cases of invasion, but of imminent danger of invasion; for the power to repel invasions must include the power to provide against any attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is, to provide the requisite force for action, before the invader has reached the territory of the nation.2 Nor can there be a doubt, that the president, who is (as will be presently seen) by the constitution the commander-in-chief of the army and navy of the United States, and of the militia, when called into the actual service of the United States, is the proper functionary, to whom this high and delicate trust ought to be confided. A free people will naturally be jealous of the exercise of military power; and that of calling forth the militia is certainly one of no ordinary magnitude. 'It is, however, a power limited in its nature to certain exigencies; and by whomsoever it is to be executed, it carries with it a corresponding responsibility.3 Who is so fit to exercise the power, and to incur the responsibility, as the president?

§ 1205. But a most material question arises: By whom is the exigency (the casts faederis, if one may so say) to be decided? Is the president the sole and exclusive judge, whether the exigency has arisen, or is it to be considered, as an open question, which every officer, to whom the orders of the president are

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1 Houston v. Moore, 5 Wheat. R. 1, 60; Martin v. Mott, 12 Wheat. R. 19; Houston v. Moore, 3 Sergeant & Rawle, 169; Duffield v. Smith, 3 Sergeant & Rawle, 590; Vanderheyden v. Young, 11 Johns. R. 150.
2 Martin v. Mott, 12 Wheat. R. 19, 29.
3 Martin v. Mott, 12 Wheat. R. 19, 29; Rawle on Constitution, ch. 13, p. 155, &c.

addressed, may decide for himself, and equally open to be contested by every militia-man, who shall refuse to obey the orders of the president?1 This question was much agitated during the late war with Great Britain, although it is well known, that it had been practically settled by the government, in the year 1794, to belong exclusively to the president;2 and no inconsiderable diversity of opinion was then manifested in the heat of the controversy, pendente lite, et flagrante hello. In Connecticut and Massachusetts, it was held, that the governors of the states, to whom orders were addressed by the president to call forth the militia on account of danger of invasion, were entitled to judge for themselves, whether the exigency had arisen; and were .not bound by the opinion or orders of the president? This doctrine, however, was disapproved elsewhere.3 It was contested by the government of the United States; 4 and was renounced by other states.5

§ 1206. At a very recent period, the question came before the Supreme Court of the United States for a judicial decision; and it was then unanimously determined, that the authority to decide, whether the exigency has arisen, belongs exclusively to the president;

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1 Martin v. Mott, 12 Wheat R. 19, 29, 30.
2 See Houston v. Moore, 5 Wheat. R. 37.
3 1 Kent's Comm. Lect 12, p. 244 to 250; 8 Mass. R. Suppt. 547 et seq.; Rawle on the Constitution, ch. 13, p. 155. &c. -- At a later period this doctrine seems to have been abandoned by Massachusetts. See Report and Resolves of Massachusetts, June 12, 1818, and February 15, 1830. See also Resolutions of Maine Legislature in 1820.
4 See President Madison's Message of 4th November, 1812, and President Monroe's Message, and other documents stated in Report and Resolves of Massachusetts, 15th February, 1830.
5 See Vanderheyden v. Young, 11 Johns R. 150; Rawle on the Constitution, ch. 13, p. 155 to 160; Duffield v. Smith, 3 Sergeant & Rawle, 590.

and that his decision is conclusive upon all other persons. The court said, that this construction necessarily resulted from the nature of the power itself, and from the manifest objects contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances, which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay and every obstacle to an efficient and immediate compliance would necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider, whether they ought to obey, or are scrupulously weighing the facts, upon which the commander-in-chief exercises the fight to demand their services, the hostile enterprize may be accomplished, without the means of resistance. If the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are, as it has been emphatically said, they are,1 natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy, these powers must be so construed, as to the modes of their exercise, as not to defeat the great end in view. If a superior officer has a right to contest the orders of the president, upon his own doubts, as to the exigency having arisen, it must be equally the right of every inferior officer and soldier. And any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his

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1 The Federalist, No. 29.

defence must finally re.st upon his ability to establish the facts by competent proofs. Besides; in many instances the evidence, upon which the president might decide, that there was imminent danger of invasion, might be of a nature not constituting strict technical proof; or the disclosure of the evidence might reveal important state secrets, which the public interest, and even safety, might imperiously demand to be kept in concealment.1 The act of 1795 was manifestly framed upon this reasoning. The president is by it necessarily constituted, in the first instance, the judge of the existence of the exigency, and is hound to act according to his belief of the facts. If he does so act, and decides to call out the militia, his orders for this purpose are in strict conformity to the law; and it would seem to

follow, as a necessary consequence, that every act done by a subordinate officer in obedience to such orders is equally justifiable. The law contemplates, that under such circumstances orders shall be given to carry the power into effect; and it cannot be, that it is a correct inference, that any other person has a right to disobey them. No provision is made for an appeal from, or review of the president's opinion. And whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, the general rule of construction is, that he is thereby constituted the sole and exclusive judge of the existence of those facts.2

§ 1207. It seems to be admitted, that the power to call forth the militia may be exercised either by requisitions upon the executive of the states; or by orders

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1 Martin v. Mott, 12 Wheat. R. 30, 31.

2 Martin v. Mott, 12 Wheat. R. 19, 31, 32.

directed to such executive, or to any subordinate officers of the militia. It is not, however, to be understood, that the state executive is in any case bound to leave his executive duties, and go personally into the actual service of the United States.1

§ 1208. The power to govern the militia, when in the actual service of the United States, is denied by no one to be an exclusive one. Indeed, from its very nature, it must be so construed; for the notion of distinct and independent orders from authorities wholly unconnected, would be utterly inconsistent with that unity of command and action, on which the success of all military, operations must essentially depend.2 But there is nothing in the constitution, which prohibits a state from calling forth its own militia, not detached into the service of the Union, to aid the United States in executing the laws, in suppressing insurrections, and in repelling invasions. Such a concurrent exercise of power in no degree interferes with, or obstructs the exercise of the powers of the Union. Congress may, by suitable laws, provide for the calling forth of the militia, and annex suitable penalties to disobedience of their orders, and direct the manner, in which the delinquents may be tried. But the authority to call forth, and the authority exclusively to govern, are quite distinct in their nature. The question, when the authority of congress over the militia becomes exclusive, must essentially depend upon the fact, when they are to be deemed in the actual service of the United States. There is a clear distinction between calling forth the militia, and their being in

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1 See Houston v. Moore, 5 Wheat. R. 1, 15, 16, and Mr.J. Johnson's Opinion, Id. 36, 37, 40, 46.

2 The Federalist, No. 9, 29; Houston v. Moore, 5 Wheat. R. 1, 17, 53, 54, 55, 56, 61, 62.

actual service. These are not contemporaneous acts, nor necessarily identical in their constitutional bearings. The president is not commander-in-chief of the militia, except when in actual service; and not, when they are merely ordered into service. They are subjected to martial law only, when in actual service, and not merely when called forth, before they have obeyed the call. The act of 1795, and other acts on this subject, manifestly contemplate and recognise this distinction. To bring the militia within the meaning of being in actual service, there must be an obedience to the call, and some acts of organization, mustering, rendezvous, or marching, done in obedience to the call, in the public service.1

§ 1209. But whether the power is exclusive in congress to punish delinquencies in not obeying the call on the militia, by their own courts-martial, has been a question much discussed, and upon which no inconsiderable contrariety of opinion has been expressed. That it may, by law, be made exclusive, is not denied. But if no such law be made, whether a state may not, by its own laws, constitute courts-martial to try and punish the delinquencies, and inflict the penalties prescribed by the act of congress, has been the point of controversy. It is now settled, that, under such circumstances, a state court-martial may constitutionally take cognizance of, and inflict the punishment. But a state cannot add to, or vary the punishments inflicted by the acts of congress upon the delinquents.2

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1 Houston. v. Moore, 5 Wheat. R. 1, 17, 18, 20, 53, 60, 61, 63, 64; Rawle on Coast. ch. 13, p. 159.

2 Houston v. Moore, 5 Wheat. R. 1, 2, 3, 24, 28, 44, 69 to 75; Rawleon Const. ch. 13, p. 158, 159; Houston v. Moore, 3 Serg. & Rawle, 169; Duffield v. Smith, 3 Berg. & R. 590; 1 Kent's Comm. Lect 12, p. 248, 249, 250; Berg. on Const. ch. 28, [ch. 30]; Meade's case, 5 Hall's Law Journ. 536; Bolten's case, 3 Serg. & Rawle, 176, note.

§ 1210. A question of another sort was also made during the late war with Great Britain; whether the militia, called into the actual service of the United States, were to be governed and commanded by any officer, but of the same militia, except the president of the United States; in other words, whether the president could delegate any other

officer of the regular army, of equal or superior rank, to command the militia in his absence. It was held in several of the Eastern states, that the militia were exclusively under the command of their own officers, subject to the personal orders of the president; and that he could not authorize any officer of the army of the United States to command them in his absence, nor place them under the command of any such officer.1 This doctrine was deemed inadmissible by the functionaries of the United States. It has never yet been settled by any definitive judgment of any tribunal competent to decide it.2 If, however, the doctrine can be maintained, it is obvious, that the public service must be continually liable to very great embarrassments in all eases, where the militia are called into the public service in connexion with the regular troops.

1 8 Mass. Rep. Supp. 549, 550; 5 Hall's Amer. Law Journ. 495; 1 Kent's Comm. Lect. 12, p. 244 to 247.
2 1 Kent's Comm. Lect. 12, p. 244 to 247.

CHAPTER XXIII.
POWER OVER SEAT OF GOVERNMENT AND OTHER CEDED PLACES.

§ 1211. The next power of congress is, "to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the SEAT OF THE GOVERNMENT of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection Of FORTS, MAGAZINES, ARSENALS, and other needful BUILDINGS."

§ 1212. This clause was not in the original draft of the constitution; but was referred to a committee, who reported in its favour; and it was adopted into the constitution with a slight amendment without any apparent objection.1

§ 1213. The indispensable necessity of complete and exclusive power, on the part of the congress, at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, and one might say of the World, by virtue of its general supremacy. Without it not only the public authorities might be insulted, and their proceedings be interrupted with impunity; but the public archives might be in danger of violation, and destruction, and a dependence of the members of the national government on the state authorities for protection in the discharge of their functions be created, which would bring on the national councils the imputation of being subjected

1 Journ. of Convent. 222, 260. 328, 329, 358.

to undue awe and influence, and might, in times of high excitement, expose their lives to jeopardy. It never could be safe to leave in possession of any state the exclusive power to decide, whether the functionaries of the national government should have the moral or physical power to perform their duties.1 It might subject the favoured state to the most unrelenting jealousy of the other states, and introduce earnest controversies from time to time respecting the removal of the seat of government.

§ 1214. Nor can the cession be justly an object of jealousy to any state; or in the slightest degree impair its sovereignty. The ceded district is of a very narrow extent; and it rests in the option of the state, whether it shall be made or not. There can be little doubt, that the inhabitants composing it would receive with thankfulness such a blessing, since their own importance would be thereby increased, their interests be subserved, and their rights be under the immediate protection of the representatives of the whole Union.2 It is not improbable, that an occurrence, at the very close of the revolutionary war, had a great effect in introducing this provision into the constitution. At the period alluded to, the congress, then sitting at Philadelphia, was surrounded and insulted by a small, but insolent body of mutineers of the continental army. Congress applied to the executive authority of Pennsylvania for defence; but, under the ill-conceived constitution of the state at that time, the executive power was vested in a council consisting of thirteen members; and they possessed, or exhibited so little energy, and such apparent intimidation, that congress indignantly removed to New-Jersey,

1 The Federalist, No. 43; 2 Elliot's Deb. 92, 321,322, 326.
2 The Federalist, No. 43; 2 Elliot's Deb. 92, 321, 322, 326, 327.

whose inhabitants welcomed them with promises of defending them. Congress remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, they adjourned to Annapolis. The general

dissatisfaction with the proceedings of Pennsylvania, and the degrading spectacle of a fugitive congress, were sufficiently striking to produce this remedy.1 Indeed, if such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence, as it would have been offensive to their honour.

§ 1215. And yet this clause did not escape the common fate of most of the powers of the national government. It was represented, as peculiarly dangerous. It may, it was said, become a soft of public sanctuary, with exclusive privileges and immunities of every sort. It may be the very spot for the establishment of tyranny, mid of refuge of the oppressors of the people. The inhabitants will be answerable to no laws, except those of congress. A powerful army may be here kept on foot; and the most oppressive and sanguinary laws may be passed to govern the district.2 Nay, at the distance of fourteen years after the constitution had quietly gone into operation, and this power had been acted upon with a moderation, as commendable, as it ought to be satisfactory, a learned commentator expressed regret at the extent of the power, and intimated in no inexplicit terms his fears for the future. "A system of

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1 Rawle on Const. ch. 9, p. 112, 113.

2 2 Elliot's Debates, 320, 321, 323, 324, 325, 326; Id. 115. -- Amendments limiting the power of congress to such regulations, as respect time police and good government of the district, were proposed by several or the states at the time of the adoption of the constitution. But they have been silently abandoned. 1 Tucker's Black. Comm. App. 276, 374.

laws," says he, "incompatible with the nature and principles of a representative democracy, though not likely to be introduced at once, may be matured by degrees, and diffuse its influence through the states, and finally lay the foundation of the most important changes in the nature of the federal government. Let foreigners be enabled to hold lands, and transmit them by inheritance, or devise; let the preference to males, and the rights or primogeniture he revived with the doctrine of entails; and aristocracy will neither want a ladder to climb by, nor a base for its support.1"

§ 1216. What a superstructure to be erected on such a narrow foundation! Several or the states now permit foreigners to hold and transmit lands; and yet their liberties are not overwhelmed. The whole South, before the revolution, allowed and cherished the system of primogeniture; and yet they possessed, and transmitted to their children their colonial rights and privileges, and achieved under this very system the independence of the country. The system of entails is still the law of several of the states; and yet no danger has yet assailed them. They possess, and enjoy the fruits of republican industry and frugality, without any landed or other aristocracy. And yet the petty district of ten miles square is to overrule in its policy and legislation all, that is venerable and admirable in state legislation! The states, and the people of the states are represented in congress. The district has no representatives there; but is subjected to the exclusive legislation of the former. And yet congress, at home republican, will here nourish aristocracy. The states will here lay the foundation for the destruction of their

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1 1 Tucker's Black. Comm. App. 277.

own institutions, rights, and sovereignty. At home, they will follow the legislation of the district, instead of guiding it by their precept and example. They will choose to be the engines of tyranny and oppression in the district, that they may become enslaved within their own territorial sovereignty. What, but a disposition to indulge in all sorts of delusions and alarms, could create such extraordinary flights of imagination? Can such things be, and overcome us, like a summer's cloud, without our special wonder? At this distance of time, it seems wholly unnecessary to refute the suggestions, which have been so ingeniously urged. If they prove any thing, they prove, that there ought to be no government, because no persons can be found worthy of the trust.

§ 1217. The seat of government has now, for more than thirty years, been permanently fixed on the river Potomac, on a tract of ten miles square, ceded by the states of Virginia and Maryland. It was selected by that great man, the boast of all America, the first in war, the first in peace, and the first in the hearts of his countrymen. It bears his name; it is the monument of his fame and wisdom. May it be for ever consecrated to its present noble purpose, capitoli immobile saxum!

§ 1218. The inhabitants enjoy all their civil, religious, and political rights. They live substantially under the same laws, as at the time of the cession; such changes only having been made, as have been devised, and sought by themselves. They are not indeed citizens of any state, entitled to the privileges of such; but they are citizens of the United States. They have no immediate representatives in congress. But they may justly boast, that they live under a paternal government, attentive to their wants, and zealous for their

welfare. They, as yet, possess no local legislature; and have, as yet, not desired to possess one. A learned commentator has doubted, whether congress can create such a legislature, because k is the delegation of a delegated authority.1 A very different opinion was expressed by the Federalist; for it was said, that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them." 2 In point of fact, the corporations of the three cities within its limits possess and exercise a delegated power of legislation under their charters, granted by congress, to the full extent of their municipal wants, without any constitutional scruple, or surmise of doubt.

§ 1219. The other part of the power, giving exclusive legislation over places ceded for the erection of forts, magazines, &c., seems still more necessary for the public convenience and safety. The public money expended on such places, and the public property deposited in them, and the nature of the military duties, which may be required there, all demand, that they should be exempted from state authority. In truth, it would be wholly improper, that places, on which the security of the entire Union may depend, should be subjected to the control of any member of it. The power, indeed, is wholly unexceptionable; since it can only be exercised at the will of the state; and therefore it is placed beyond all reasonable scruple.3 Yet, it did not escape without the scrutinizing jealousy of the opponents of the constitution, and was denounced, as dangerous to state sovereignty.4

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1 1 Tucker's Black. Comm. App. 278.

2 The Federalist. No. 43.

3 The Federalist, No. 43. See also United States v. Bevans, 3 Wheat.R. 336, 388.

4 2 Elliot's Debates, 145.

§ 1220. A great variety of cessions have been made by the states under this power. And generally there has been a reservation of the right to serve all state process, civil and criminal, upon persons found therein. This reservation has not been thought at all inconsistent with the provision of the constitution; for the state process, quoad hoc, becomes the process of the United States, and the general power of exclusive legislation remains with congress. Thus, these places are not capable of being made a sanctuary for fugitives, to exempt them from acts done within, and cognizable by, the states, to which the territory belonged; and at the same time congress is enabled to accomplish the great objects of the power.1

§ 1221. The power of Congress to exercise exclusive jurisdiction over these ceded places is conferred on that body, as the legislature of the Union; and cannot be exercised in any other character. A law passed in pursuance of it is the supreme law of the land, and binding on all the states, and cannot be defeated by them. The power to pass such a law carries with it all the incidental powers to give it complete and effectual execution; and such a law may be extended in its operation incidentally throughout the United States, if congress think it necessary so to do. But. if intended to have efficiency beyond the district, language must be used in the act expressive of such an intention; otherwise it will be deemed purely local.2

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1 Commonwealth v. Clary, 8 Mass. R. 72; United States v. Cornell, 2 Mason R. 60; Rawle on Constitution, ch. 27, p. 238; Sergeant on Constitution, ch. 28, [ch. 30;] 1 Kent's Comm. Lect. 19, p. 402 to 404.

2 Cohens v. Virginia, 6 Wheat. R. 264, 424, 425, 426, 427, 428; Sergeant on Constitution, ch. 28, [ch. 30 ;] 1 Kent. Comm. Lect. 19, p. 402 to 404; Rawle on Constitution, ch. 27, p. 238, 239; Loughborough v. Blake, 5 Wheat. R. 322, 324.

§ 1222. It follows from this review of the clause, that the states cannot take cognizance of any acts done ira the ceded places after the cession; and, on the other hand, the inhabitants o[those places cease to be inhabitants of the state, and can no longer exercise any civil or political rights under the laws of the state.1 But if there has been no cession by the state of the place, although it has been constantly occupied and used, under purchase, or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect.2

§ 1223. Upon a recent occasion, the nature and effect of the exclusive power of legislation, thus given by the constitution in these ceded places, came under the consideration of the Supreme Court, and was much discussed. It was argued, that all such legislation by congress was purely local, like that exercised by a territorial legislature; and was not to be deemed legislation by congress in the character of the legislature of the Union. The object of the argument was to establish, that a law, made in or for such ceded places, had no extra-territorial force or obligation, it not being a law of the United States. The reasoning of the court affirming, that such an act was a law of the United

States, and that congress in passing it acted, as the legislature of the Union, can be best conveyed in their own language, and would be impaired by an abridgment.

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1 8 Mass. R. 72; 1 Hall's Journal of Jurisp. 53; 1 Kent's Comm. Lect. 19, p. 403, 404.

2 The People v. Godfrey, 17 Johns. R. 225; Commonwealth v. Young, 1 Hall's Journal of Jurisp. 47; 1 Kent's Comm. Lect. 19, p. 401, 404; Sergeant on Constitution, ch. 28. [ch. 30 ;] Rawle on Constitution, ch. 27, p. 238 to 240.

§ 1224. "In the enumeration of the powers of congress, which is made in the eighth section of the first article, we find that of exercising exclusive legislation over such district, as shall become the seat of government. This power, like all others, which are specified, is conferred on congress, as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for it is in that character alone, that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced. The second clause of the sixth article declares, that 'this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land.' The clause, which gives exclusive jurisdiction, is unquestionably a part of the constitution, and, as such, binds all the United States. Those, who contend, that acts of congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule, which shall support this construction, and prove, that an act of congress, clothed in all the forms, which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

§ 1225. "One of the gentlemen sought to illustrate his proposition, that congress, when legislating for the district, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is,

they say, a court of common law, and a court of equity. Its character, when sitting as a court of common law, is as distinct from its character, when sitting as a court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other. Without inquiring, how far the union of different characters in one court may be applicable, in principle, to the union in congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity, that a mere inspection of the record gives decisive information of the character, in which the court sits, and consequently of the extent of its powers. But if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

§ 1226. "Since congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those, which are limited, we must inquire, whether there be any thing in the nature of this exclusive legislation, which necessarily confines the operation of the laws, made in virtue of this power, to the place, with a view to which they are made. Connected with the power to legislate within this district, is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in, a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states. In the act for the punishment of crimes against the United States, murder

committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus congress legislates in the same act, under its exclusive and its limited powers.

§ 1227. "The act proceeds to direct, that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and, punishes any person, who shall rescue such body during its conveyance from the place of execution to the surgeon, to whom it is to be delivered. Let these actual provisions of the law, or any other provisions, which can be made on the subject, be considered with a view to the character, in which congress acts, when exercising its powers of exclusive legislation. If congress is to be considered merely as a local legislature, invested, as to this object, with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offence be tried in any other court, than that of the place, in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign,

and the individual punished, who, within that jurisdiction, shall rescue the body? Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive, and acknowledge its incompetency to such a course of legislation. If congress be not equally incompetent, it is, because that body unites the powers of local legislation with those, which are to op-

erate through the Union, and may use the last in aid of the first; or, because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual; and the incidental power may be exercised throughout the Union, because the principal power is given to that body, as the legislature of the Union.

§ 1228. "So, in the same act, a person, who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dockyard, magazine, or other place, or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, &c. he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, &c. It is clear, that congress cannot punish felonies generally; and, of consequence, cannot punish misprision of felony. It is equally clear, that a state legislature, the state of Maryland for example, cannot punish those, who, in another state, conceal a felony committed in Maryland. How, then, is it, that congress, legislating exclusively for a fort, punishes those, who, out of that fort, conceal a felony committed within it?

§ 1229. "The solution, and the only solution of the difficulty, is, that the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state, in which the act has been committed, the government cannot pursue him into another state, and apprehend him there; but must demand him from the executive power of that other state. If congress were to be considered merely, as the local legislature for the fort, or other place, in which the of-

fence might be committed, then this principle would apply to them, as to other local legislatures; and the felon, who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know, that the principle does not apply; and the reason is, that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers, which are necessary to its complete and effectual execution.

§ 1230. "Whether any particular law be designed to operate without the district or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power, so exercised, be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it, which is allowed in such a case."1

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1 Cohens, v. Virginia, 6 Wheat. R. 424 to 429.

CHAPTER XXIV.

POWERS OF CONGRESS -- INCIDENTAL.

§ 1931. THE next power of congress is, "to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any, department, or officer thereof."

§ 1232. Few powers of the government were at the time of the adoption of the constitution assailed with more severe invective, and more declamatory intemperance, than this.1 And it has ever since been made a theme of constant attack, and extravagant jealousy.2 Yet it is difficult to perceive the grounds, upon which it can be maintained, or the logic, by which it can be reasoned out. It is only declaratory, of a truth, which would have resulted by necessary and unavoidable implication from the very act of establishing the national government, and vesting it with certain powers. What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the means necessary to its execution? What is a legislative power, but a power of making laws? What are the means to execute a legislative power, but laws? What is the power for instance, of laying and collecting taxes, but a legislative power, or a power to make laws to lay and collect taxes? What

1 The Federalist, No. 33, 44; 1 Elliot's Deb. 293, 294, 300; 2 Elliot's Deb. 196, 342.

2 1 Tuck. Black. Comm. App. 286, 287; 4 Elliot's Deb. 216, 217, 224, 225.

are the proper means of executing such a power, but necessary and proper laws? In truth, the constitutional operation of the government would be precisely the same, if the clause were obliterated, as if it were repeated in every article.1 It would otherwise result, that the power could never be exercised; that is, the end would be required, and yet no means allowed. This would be a perfect absurdity. It would be to create powers, and compel them to remain for ever in a torpid, dormant, and paralytic state. It cannot, therefore, be denied, that the powers, given by the constitution, imply the ordinary means of execution;2 for without the substance of the power the constitution would be a dead letter. Those, who object to the article, must therefore object to the form, or the language of the provision. Let us see, if any better could be devised.3

§ 1233. There are four possible methods, which the convention might have adopted on this subject. First, they might have copied the second article of the confederation, which would have prohibited the exercise of any power not expressly delegated. If they had done so, the constitution would have been construed with so much rigour, as to disarm it of all real authority; or with so much latitude, as altogether to destroy the force of the restriction. It is obvious, that no important power delegated by the confederation was, or indeed could be executed by congress, without recurring more or less to the doctrine of construction or implica-

1 The Federalist, No. 33; 2 Elliot's Debates, 196; Hamilton on Bank, 2 Hamilton's Works, 121; M'Culloch v. Maryland, 4 Wheaton's R. 419.

2 M'Culloch v. Maryland, 4 Wheat. R. 409; 4 Elliot's Debates, 217, 218, 220, 221.

3 The Federalist, No. 44. See also President Monroe's Exposition and Message, 4th of May, 1822, p. 47; 3 Elliot's Deb. 318.

tion.1 It had, for instance, power to establish courts for the trial of prizes and piracies, to borrow money, and emit bills of credit. But how could these powers be put in operation without some other implied powers and means? The truth is, that, under the confederation, congress was from this very clause driven to [the distressing alternative, either to violate the articles by a broad latitude of construction, or to suffer the powers of the government to remain prostrate, and the public service to be wholly neglected. It is notorious, that they adopted, and were compelled to adopt the former course; and the country bore them out in what might be deemed an usurpation of authority.2 The past experience of the country was, therefore, decisive against any such restriction. It was either useless, or mischievous.3

§ 1234. Secondly. The convention might have attempted a positive enumeration of the powers comprehended under the terms, necessary anti proper. The attempt would have involved a complete digest of laws on every subject, to which the constitution relates. It must have embraced all future, as well as all present exigencies, and been accommodated to all times, and all occasions, and all changes of national situation and character. Every new application of the general power must have been foreseen and specified; for the particular powers, which are the means of attaining the objects of the general power, must, necessarily, vary with those objects; and be often properly varied, when the objects

1 The Federalist, No. 44.

2 See The Federalist, No. 38, 44; 4 Wheat. R. 423; 4 Elliot's Deb. 218, 219.

3 M'Culloch v. Maryland, 4 Wheat. R. 406, 407, 423.

remain the same.1 Who does not at once perceive, that such a course is utterly beyond human reach and foresight?2 It demands a wisdom never yet given to man; and a knowledge of the future, which belongs only to Him, whose providence directs, and governs all.

§ 1235. Thirdly. The convention might have attempted a negative enumeration of the powers, by specifying the powers, which should be excepted from the general grant. It will be at once perceived, that this task would have been equally chimerical with the foregoing; and would have involved this additional objection, that in such a case, every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions, and described the residue., by the general terms, "not necessary or proper," it must have happened, that the enumeration would comprehend a few exceptions only, and those only, which were most prominent; and therefore the least likely to be abused; and that others would

be less forcibly excepted under the residuary clause, than if there had not been any partial enumeration of exceptions.3

§ 1236. Fourthly. The convention might have been wholly silent on this head; and then (as has been already seen) the auxiliary powers, or means to carry into execution the general powers, would have resulted to the government by necessary implication; for wherever the end is required, the means are authorized; and wherever a general power to do a thing

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1 The Federalist, No. 44; 2 Elliot's Deb. 223.

2 M'Culloch v. Maryland, 4 Wheat. R. 407; 4 Elliot's Deb. 223, 224; Anderson v. Dunn, 6 Wheat. R. 204, 225, 226.

3 The Federalist, No. 44.

is given, every particular power necessary for doing it, is included. If this last course had been adopted, every objection, now urged against the clause, would have remained in full force; and the omission might have been made in critical periods a ground to assail the essential powers of the Union.1

§ 1237. If, then, the clause imports no more, than would result from necessary implication, it may be asked, why it was inserted at all. The true answer is, that such a clause was peculiarly useful, in order to avoid any doubt, which ingenuity or jealousy might raise upon the subject. Much plausible reasoning might be employed by those, who were hostile to the Union, and in favour of state power, to prejudice the people on such a subject, and to embarrass the government in all its reasonable operations. Besides; as the confederation contained a positive clause, restraining the authority of congress to powers expressly granted, there was a fitness in declaring, that that rule of interpretation should no longer prevail. The very zeal, indeed, with which the present clause has been always assailed, is the highest proof of its importance and propriety. It has narrowed down the grounds of hostility to the mere interpretation of terms.2

§ 1238. The plain import of the clause is, that congress shall have all the incidental and instrumental powers, necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted; nor is it a grant of any new power to congress. But it is merely a declaration for the removal of all uncertainty, that the means of carry-

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1 The Federalist, No. 44.

2 The Federalist, No. 33, 44.

ing into execution those, otherwise granted, are included in the grant.1 Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it.2

§ 1239. But still a ground of controversy remains open, as to the true interpretation of the terms of the clause; and it has been contested with no small share of earnestness and vigour. What, then, is the true constitutional sense of the words "necessary and proper" in this clause? It has been insisted by the advocates of a rigid interpretation, that the word "necessary" is here used in its close and most intense meaning; so that it is equivalent to absolutely and indispensably necessary. It has been said, that the constitution allows only the means, which are necessary; not those, which are merely convenient for effecting the enumerated powers. If such a latitude of construction be given to this phrase, as to give any non-enumerated power, it will go far to give every one; for there is no one, which ingenuity might not

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1 Some few statesmen have contended, that the clause gave farther powers, than mere incidental powers. But their reasoning does not seem very clear or satisfactory. See Governor Randolph's Remarks, 2 Elliot's Debates, 342; Mr. Gerry's Speech in February, 1791, 4 Elliot's Debates, 295, 227. These Speeches are, however, valuable for some striking views, which they present, of the propriety of a liberal construction of the words.

2 See Virginia Report and Resolutions, Jan., 1800, p. 33, 34; 1 Tuck. Black. Comm. App. 287, 288; President Monroe's Exposition and Message, 4th of May, 1822, p. 47; 5 Marshall's Wash. App. note 3; 1 Hamilton's Works, 117, 121.

torture into a convenience in some way or other to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase. Therefore it is, that the constitution has restrained them to the necessary means; that is to say, to those means, without which the grant of the power would be nugatory. A little difference in the degree of convenience cannot constitute the necessity, which the constitution refers to.1

§ 1240. The effect of this mode of interpretation is to exclude all choice of means; or, at most, to leave to congress in each case those only, which are most direct and simple. If, indeed, such implied powers, and such only, as can be shown to be indispensably necessary, are within the purview of the clause, there will be no end to difficulties, and the express powers must practically become a mere nullity.2 It will be found, that the operations of the government, upon any of its powers, will rarely admit of a rigid demonstration of the necessity (in this strict sense) of the particular means. In most cases, various systems or means may be resorted to, to attain the same end; and yet, with respect to each, it may be argued, that it is not constitutional, because it is not indispensable; and the end may be obtained by other means. The consequence of such reasoning would be, that, as no means could be shown to be constitutional, none could be adopted.3 For instance, con-

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1 4 Jefferson's Corresp. 525, 526; 4 Elliot's Deb. 216, 217, 224, 225, 267; M'Culloch v. Maryland, 4 Wheat. R. 412, 413.

2 Hamilton on Bank, 1 Hamilton's Works, 119; 5 Marshall's Wash. App. note 3, p. 9; Mr. Madison, 4 Elliot's Deb. 223.

3 United States v. Fisher, 2 Cranch, 358; 1 Peters's Cond. R. 421; Hamilton on Bank, 1 Hamilton's Works, 119; 5 Marshall's Wash. note 3, p. 9, 10; Mr Madison, 4 Elliot's Deb. 223.

gress possess the power to make war, and to raise armies, and incidentally to erect fortifications, and purchase cannon and ammunition, and other munitions of war. But war may be carried on without fortifications, cannon, and ammunition. No particular kind of arms can be shown to be absolutely necessary; because various sorts of arms of different convenience, power, and utility are, or may be resorted to by different nations. What then becomes of the power? Congress has power to borrow money, and to provide for the payment of the public debt; yet no particular method is indispensable to these ends. They may be attained by various means. Congress has power to provide a navy; but no particular size, or form, or equipment of ships is indispensable. The means of providing a naval establishment are very various; and the applications of them admit of infinite shades of opinion, as to their convenience, utility, and necessity. What then is to be done? Are the powers to remain dormant? Would it not be absurd to say, that congress did not possess the choice of means under such circumstances, and ought not to be empowered to select, and use any means, which are in fact conducive to the exercise of the powers granted by the constitution?1 Take another example; congress has, doubtless, the authority, under the power to regulate commerce, to erect lighthouses, beacons, buoys, and public piers, and authorize the employment of pilots.2 But it cannot be affirmed, that the exercise of these powers is in a strict sense necessary; or that the power to regulate commerce would be nugatory without establishments of this na-

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1 United States v. Fisher, 2 Cranch. R. 358; 1 Peters's Condens. R. 421.

2 See 4 Elliot's Debates, 265, 280. .

ture.1 In truth, no particular regulation of commerce can ever be shown to be exclusively and indispensably necessary; and thus we should be driven to admit, that all regulations are within the scope of the power, or that none are. If there be any general principle, which is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, it is, that every power, vested in a government, is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the end of such power; unless they are excepted in the constitution, or are immoral, or are contrary to the essential objects of political society.2

§ 1241. There is another difficulty in the strict construction above alluded to, that it makes the constitutional authority depend upon casual and temporary circumstances, which may produce a necessity to-day, and change it to-morrow. This alone shows the fallacy of the reasoning. The expediency of exercising a particular power at a particular time must, indeed, depend on circumstances, but the constitutional right of exercising it must be uniform and invariable, the same to-day as to-morrow.3

§ 1249. Neither can the degree, in which a measure is necessary, ever be a test of the legal right to adopt it. That must be a matter of opinion, (upon which different men, and different bodies may form opposite judgments,) and can only be a test of expediency.

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1 Hamilton on Bank, 1 Hamilton's Works, 120.

2 Hamilton on Bank, 1 Hamilton's Works, 112.

3 Hamilton on Bank, 1 Hamilton's Works, 117; 5 Marshall's Wash. App. note 3, p. 8.

The relation between the measure and the end, between the nature of the means employed towards the execution of a power, and the object of that power, must be the criterion of constitutionality; and not the greater or less of necessity or expediency.1 If the legislature possesses a right of choice as to the means, who can limit that choice? Who is appointed an umpire, or arbiter in cases, where a discretion is confided to a government? The very idea of such a controlling authority in the exercise of its powers is a virtual denial of the supremacy of the government in regard to its powers. It repeals the supremacy of the national government, proclaimed in the constitution.

§ 1243. It is equally certain, that neither the grammatical, nor the popular sense of the word, "necessary," requires any such construction. According to both, "necessary" often means no more than needful, requisite, incidental, useful, or conducive to. It is a common mode of expression to say, that it is necessary for a government, or a person to do this or that thing, when nothing more is intended or understood, than that the interest of the government or person requires, or will be promoted by the doing of this or that thing. Every one's mind will at once suggest to him many illustrations of the use of the word in this sense.2 To employ the means, necessary to an end, is generally understood, as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. § 1244. Such is the character of human language,

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1 Hamilton on Bank, 1 Hamilton's Works, 129, 120; 5 Marshall's Wash. App. note 3, p. 9, 10; M'Culloch v. Maryland, 4 Wheat. R. 423.

2 Hamilton on Bank, 1 Hamilton's Works, 118; 5 Marshall's Wash. App. note 3, p. 9.

that no word conveys to the mind-in all situations one single definite idea; and nothing is more common, than to use words in a figurative sense. Almost all compositions contain. words, which, taken in their rigorous sense, would convey a meaning, different from that, which is obviously intended. It is essential to just interpretation, that many words, which import something excessive, should be understood in a more mitigated sense; in a sense, which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is o{ten connected with other words, which increase or diminish the impression, which the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. It may be little necessary, less necessary, or least necessary. To no mind would the same idea be conveyed by any two of these several phrases. The tenth section of the first article of the constitution furnishes a strong illustration of this very use of the word. It contains a prohibition upon any state to "lay any imposts or duties, &c. except what may be absolutely necessary for executing its inspection laws." No one can compare this clause with the other, on which we are commenting, without being struck with the conviction, that the word "absolutely," here prefixed to "necessary," was intended to distinguish it from the sense, in which, standing alone, it is used in the other.1

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1 M'CuIloch v. Maryland, 4 Wheaton's R. 413 to 415.--In this case (4 Wheaton's R. 411 to 425,) there is a very elaborat argument of the Supreme Court upon the whole of this subject, a portion of which has been already extracted in the preceding Commentaries, on the rules of interpretation of the constitution.

§ 1245. That the restrictive interpretation must be abandoned; in regard to certain powers of the government, cannot be reasonably doubted. It is universally conceded, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. If, then, the restrictive interpretation must be abandoned, in order to justify the constitutional exercise of the power to punish; whence is the rule derived, which would reinstate it, when the government would carry its powers into operation, by means not vindictive in their nature? If the word, "necessary" means needful, requisite, essential, conducive to, to let in the power of punishment, why is it not equally comprehensive, when applied to other means used to facilitate the execution of the powers of the government?1

§ 1246. The restrictive interpretation is also contrary to a sound maxim of construction, generally admitted, namely, that the powers contained in a constitution of government,-especially those, which concern the general administration of the affairs of the country, such as its finances, its trade, and its defence, ought to be liberally expounded in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcations of the boundaries of its powers; but on the nature and objects of government itself. The means, by which national exigencies are provided for, national inconveniences obviated, and national prosperity pro-

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1 M'CuIloch v. Maryland, 4 Wheat. R. 418.

moted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection, and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities, entrusted to a government, on principles of liberal construction.1

§ 1247. It is no valid objection to this doctrine to say, that it is calculated to extend the powers of the government throughout the entire sphere of state legislation. The same thing may be said, and has been said, in regard to every exercise of power by implication and construction. There is always some chance of error, or abuse of every power; but this furnishes no ground of objection against the power; and certainly no reason for an adherence to the most rigid construction of its terms, which would at once arrest the whole movements of the government.2 The remedy for any abuse, or misconstruction of the power, is the same, as in similar abuses and misconstructions of the state governments. It is by an appeal to the other departments of the government; and finally to the people, In the exercise of their elective franchises.3

§ 1248. There are yet other grounds against the restrictive interpretation derived from the language, and the character of the provision. The language is, that congress shall have power "to make all laws, which "shall be necessary and proper." If the word "necessary" were used in the strict and rigorous sense contended for, it would be an extraordinary departure from the usual course of the human mind, as exhibited in solemn instruments, to add another word "proper;"

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1 Hamilton on Bank, 1 Hamilton's Works, 120,121.

2 Hamilton on Bank, 1 Hamilton's Works, 122.

3 The Federalist, No. 33, 44.

the only possible effect of which is to qualify that strict and rigorous meaning, and to present clearly the idea of a choice of means in the course of legislation.1 If no means can be resorted to, but such as are indispensably necessary, there can be neither sense, nor utility in adding the other word; for the necessity shuts out from view all consideration of the propriety of the means, as contradistinguished from the former. But if the intention was to use the word "necessary" in its more liberal sense, then there is a peculiar fitness in the other word. It has a sense at once admonitory, and directory. it requires, that the means should be, bona fide, appropriate to the end.

§ 1249. The character of the clause equally forbids any presumption of an intention to use the restrictive interpretation. In the first place, the clause is placed among the powers of congress, and not among the limitations on those powers. In the next place, its terms purport to enlarge, and not to diminish, the powers vested in the government. It purports, on its face, to be an additional power, not a restriction on those already granted.2 If it does not, in fact, (as seems the true construction,) give any new powers, it affirms the right to use all necessary and proper means to carry 'into execution the other powers, and thus makes an express power, what would otherwise be merely an implied power. In either aspect, it is impossible to construe it to be a restriction. If it have any effect, it is to remove the implication of any restriction. If a restriction had been intended, it is impossible, that the framers of the constitution should have concealed it

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1 M'Culloch v. Maryland, 4 Wheat. R. 418, 419.

2 M'CuIloch v. Maryland, 4 Wheat. R. 419, 420.

under phraseology, which purports to enlarge, or at least give the most ample scope to the other powers. There was every motive on their part to give point and clearness to every restriction of national power; for they well knew, that the national government would be more endangered in its adoption by its supposed strength, than by its weakness. It is inconceivable, that they should have disguised a restriction upon its powers under the form of a grant of power. They would have sought other terms, and have imposed the restraint by negatives.1 And what is equally strong, no

one, in or out of the state conventions, at the time when the constitution was put upon its deliverance before the people, ever dreamed of or suggested, that it contained a restriction of power. The whole argument on each side, of attack and of defence, gave it the positive form of an express power, and not of an express restriction.

§ 1250. Upon the whole, the result of the most careful examination of this clause is, that, if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment, in the selection of measures to carry into execution the constitutional powers of the national government. The motive for its insertion doubtless was, the desire to remove all possible doubt respecting the right to legislate on that vast mass of incidental powers, which must be involved in the constitution, if that instrument be not a splendid pageant, or a delusive phantom of sovereignty. Let the end be legitimate; let it be within the scope of the constitution; and all means, which are appropriate, which are

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1 M'Culloch v. Maryland, 4 Wheat. R. 420.

plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument, are constitutional.1

§ 1251. It may be well, in this connexion, to mention another sort of implied power, which has been called with great propriety a resulting power, arising from the aggregate powers of the national government. It Will not be doubted, for instance, that, if the United States should make a conquest of any of the territories of its neighbours, the national government would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incidentof the powers specially enumerated.2 It may, however, be deemed, if an incident to any, an incident to the power to make war. Other instances or resulting powers will easily suggest themselves. The United States are nowhere declared in the constitution to be a sovereignty entitled to sue, though jurisdiction is given to the national courts over controversies, to which the United States shall be a party. It is a natural incident, resulting from the sovereignty and character of the national government.3 So the United States, in their political capacity, have a right to enter into a contract, (although it is not expressly provided for by the constitution,) for it is an incident to their general fight or sovereignty, so far as it is appro-

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1 M'Culloch v. Maryland, 4 Wheat. R. 420, 421, 423. See also 4 Elliot's Debates, 220, 221, 222, 223, 224, 225; 2 Elliot's Debates, 196, 342; 5 Marsh. Wash. App. No. 3; 2 American Museum, 536; Anderson v. Dunn, 6 Wheat. It. 204, 225, 226; Hamilton on Bank, 1 Hamilton's Works, 111 to 123.

2 Hamilton on Bank, 1 Hamilton's Works, 115.

3 See Dugan v. United States, 3 Wheat. R. 173, 179, 180.

priate to any of the ends of the government, and within the constitutional range of its powers.1 So congress possess power to punish offences committed on board of the public ships of War of the government by persons not in the military or naval service of the United States, whether they are in port, or at sea; for the jurisdiction on board of public ships is every, where deemed exclusively to belong to the sovereign.2

§ 1252. And not only may implied powers, but implied exemptions from state authority, exist, although not expressly provided for by law. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions, which are public in their nature, are examples in point. It has never been doubted, that all, who are employed in them, are protected, while in the line of their duty, from state control; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts, by which those institutions are created; and is preserved to them by the judicial department, as a part of its functions.3 A contractor for supplying a military post with provisions cannot be restrained from making purchases within a state, or from transporting provisions to the place, at which troops are stationed. He could not be taxed, or fined, or lawfully obstructed, in so doing.4 These incidents necessarily flow from the supremacy of the powers of the Union, within their legitimate sphere of action.

§ 1253. It would be almost impracticable, if it were not useless, to enumerate the various instances, in

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1 United States v. Tingey, 5 Peters's R. 115.

2 United States v. Bevans, 3 Wheaton's R. 388; The Exchange, 7 Cranch, 116; S.C. 2 Peters's Cond. R. 439.

3 0sborn v. Bank of U. States, 9 Wheat. R. 365, 366.

4 Id. 367.

which congress, in the progress of the government, have made use of incidental and implied means to execute its powers. They are almost infinitely varied in their ramifications and details. It is proposed, however, to take notice of the principal measures, which have been contested, as not within the scope of the powers. of congress, and which may be distinctly traced in the operations of the government, and in leading party divisions.1

1 Some minor points will be found in the debates collected in 4 Elliot's Debates, 139, 141, 229, 234, 235, 238, 239, 240, 243, 249, 251, 252, 261, 265, 266, 270, 271, 280. There is no express power given by the constitution to erect forts, or magazines, or light-houses, or piers, or buoys, or public buildings, or to make surveys of the coast; but they have been constantly deemed incidental to the general powers. Mr. Bayard's Speech in 1807, (4 Elliot's Debates, 265;) Mr. Pickering's Speech, 1817, (4 Elliot's Debates, 280.)

CHAPTER XXIV.

POWERS OF CONGRESS -- INCIDENTAL.

§ 1931. THE next power of congress is, "to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any, department, or officer thereof."

§ 1232. Few powers of the government were at the time of the adoption of the constitution assailed with more severe invective, and more declamatory intemperance, than this.1 And it has ever since been made a theme of constant attack, and extravagant jealousy.2 Yet it is difficult to perceive the grounds, upon which it can be maintained, or the logic, by which it can be reasoned out. It is only declaratory, of a truth, which would have resulted by necessary and unavoidable implication from the very act of establishing the national government, and vesting it with certain powers. What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the means necessary to its execution? What is a legislative power, but a power of making laws? What are the means to execute a legislative power, but laws? What is the power for instance, of laying and collecting taxes, but a legislative power, or a power to make laws to lay and collect taxes? What

1 The Federalist, No. 33, 44; 1 Elliot's Deb. 293, 294, 300; 2 Elliot's Deb. 196, 342.

2 1 Tuck. Black. Comm. App. 286, 287; 4 Elliot's Deb. 216, 217, 224, 225.

are the proper means of executing such a power, but necessary and proper laws? In truth, the constitutional operation of the government would be precisely the same, if the clause were obliterated, as if it were repeated in every article.1 It would otherwise result, that the power could never be exercised; that is, the end would be required, and yet no means allowed. This would be a perfect absurdity. It would be to create powers, and compel them to remain for ever in a torpid, dormant, and paralytic state. It cannot, therefore, be denied, that the powers, given by the constitution, imply the ordinary means of execution;2 for without the substance of the power the constitution would be a dead letter. Those, who object to the article, must therefore object to the form, or the language of the provision. Let us see, if any better could be devised.3

§ 1233. There are four possible methods, which the convention might have adopted on this subject. First, they might have copied the second article of the confederation, which would have prohibited the exercise of any power not expressly delegated. If they had done so, the constitution would have been construed with so much rigour, as to disarm it of all real authority; or with so much latitude, as altogether to destroy the force of the restriction. It is obvious, that no important power delegated by the confederation was, or indeed could be executed by congress, without recurring more or less to the doctrine of construction or implica-

1 The Federalist, No. 33; 2 Elliot's Debates, 196; Hamilton on Bank, 2 Hamilton's Works, 121; M'Culloch v. Maryland, 4 Wheaton's R. 419.

2 M'Culloch v. Maryland, 4 Wheat. R. 409; 4 Elliot's Debates, 217, 218, 220, 221.

3 The Federalist, No. 44. See also President Monroe's Exposition and Message, 4th of May, 1822, p. 47; 3 Elliot's Deb. 318.

tion.1 It had, for instance, power to establish courts for the trial of prizes and piracies, to borrow money, and emit bills of credit. But how could these powers be put in operation without some other implied powers and means? The truth is, that, under the confederation, congress was from this very clause driven to [the distressing alternative,

either to violate the articles by a broad latitude of construction, or to suffer the powers of the government to remain prostrate, and the public service to be wholly neglected. It is notorious, that they adopted, and were compelled to adopt the former course; and the country bore them out in what might be deemed an usurpation of authority.2 The past experience of the country was, therefore, decisive against any such restriction. It was either useless, or mischievous.3

§ 1234. Secondly. The convention might have attempted a positive enumeration of the powers comprehended under the terms, necessary anti proper. The attempt would have involved a complete digest of laws on every subject, to which the constitution relates. It must have embraced all future, as well as all present exigencies, and been accommodated to all times, and all occasions, and all changes of national situation and character. Every new application of the general power must have been foreseen and specified; for the particular powers, which are the means of attaining the objects of the general power, must, necessarily, vary with those objects; and be often properly varied, when the objects

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1 The Federalist, No. 44.

2 See The Federalist, No. 38, 44; 4 Wheat. R. 423; 4 Elliot's Deb. 218, 219.

3 M'Culloch v. Maryland, 4 Wheat. R. 406, 407, 423.

remain the same.1 Who does not at once perceive, that such a course is utterly beyond human reach and foresight?2 It demands a wisdom never yet given to man; and a knowledge of the future, which belongs only to Him, whose providence directs, and governs all.

§ 1235. Thirdly. The convention might have attempted a negative enumeration of the powers, by specifying the powers, which should be excepted from the general grant. It will be at once perceived, that this task would have been equally chimerical with the foregoing; and would have involved this additional objection, that in such a case, every defect in the enumeration would have been equivalent to a positive grant of authority. If, to avoid this consequence, they had attempted a partial enumeration of the exceptions, and described the residue., by the general terms, "not necessary or proper," it must have happened, that the enumeration would comprehend a few exceptions only, and those only, which were most prominent; and therefore the least likely to be abused; and that others would be less forcibly excepted under the residuary clause, than if there had not been any partial enumeration of exceptions.3

§ 1236. Fourthly. The convention might have been wholly silent on this head; and then (as has been already seen) the auxiliary powers, or means to carry into execution the general powers, would have resulted to the government by necessary implication; for wherever the end is required, the means are authorized; and wherever a general power to do a thing

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1 The Federalist, No. 44; 2 Elliot's Deb. 223.

2 M'Culloch v. Maryland, 4 Wheat. R. 407; 4 Elliot's Deb. 223, 224; Anderson v. Dunn, 6 Wheat. R. 204, 225, 226.

3 The Federalist, No. 44.

is given, every particular power necessary for doing it, is included. If this last course had been adopted, every objection, now urged against the clause, would have remained in full force; and the omission might have been made in critical periods a ground to assail the essential powers of the Union.1

§ 1237. If, then, the clause imports no more, than would result from necessary implication, it may be asked, why it was inserted at all. The true answer is, that such a clause was peculiarly useful, in order to avoid any doubt, which ingenuity or jealousy might raise upon the subject. Much plausible reasoning might be employed by those, who were hostile to the Union, and in favour of state power, to prejudice the people on such a subject, and to embarrass the government in all its reasonable operations. Besides; as the confederation contained a positive clause, restraining the authority of congress to powers expressly granted, there was a fitness in declaring, that that rule of interpretation should no longer prevail. The very zeal, indeed, with which the present clause has been always assailed, is the highest proof of its importance and propriety. It has narrowed down the grounds of hostility to the mere interpretation of terms.2

§ 1238. The plain import of the clause is, that congress shall have all the incidental and instrumental powers, necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically granted; nor is it a grant of any new power to congress. But it is merely a declaration for the removal of all uncertainty, that the means of carry-

1 The Federalist, No. 44.

2 The Federalist, No. 33, 44.

ing into execution those, otherwise granted, are included in the grant.1 Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be, whether it is properly an incident to an express power, and necessary to its execution. If it be, then it may be exercised by congress. If not, congress cannot exercise it.2

§ 1239. But still a ground of controversy remains open, as to the true interpretation of the terms of the clause; and it has been contested with no small share of earnestness and vigour. What, then, is the true constitutional sense of the words "necessary and proper" in this clause? It has been insisted by the advocates of a rigid interpretation, that the word "necessary" is here used in its close and most intense meaning; so that it is equivalent to absolutely and indispensably necessary. It has been said, that the constitution allows only the means, which are necessary; not those, which are merely convenient for effecting the enumerated powers. If such a latitude of construction be given to this phrase, as to give any non-enumerated power, it will go far to give every one; for there is no one, which ingenuity might not

1 Some few statesmen have contended, that the clause gave farther powers, than mere incidental powers. But their reasoning does not seem very clear or satisfactory. See Governor Randolph's Remarks, 2 Elliot's Debates, 342; Mr. Gerry's Speech in February, 1791, 4 Elliot's Debates, 295, 227. These Speeches are, however, valuable for some striking views, which they present, of the propriety of a liberal construction of the words.

2 See Virginia Report and Resolutions, Jan., 1800, p. 33, 34; 1 Tuck. Black. Comm. App. 287, 288; President Monroe's Exposition and Message, 4th of May, 1822, p. 47; 5 Marshall's Wash. App. note 3; 1 Hamilton's Works, 117, 121.

torture into a convenience in some way or other to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase. Therefore it is, that the constitution has restrained them to the necessary means; that is to say, to those means, without which the grant of the power would be nugatory. A little difference in the degree of convenience cannot constitute the necessity, which the constitution refers to.1

§ 1240. The effect of this mode of interpretation is to exclude all choice of means; or, at most, to leave to congress in each case those only, which are most direct and simple. If, indeed, such implied powers, and such only, as can be shown to be indispensably necessary, are within the purview of the clause, there will be no end to difficulties, and the express powers must practically become a mere nullity.2 It will be found, that the operations of the government, upon any of its powers, will rarely admit of a rigid demonstration of the necessity (in this strict sense) of the particular means. In most cases, various systems or means may be resorted to, to attain the same end; and yet, with respect to each, it may be argued, that it is not constitutional, because it is not indispensable; and the end may be obtained by other means. The consequence of such reasoning would be, that, as no means could be shown to be constitutional, none could be adopted.3 For instance, con-

1 4 Jefferson's Corresp. 525, 526; 4 Elliot's Deb. 216, 217, 224, 225, 267; M'Culloch v. Maryland, 4 Wheat. R. 412, 413.

2 Hamilton on Bank, 1 Hamilton's Works, 119; 5 Marshall's Wash. App. note 3, p. 9; Mr. Madison, 4 Elliot's Deb. 223.

3 United States v. Fisher, 2 Cranch, 358; 1 Peters's Cond. R. 421; Hamilton on Bank, 1 Hamilton's Works, 119; 5 Marshall's Wash. note 3, p. 9, 10; Mr Madison, 4 Elliot's Deb. 223.

gress possess the power to make war, and to raise armies, and incidentally to erect fortifications, and purchase cannon and ammunition, and other munitions of war. But war may be carried on without fortifications, cannon, and ammunition. No particular kind of arms can be shown to be absolutely necessary; because various sorts of arms of different convenience, power, and utility are, or may be resorted to by different nations. What then becomes of the power? Congress has power to borrow money, and to provide for the payment of the public debt; yet no particular method is indispensable to these ends. They may be attained by various means. Congress has power to provide a

navy; but no particular size, or form, or equipment of ships is indispensable. The means of providing a naval establishment are very various; and the applications of them admit of infinite shades of opinion, as to their convenience, utility, and necessity. What then is to be done? Are the powers to remain dormant? Would it not be absurd to say, that congress did not possess the choice of means under such circumstances, and ought not to be empowered to select, and use any means, which are in fact conducive to the exercise of the powers granted by the constitution?1 Take another example; congress has, doubtless, the authority, under the power to regulate commerce, to erect lighthouses, beacons, buoys, and public piers, and authorize the employment of pilots.2 But it cannot be affirmed, that the exercise of these powers is in a strict sense necessary; or that the power to regulate commerce would be nugatory without establishments of this na-

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1 United States v. Fisher, 2 Cranch. R. 358; 1 Peters's Condens. R. 421.

2 See 4 Elliot's Debates, 265, 280. .

ture.1 In truth, no particular regulation of commerce can ever be shown to be exclusively and indispensably necessary; and thus we should be driven to admit, that all regulations are within the scope of the power, or that none are. If there be any general principle, which is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, it is, that every power, vested in a government, is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the end of such power; unless they are excepted in the constitution, or are immoral, or are contrary to the essential objects of political society.2

§ 1241. There is another difficulty in the strict construction above alluded to, that it makes the constitutional authority depend upon casual and temporary circumstances, which may produce a necessity to-day, and change it to-morrow. This alone shows the fallacy of the reasoning. The expediency of exercising a particular power at a particular time must, indeed, depend on circumstances, but the constitutional right of exercising it must be uniform and invariable, the same to-day as to-morrow.3

§ 1249. Neither can the degree, in which a measure is necessary, ever be a test of the legal right to adopt it. That must be a matter of opinion, (upon which different men, and different bodies may form opposite judgments,) and can only be a test of expediency.

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1 Hamilton on Bank, 1 Hamilton's Works, 120.

2 Hamilton on Bank, 1 Hamilton's Works, 112.

3 Hamilton on Bank, 1 Hamilton's Works, 117; 5 Marshall's Wash. App. note 3, p. 8.

The relation between the measure and the end, between the nature of the means employed towards the execution of a power, and the object of that power, must be the criterion of constitutionality; and not the greater or less of necessity or expediency.1 If the legislature possesses a right of choice as to the means, who can limit that choice? Who is appointed an umpire, or arbiter in cases, where a discretion is confided to a government? The very idea of such a controlling authority in the exercise of its powers is a virtual denial of the supremacy of the government in regard to its powers. It repeals the supremacy of the national government, proclaimed in the constitution.

§ 1243. It is equally certain, that neither the grammatical, nor the popular sense of the word, "necessary," requires any such construction. According to both, "necessary" often means no more than needful, requisite, incidental, useful, or conducive to. It is a common mode of expression to say, that it is necessary for a government, or a person to do this or that thing, when nothing more is intended or understood, than that the interest of the government or person requires, or will be promoted by the doing of this or that thing. Every one's mind will at once suggest to him many illustrations of the use of the word in this sense.2 To employ the means, necessary to an end, is generally understood, as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. § 1244. Such is the character of human language,

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1 Hamilton on Bank, 1 Hamilton's Works, 129, 120; 5 Marshall's Wash. App. note 3, p. 9, 10; M'Culloch v. Maryland, 4 Wheat. R. 423.

2 Hamilton on Bank, 1 Hamilton's Works, 118; 5 Marshall's Wash. App. note 3, p. 9.

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§ 1246. The restrictive interpretation is also contrary to a sound maxim of construction, generally admitted, namely, that the powers contained in a constitution of government,-especially those, which concern the general administration of the affairs of the country, such as its finances, its trade, and its defence, ought to be liberally expounded in advancement of the public good. This rule does not depend on the particular form of a government, or on the particular demarcations of the boundaries of its powers; but on the nature and objects of government itself. The means, by which national exigencies are provided for, national inconveniences obviated, and national prosperity pro-

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moted, are of such infinite variety, extent, and complexity, that there must of necessity be great latitude of discretion in the selection, and application of those means. Hence, consequently, the necessity and propriety of exercising the authorities, entrusted to a government, on principles of liberal construction.1

§ 1247. It is no valid objection to this doctrine to say, that it is calculated to extend the powers of the government throughout the entire sphere of state legislation. The same thing may be said, and has been said, in regard to every exercise of power by implication and construction. There is always some chance of error, or abuse of every power; but this furnishes no ground of objection against the power; and certainly no reason for an adherence to the most rigid construction of its terms, which would at once arrest the whole movements of the government.2 The remedy for any abuse, or misconstruction of the power, is the same, as in similar abuses and misconstructions of the state governments. It is by an appeal to the other departments of the government; and finally to the people, In the exercise of their elective franchises.3

§ 1248. There are yet other grounds against the restrictive interpretation derived from the language, and the character of the provision. The language is, that congress shall have power "to make all laws, which "shall be necessary and proper." If the word "necessary" were used in the strict and rigorous sense contended for, it would be an extraordinary departure from the usual course of the human mind, as exhibited in solemn instruments, to add another word "proper;"

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1 Hamilton on Bank, 1 Hamilton's Works, 120,121.

2 Hamilton on Bank, 1 Hamilton's Works, 122.

3 The Federalist, No. 33, 44.

the only possible effect of which is to qualify that strict and rigorous meaning, and to present clearly the idea of a choice of means in the course of legislation.1 If no means can be resorted to, but such as are indispensably necessary, there can be neither sense, nor utility in adding the other word; for the necessity shuts out from view all consideration of the propriety of the means, as contradistinguished from the former. But if the intention was to use the word "necessary" in its more liberal sense, then there is a peculiar fitness in the other word. It has a sense at once admonitory, and directory. it requires, that the means should be, bona fide, appropriate to the end.

§ 1249. The character of the clause equally forbids any presumption of an intention to use the restrictive interpretation. In the first place, the clause is placed among the powers of congress, and not among the limitations on those powers. In the next place, its terms purport to enlarge, and not to diminish, the powers vested in the government. It purports, on its face, to be an additional power, not a restriction on those already granted.2 If it does not, in fact, (as seems the true construction,) give any new powers, it affirms the right to use all necessary and proper means to carry 'into execution the other powers, and thus makes an express power, what would otherwise be merely an implied power. In either aspect, it is impossible to construe it to be a restriction. If it have any effect, it is to remove the implication of any restriction. If a restriction had been intended, it is impossible, that the framers of the constitution should have concealed it

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1 M'Culloch v. Maryland, 4 Wheat. R. 418, 419.

2 M'CuIloch v. Maryland, 4 Wheat. R. 419, 420.

under phraseology, which purports to enlarge, or at least give the most ample scope to the other powers. There was every motive on their part to give point and clearness to every restriction of national power; for they well knew, that the national government would be more endangered in its adoption by its supposed strength, than by its weakness. It is inconceivable, that they should have disguised a restriction upon its powers under the form of a grant of power. They would have sought other terms, and have imposed the restraint by negatives.1 And what is equally strong, no one, in or out of the state conventions, at the time when the constitution was put upon its deliverance before the people, ever dreamed of or suggested, that it contained a restriction of power. The whole argument on each side, of attack and of defence, gave it the positive form of an express power, and not of an express restriction.

§ 1250. Upon the whole, the result of the most careful examination of this clause is, that, if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment, in the selection of measures to carry into execution the constitutional powers of the national government. The motive for its insertion doubtless was, the desire to remove all possible doubt respecting the right to legislate on that vast mass of incidental powers, which must be involved in the constitution, if that instrument be not a splendid pageant, or a delusive phantom of sovereignty. Let the end be legitimate; let it be within the scope of the constitution; and all means, which are appropriate, which are

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1 M'Culloch v. Maryland, 4 Wheat. R. 420.

plainly adapted to the end, and which are not prohibited, but are consistent with the letter and spirit of the instrument, are constitutional.1

§ 1251. It may be well, in this connexion, to mention another sort of implied power, which has been called with great propriety a resulting power, arising from the aggregate powers of the national government. It Will not be doubted, for instance, that, if the United States should make a conquest of any of the territories of its neighbours, the national government would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incidentof the powers specially enumerated.2 It may, however, be deemed, if an incident to any, an incident to the power to make war. Other instances or resulting powers will easily suggest themselves. The United States are nowhere declared in the constitution to be a sovereignty entitled to sue, though jurisdiction is given to the national courts over controversies, to which the United States shall be a party. It is a natural incident, resulting from the sovereignty and character of the national government.3 So the United States, in their political capacity, have a right to enter into a contract, (although it is not expressly provided for by the constitution,) for it is an incident to their general fight or sovereignty, so far as it is appro-

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1 M'Culloch v. Maryland, 4 Wheat. R. 420, 421, 423. See also 4 Elliot's Debates, 220, 221, 222, 223, 224, 225; 2 Elliot's Debates, 196, 342; 5 Marsh. Wash. App. No. 3; 2 American Museum, 536; Anderson v.

Dunn, 6 Wheat. It. 204, 225, 226; Hamilton on Bank, 1 Hamilton's Works, 111 to 123.

2 Hamilton on Bank, 1 Hamilton's Works, 115.

3 See Dugan v. United States, 3 Wheat. R. 173, 179, 180.

priate to any of the ends of the government, and within the constitutional range of its powers.1 So congress possess power to punish offences committed on board of the public ships of War of the government by persons not in the military or naval service of the United States, whether they are in port, or at sea; for the jurisdiction on board of public ships is every, where deemed exclusively to belong to the sovereign.2

§ 1252. And not only may implied powers, but implied exemptions from state authority, exist, although not expressly provided for by law. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions, which are public in their nature, are examples in point. It has never been doubted, that all, who are employed in them, are protected, while in the line of their duty, from state control; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts, by which those institutions are created; and is preserved to them by the judicial department, as a part of its functions.3 A contractor for supplying a military post with provisions cannot be restrained from making purchases within a state, or from transporting provisions to the place, at which troops are stationed. He could not be taxed, or fined, or lawfully obstructed, in so doing.4 These incidents necessarily flow from the supremacy of the powers of the Union, within their legitimate sphere of action.

§ 1253. It would be almost impracticable, if it were not useless, to enumerate the various instances, in

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1 United States v. Tingey, 5 Peters's R. 115.

2 United States v. Bevans, 3 Wheaton's R. 388; The Exchange, 7 Cranch, 116; S.C. 2 Peters's Cond. R. 439.

3 0sborn v. Bank of U. States, 9 Wheat. R. 365, 366.

4 Id. 367.

which congress, in the progress of the government, have made use of incidental and implied means to execute its powers. They are almost infinitely varied in their ramifications and details. It is proposed, however, to take notice of the principal measures, which have been contested, as not within the scope of the powers. of congress, and which may be distinctly traced in the operations of the government, and in leading party divisions.1

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1 Some minor points will be found in the debates collected in 4 Elliot's Debates, 139, 141, 229, 234, 235, 238, 239, 240, 243, 249, 251, 252, 261, 265, 266, 270, 271, 280. There is no express power given by the constitution to erect forts, or magazines, or light-houses, or piers, or buoys, or public buildings, or to make surveys of the coast; but they have been constantly deemed incidental to the general powers. Mr. Bayard's Speech in 1807, (4 Elliot's Debates, 265;) Mr. Pickering's Speech, 1817, (4 Elliot's Debates, 280.)

CHAPTER XXVI.

POWERS OF CONGRESS--INTERNAL IMPROVEMENTS.

§ 1267. ANOTHER question, which has for a long time agitated the public councils of the nation, is, as to the authority of congress to make roads, canals, and other internal improvements.

§ 1268. So far, as regards the right to appropriate money to internal improvements generally, the subject has already passed under review in considering the power to lay and collect taxes. The doctrine there contended for, which has been in a great measure borne out by the actual practice of the government, is, that congress may appropriate money, not only to clear obstructions to navigable rivers; to improve harbours; to build breakwaters; to assist navigation; to erect forts, light-houses, and piers; and for other purposes allied to some of the enumerated powers; but may also appropriate it in aid of canals, roads, and other institutions of a similar nature, existing under state authority. The only limitations upon the power are those prescribed by the terms of the constitution, that the objects shall be for the common defence, or the general welfare of the Union. The true test is, whether the object be of a local character, and local use; or, whether it be of general benefit to the states.1 If it be purely

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1 Hamilton's Report on Manufactures, 1791, 1 Hamilton's Works, 231, 232; 1 Kent's Comm. Lect. 12, p. 250, 251, (2ed. p. 267, 268;) Sergeant on Constitution, ch. 28, [ch. 30;] President Monroe's Exposition and Message, 4th May, 1822, p. 38, 39.

local, congress cannot constitutionally appropriate money for the object. But, if the benefit be general, it matters not, whether in point of locality it be in one state, or several; whether it be of large or of small extent; its nature and character determine the right, and congress may appropriate money in aid of it; for it is then in a just sense for the general welfare.

§ 1269. But it has been contended, that the constitution is not confined to mere appropriations of money; but authorizes congress directly to undertake and carry on a system of internal improvements for the general welfare; wherever such improvements fall within the scope of any of the enumerated powers. Congress may not, indeed, engage in such undertakings merely because they are internal improvements for the general welfare, unless they fall within the scope of the enumerated powers. The distinction between this power, and the power of appropriation is, that in the latter, congress may appropriate to any purpose, which is for the common defence or general welfare; but in the former, they can engage in such undertakings only, as are means, or incidents to its enumerated powers. Congress may, therefore, authorize the making of a canal, as incident to the power to regulate commerce, where such canal may facilitate the intercourse between state and state. They may authorize light-houses, piers, buoys, and beacons to be built for the purposes of navigation. They may authorize the purchase and building of custom-houses, and revenue cutters, and public warehouses, as incidents to the power to lay and collect taxes. They may purchase places for public uses; and erect forts, arsenals, dock-yards, navy-yards, and magazines, as incidents to the power to make war.

§ 1270. For the same reason congress may authorize the laying out and making of a military road, and acquire a right over the soil for such purposes; and as incident thereto they have a power to keep the road in repair, and prevent all obstructions thereto. But in these, and the like cases, the general jurisdiction of the state over the soil, subject only to the rights of the United States, is not excluded. As, for example, in case of a military road; although a state cannot prevent repairs on the part of the United States, or authorize any obstructions of the road, its general jurisdiction remains untouched. It may punish all crimes committed on the road; and it retains in other respects its territorial sovereignty over it. The right of soil may still remain in the state, or in individuals, and the right to the easement only in the national government. There is a great distinction between the exercise of a power, excluding altogether state jurisdiction, and the exercise of a power, which leaves the state jurisdiction generally in force, and yet includes, on the part of the national government, a power to preserve, what it has created.1

§ 1271. In all these, and other cases, in which the power of congress is asserted, it is so upon the general ground of its being an incidental power; and the course of reasoning, by which it is supported, is precisely the same, as that adopted in relation to other cases already considered. It is, for instance, admitted,'that congress cannot authorize the making of a canal, except for some purpose of commerce among the states, or for some

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1 See 1 Kent's Comm. Lect. 12, p. 250, 251; Sergeant on Constitution, ch. 28, [ch. 30, ed. 1830;] 2 U.S. Law Journal, April, 1826, p. 251, &c.; 3 Elliot's Debates, 309, 310; 4 Elliot's Debates, 244, 265, 279, 291, 356; Webster's Speeches, p. 392 to 397.

other purpose belonging to the Union; and it cannot. make a military road, unless it be necessary and proper for purposes of war. To go over the reasoning at large would, therefore, be little more, than a repetition of what has been already fully-expounded.1 The Journal of the Convention is not supposed to furnish any additional lights on the subject, beyond what have been already stated.2

§ 1272. The resistance to this. extended reach of the national powers turns also upon the same general reasoning, by which a strict construction of the constitution has been constantly maintained. It is said, that such a power is not among those enumerated in the constitution; nor is it implied, as a means of executing any of them. The power to regulate commerce cannot include a power to construct roads and canals, and improve the navigation of water-courses in order to facilitate, promote, and secure such commerce, without a latitude of construction departing from the ordinary import of the terms, and incompatible with the nature of the constitution.3 The liberal inter-

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1 See M'Culloch v. Maryland, 4 Wheat R. 406, 407, 413 to 421; Webster's Speeches, p. 392 to 397; 4 Elliot's Debate. 280.

2 Journal of Convention, p. 260, 376.

3 President Madison's Message. 3d March, 1817; 4 Elliot's Debates, 280, 281; President Monroe's Message, 4th May, 1822, p. 22 to 35; President Jackson's Message, 27th May, 1830; 4 Elliot's Debates, 333, 334. 335; 1 Kent's Comm. Lect. 12, p. 250, 251; 4 Elliot's Debates, 291, 292, 354, 355; Sergeant on

Constitution, ch. 28, [ch. 30 ;] 4 Jefferson's Corresp. 421.-- President Monroe, in his elaborate Exposition accompanying his Message of the 4th of May, 1822, denies the independent right of congress to construct roads and canals; but asserts in the strongest manner their right to appropriate money to such objects. His reasoning for the latter is thought by many to be quite irresistible in favour of the former. See the message from page. 35 to page 47. One short passage may be quoted. "Good roads and canals will promote many very important national purposes. They will facilitate the opera-

pretation has been very uniformly asserted by congress; the strict interpretation has not uniformly, but has upon several important occasions been insisted upon by the executive.1 In the present state of the controversy, the duty of forbearance seems inculcated upon the commentator; and the reader must decide for himself upon his own views of the subject.

§ 1273. Another question has been made, how far congress could make a law giving to the United States a preference and priority of payment of their debts, in cases of the death, or insolvency, or bankruptcy of their debtors, out of their estates. It has been settled, upon deliberate argument, that congress possess such a constitutional power. It is a necessary and proper power to carry into effect the other powers of the government. The government is to pay the debts of the Union; and must be authorized to use the means, which appear to itself most eligible to effect that object. It may purchase, and remit bills for this object; and it may take all those precautions, and make all those regulations, which will render the transmission safe. It may, in like manner, pass all laws to render effectual the collection of its debts. It is no objection to this right of priority, that it will interfere with the rights of the state sovereignties respecting the dignity of debts, and will defeat the measures, which they have a right

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tions of war; the movements of troops; the transportation of cannon, of provisions and every warlike store, much to our advantage, and the disadvantage of the enemy in time of war. Good roads will facilitate the transportation of the mail, and thereby promote the purposes of commerce and political intelligence among the people. They will, by being properly directed to these objects, enhance the value of our vacant lands, a treasure of vast resource to the nation." This is the very reasoning, by which the friends of:. the general power support its constitutionality. 1 4 Jefferson's Corresp. 421; 1 Kent's Comm. Lect. 12, p. 250, 251.

to adopt to secure themselves against delinquencies on the part of their own revenue or other officers. This objection, if of any avail, is an objection to the powers given by the constitution. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects, to which the legislative power of congress extends.1

§ 1274. It is under the same implied authority, that the United States have any right even to sue in their own courts; for an express power is no where given in the constitution, though it is clearly implied in that part respecting the judicial power. And congress may not only authorize suits to be brought in the name of the United States, but in the name of any artificial person, (such as the Postmaster-General,2) or natural person for their benefit.3 Indeed, all the usual incidents appertaining to a personal sovereign, in relation to contracts, and suing, and enforcing fights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns.4 The right of making contracts and instituting suits is an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department, to which those powers are confided, enter into

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1 United States v. Fisher, 2 Cranch, 358; 1 Peters's Condensed Rep. 421; Harrison v. Sterry, 5 Cranch, 289; 2 Peters's Condensed Rep. 260; 1 Kent's Comm. Lect. 19, p. 229 to 233.

2 Postmaster-General v. Early, 12 Wheat. R. 136.

3 See Dugan v. United States, 3 Wheat. R. 173, 179; United States v. Buford, 3 Peters's R. 12, 30; United State: v. Tingey, 5 Peters's R. 115, 127, 128.

4 Cox v. United States, 6 Peters's R. 172.

contracts not prohibited by law, and appropriate to the just exercise of those powers; and enforce the observance of them by suits and judicial process.1

§ 1275. There are almost innumerable cases, in which the auxiliary and implied powers belonging to congress have been put into operation. But the object of these Commentaries is, rather to take notice of those, which have been the subject of animadversion, than of those, which have hitherto escaped reproof, or have been silently approved.

§ 1276. Upon the ground of a strict interpretation, some extraordinary objections have been taken in the course of the practical operations of the government. The very first act, passed under the government, which regulated the time, form, and manner, of administering the oaths prescribed by the constitution,2 was denied to be constitutional. But the objection has long since been abandoned.3 It has been doubted, whether it is constitutional to permit the secretaries to draft bills On subjects connected with their departments, to be presented to the house of representatives for their consideration.4 It has been doubted, whether an act authorizing the president to lay, regulate, and revoke, embargoes was constitutional.5 It has been doubted, whether congress have authority to establish a military academy.6 But these objections have been silently, or practically abandoned.

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1 United States v. Tingey, 5 Peters's R. 115, 128.
2 Act of 1st June, 1789, ch. 1.
3 4 Elliot's Deb. 139, 140, 141; 1 Lloyd's Deb. 218 to 225.
4 4 Elliot's Debates, 238, 239, 240.
4 Elliot's Debates, 240. See Id. 265.
6 4 Jefferson's Corresp. 499.

CHAPTER XXVII.

POWERS OF CONGRESS--PURCHASES OF FOREIGN TERRITORY--EMBARGOES.

§ 1277. BuT the most remarkable powers, which have been exercised by the government, as auxiliary and implied powers, and which, if any, go to the utmost verge o.f liberal construction, are the laying of an unlimited embargo in 1807, and the purchase of Louisiana in 1803, and its subsequent admission into the Union, as a state. These measures were brought forward, and supported, and carried, by the known and avowed friends of a strict construction of the constitution; and they were justified at the time, and can be now justified, only upon the doctrines of those, who support a liberal construction of the constitution. The subject has been already hinted at; but it deserves a more deliberate review.

§ 1278. In regard to the acquisition of Louisiana: The treaty of 1803 contains a cession of the whole of that vast territory by France to the United States, for a sum exceeding eleven millions of dollars. There is a stipulation in the treaty on the part of the United States, that the inhabitants of the ceded territory shall be incorporated into the Union, and admitted, as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States.1

§ 1279. It is obvious, that the treaty embraced several very important questions, each of them upon the

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1 Art. 3.

grounds of a strict construction full of difficulty and delicacy. In the first place, had the United States a constitutional authority to accept the cession and pay for it? In the next place, if they had, was the stipulation for the admission of the inhabitants into the Union, as a state, constitutional, or within the power of congress to give it effect?

§ 1280. There is no pretence, that the purchase, or cession of any foreign territory is within any of the powers expressly enumerated in the constitution. It is no where in that instrument said, that congress, or any other department of the national government, shall have a right to purchase, or accept of any cession of foreign territory. The power itself (it has been said) could scarcely have been in the contemplation of the framers of it. It is, in its own nature, as dangerous to liberty, as susceptible of abuse in its actual application, and as likely as any, which could be imagined, to lead to a dissolution of the Union. If congress have the power, it may unite any foreign territory whatsoever to our own, however distant, however populous, and however powerful. Under the form of a cession, we may become united to a more powerful neighbour or rival; and be involved in European, or other foreign interests, and contests, to an interminable extent. And if there may be a stipulation for the admission of foreign states into the Union, the whole balance of the constitution may be destroyed, and the old states sunk into utter insignificance. It is incredible, that it should have been contemplated, that any such overwhelming authority should be confided to the national government with the consent of the people of the old states. If it exists at all, it is unforeseen, and the result of a sovereignty, intended to be limited, and yet. not

Sufficiently guarded. The very case of the cession of Louisiana is a striking illustration of the doctrine. It admits, by consequence, into the Union an immense territory, equal to, if not greater, than that of all the United States under

the peace of 1783. In the natural progress of events, it must, within a short period, change tile whole balance of power in the Union, and transfer to the West all the important attributes of the sovereignty of the whole. If, as is well known, one of the strong objections urged against the constitution was, that the original territory of the United States was too large for a national government; it is inconceivable, that it could have been within the intention of the people, that any additions of foreign territory should be made, which should thus double every danger from this source. The treaty-making power must be construed, as confined to objects within the scope of the constitution. And, although congress have authority to admit new states into the firm, yet it is demonstrable, that this clause had sole reference to the territory then belonging to the United States; and was designed for the admission of the states, which, under the ordinance of 1787, Were contemplated to be formed within its old boundaries. In regard to the appropriation of money for the purposes of the cession the case is still stronger. If no appropriation of money can be made, except for cases within the enumerated powers, (and this clearly is not one,) how can the enormous sum of eleven millions be justified for this object? If it be said, that it will be "for the common defence, and general weifare" to purchase the territory, how is this reconcileable with the strict construction of the constitution? If congress can appropriate money for one object, because it is deemed for the common defence and general welfare, why may

they not appropriate it for all objects of the same sort? If the territory can be purchased, it must be governed; and a territorial government must be created. But where can congress find authority in the constitution to erect a territorial government, since it does not possess the power to erect corporations?

§ 1281. Such were the objections, which have been, and in fact may be, urged against the cession, and the appropriations made to carry the treaty into effect. The friends of the measure were driven to the adoption of the doctrine, that the right to acquire territory was. incident to national sovereignty; that it was a resulting power, growing necessarily out of the aggregate powers confided by the federal constitution; that the appropriation might justly be vindicated upon this ground, and also upon the ground, that it was for the common defence and general welfare. In short, there is no possibility of defending the constitutionality of this measure, but upon the principles of the liberal construction, which has been, upon other occasions, so earnestly resisted.1

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1 See the Debates in 1803, on the Louisiana Treaty, printed by T. & G. Palmer in Philadelphia, in 1804, and 4 Elliot's Debates 257 to 260. -The objections were not taken merely by persons, who were at that time in opposition to the national administration. President Jefferson himself (under whose auspices the treaty was made,) was of opinion, that the measure was unconstitutional, and required an amendment of the constitution to justify it. He accordingly urged his friends strenuously to that course; at the same time he added, "that it will be desirable for congress to do what is necessary in silence"; "whatever congress shall think necessary to do should be done with as little, debate as possible, and particularly so far as respects the constitutional difficulty." "I confess, then, I think it important in the present case, to set an example against broad construction by appealing for new power to the people. If, however, our friends shall think differently, certainly I shall acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction, when it shall produce ill effects." What a latitude of interpretation is this! The constitution may be over-

§ 1282. As an incidental power, the constitutional right of the United States to acquire territory would seem so naturally to flow from the sovereignty confided to it, as not to admit of very serious question. The constitution confers on the government of the Union the power of making war, and of making treaties; and it seems consequently to possess the power of acquiring territory either by conquest of treaty.1 If the cession be by treaty, the terms of that treaty must be obligatory; for it is the law of the land. And if it stipulates for the enjoyment by the inhabitants of the rights, privileges, and immunities of citizens of the United States, and for the admission of the territory into the Union, as a state, these stipulations must be equally obligatory. They are within the scope of the constitutional authority of the government, which has the right to acquire territory, to make treaties, and to admit new states into the Union.2

§ 1283. The mere recent acquisition of Florida, which has been universally approved, or acquiesced in by all the states, can be maintained only on the same

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leaped, and a broad construction adopted for favourite measures, and resistance is to be made to such a construction only, when it shall produce ill effects! His letter to Dr. Sibley (in June, 1803} recently published is decisive, that he thought an amendment of the constitution necessary. Yet he did not hesitate

without such amendment to give effect to every measure to carry the treaty into effect during his administration. See 4 Jefferson's Corresp. p. It 2, 3, Letter to Dr. Sibley, and Mr. 3. Q,. Adams's Letter to Mr. Speaker Stevenson, July 11, 1832.

1 Amer. Insur. Co. v. Canter, 1 Peters's Sup. R. 51 1, 542; Id. 517, note, Mr. Justice Johnson's Opinion.

2 Ibid. -- In the celebrated Hartford Convention, in January, 1815, a proposition was made to amend the constitution so, as to prohibit the admission of new states into the Union without the consent of twothirds or both houses of congress. In the accompanying report there is a strong though indirect denial of the power to admit new states without the original limits of the United States.

principles; and furnishes a striking illustration of the truth, that constitutions of government require a liberal construction to effect their objects, and that a narrow interpretation of their powers, however it may suit the views of speculative philosophers, or the accidental interests of political parties, is incompatible with the permanent interests of the state, and subversive of the great ends of all government, the safety and independence of the people.

§ 1284. The other instance of an extraordinary application of the implied powers of the government, above alluded to, is the embargo laid in the year 1807, by the special recommendation of President Jefferson. It was avowedly recommended, as a measure of safety for our vessels, our seamen, and our merchandise from the then threatening dangers from the belligerents of Europe;1 a and it was explicitly stated "to be a measure of precaution called for by the occasion;" and "neither hostile in its character, nor as justifying, or inciting, or leading to hostility with any nation whatever."2 It was in no sense, then, a war measure. If it could be classed at all, as flowing from, or as an incident to, any of the enumerated powers, it was that of regulating commerce. In its terms, the act provided, that an embargo be, and hereby is, laid on all ships and vessels in the ports, or within the limits or jurisdiction, of the United States, &c. bound to any foreign port or place.3 It was in its terms unlimited in duration; and could be removed only by a subsequent act of congress,

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1 6 Wait's State Papers, 57.

2 7 Wait's State Papers, 25, Mr. Madison's Letter to Mr. Pinkney; Gibbon., v. Ogden, 9 Wheat. R. 191, 192, 193.

3 Act, 22d December, 1807, ch. 5.

having the assent of all the constitutional branches of the legislature.1

§ 1285. No one can reasonably doubt, that the laying of an embargo, suspending commerce for a limited period, is within the scope of the constitution. But the question of difficulty was, whether congress, under the power to regulate commerce with foreign nations, could constitutionally suspend and interdict it wholly for an unlimited period, that is, by a permanent act, having no limitation as to duration, either of the act, or of the embargo. It was most seriously controverted, and its constitutionality denied in the Eastern states of the Union, during its existence. An appeal was made to the judiciary upon the question; and it having been settled to be constitutional by that department of the government, the decision was acquiesced in, though the measure bore with almost unexampled seventy, upon the Eastern states; and its ruinous effects can still be traced along their extensive. seaboard. The argument was, 'that the power to regulate did not include the power to annihilate commerce, by interdicting it permanently and entirely with foreign nations. The decision was, that the power of congress was sovereign, relative to commercial intercourse, qualified by the limitations and restrictions contained in the constitution itself. Non-intercourse and Embargo laws are within the range of legislative discretion; and if congress have the power, for purposes of safety, of preparation, or counteraction, to suspend commercial intercourse with foreign nations, they are not limited, as to the du-

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1 In point of fact, it remained in force until the 29th of June, 1809, being repealed by an act passed on the first of March, 1809: to take effect at the end of the next session of congress which terminated on the 28th of June, 1809.

ration, any more, than as to the manner and extent of the measure.1

§ 1286. That this measure went to the utmost verge of constitutional power, and especially of implied power, has never been denied. That It could not be justified by any, but the most liberal construction of the constitution, is equally undeniable. It was the favourite measure of those, who were generally the advocates of the strictest construction. It was sustained by the people from a belief, that it was promotive of the interests, and important to the safety of the Union.

§ 1287. At the present day, few statesmen are to be found, who seriously contest the constitutionality of the acts respecting either the embargo, or the purchase and admission of Louisiana into the Union. The general voice of the nation has sustained, and supported them. Why, then, should not that general voice be equally respected in relation to other measures of vast public importance, and by many deemed of still more vital interest to the country, such as the tariff laws, and the national bank charter? Can any measures furnish a more instructive lesson, or a more salutary admonition, in the whole history of parties, at once to moderate our zeal, and awaken our vigilance, than those, which stand upon principles repudiated at one time upon constitutional scruples, and solemnly adopted at another time, to subserve a present good, or foster the particular policy of an administration? While the principles of the constitution should be preserved with a most guarded caution, and a most sacred regard to the rights of the

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1 United States v. The Brig William, 2 Hall's Law Journal, 255; 1 Kent's Comm. Lect. 19, p. 405; Sergeant on Const. Law, ch. 28, (ch. 30;) Gibbons v. Ogden, 9 Wheat. R. 1, 191 to 193.

states; it is at once the dictate of wisdom, and enlightened patriotism to avoid that narrowness of interpretation, which would dry up all its vital powers, or compel the government (as was done under the confederation,) to break down all constitutional barriers, and trust for its vindication to the people, upon the dangerous political maxim, that the.safety of the people is the supreme law, (salus populi suprema lex;) a maxim, which might be used to justify the appointment of a dictator, or any other usurpation.1

§ 1288. There remain one or two other measures of a political nature, whose constitutionality has been denied; but which, being of a transient character, have left no permanent traces in the constitutional jurisprudence of the country. Reference is here made to the Alien and Sedition laws, passed in 1798, both of which were limited to a short duration, and expired by their own limitation.2 One (the Alien act). authorized the president to order out of the country such aliens, as he should deem dangerous to the peace and safety of the United States; or should have reasonable grounds to suspect to be concerned in any treasonable, or secret

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1 Mr. Jefferson, on many occasions, was not slow to propose, or justify measures of a very strong character; and such as proceeded altogether upon the ground of implied powers. Thus, in writing to Mr. Crawford, on 20th of June, 1816, he deliberately proposed, with a view to enable us in future to meet any war, to adopt "the report of the then secretary of the war department, for placing the force of the nation at effectual command," anti to "ensure resources for money by the suppression of oil p,per circulation during peace, and licensing that of the nation atone during weir." 4 Jefferson's Corresp. 285. Whence are these vast powers derived? The latter would amount to a direct prohibition of the circulation of any bank notes of the state banks;and in fact would amount to a suppression of the most effective powers of the state banks.

2 Act of 25th of June, 1798, ch. 75; Act of 14th of July, 1798, ch. 91; 1 Tuck. Black. Comm. App. part 2, note G, p. 11 to 30.

machinations against the government of the United States, under severe penalties for disobedience. The other declared it a public crime, punishable with fine and imprisonment, for any persons unlawfully to combine, and conspire together, with intent to oppose any measure or measures of the United States, &c.; or with such intent, to counsel, advise, or attempt to procure any insurrection, unlawful assembly, or combination; or to write, print, utter, or publish, or cause, or procure to be written, &c., or willingly to assist in writing, &c., any false, scandalous, and malicious writing or writings against the government of the United States, or either house of congress, or the president, with intent to defame them, or to bring them into contempt, or disrepute, or to excite against them the hatred of the people, or to stir up sedition; or to excite any unlawful combination for opposing, or resisting any law, or any lawful act of the president, or to resist, oppose, or defeat any such law or act; or to aid, encourage, or abet any hostile designs of any foreign nations against the United States. It provided, however, that the truth of the writing or libel might be given in evidence; and that the jury, who tried the cause, should have a right to determine the law and the fact, under the direction of the court, as in other cases.

§ 1289. The constitutionality of both the acts was assailed with great earnestness and ability at the time; and was defended with equal masculine vigour. The ground of the advocates, in favour of these laws, was, that they resulted from the right and duty in the government of self-preservation, and the like duty and protection of its functionaries in the proper discharge of their official duties. They were impugned, as not conformable to the letter or spirit of the constitution;

and as inconsistent in their principles with the rights of citizens, and the liberty of the press. The Alien act was denounced, as exercising a power not delegated by the constitution; as uniting legislative and judicial functions, with that of the executive; and by this Union as subverting the general principles of free government, and the particular organization and positive provisions of the constitution. It was added, that the Sedition act was open to the same objection, and was expressly forbidden by one of the amendments of the constitution, on which there will be occasion hereafter to comment.1 At present it does not seem necessary to present more than this general outline, as the measures are not likely to be renewed; and as the doctrines, on which they are maintained, and denounced, are not materially different from those, which have been already considered.2

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1 The Alien, and Sedition Acts were the immediate cause of the Virginia Resolutions of December, 1798, and of the elaborate vindication of them, in the celebrated Report of the 7th of January, 1800. The learned reader will there find an ample exposition of the whole constitutional objections. See also 4 Jefferson's Correspondence, 93, 27. The reasoning on the other side may be found in the Debates in Congress, at the time of the passage of these acts. It is greatly to be lamented, that there is no authentic collection of all the Debates in congress, in a form, like that of the Parliamentary Debates. See also 4 Elliot's Deb. 251, 252; Debates on the Judiciary, in 1802, Mr. Bayard's Speech, p. 371, 372; Addison's Charges to the Grand Jury, No. 25, p. 270; Id. No. 26. p. 289. These charges are commonly hound with Addison's Reports. See also 1 Tuck. Black. Comm. 296 to 300; Id. Part 2, App. note 6, p. 11 to 36; Report of Committee of House of Representatives of congress, 25th February, 1799, and Resolve of Kentucky, of 1798, and Resolve of Massachusetts, of 9th and 13th of February, 1799, on the same subject.

2 Mr. Vice President Calhoun, in his letter of the 28th of August, 1832, to Gov. Hamilton, uses the following language. "From the adoption of the constitution we have had but one continued agitation of constitutional questions, embracing some of the most important powers exercised by the government; and yet, in spite of all the ability, and force

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of argument, displayed in the various discussions, backed by the high authority, claimed for the Supreme Court to adjust such controversies, not a single constitutional question of a political character, which has ever been agitated during this long period, has been settled in the public opinion, except that of the unconstitutionality of the alien, and Sedition laws; and what is remarkable, that was settled against the decision of the Supreme Court." Now, in the first place, the constitutionality of the Alien, and Sedition laws never came before the Supreme Court for decision; and consequently, never was decided by that court. In the next place, what is meant by public opinion deciding constitutional questions? What public opinion? Where, and at what time delivered? It is notorious, that some of the ablest statesmen and jurists of America, at the time of the passage of these acts, and ever since, have maintained the constitutionality of these laws. They were upheld, as constitutional, by some of the most intelligent, and able state legislatures in the Union, in deliberate resolutions affirming their constitutionality. Nay more, it may be affirmed, that at the time, when the controversy engaged the public mind most earnestly upon the subject, there was, (to say the least of it) as great a weight of judicial, and professional talent, learning, and patriotism, enlisted in their favour, as there ever has been against them. If, by being settled by public opinion, is meant that all the people of America wore united in one opinion on the subject, the correctness of the statement cannot be admitted; though its sincerity will not be questioned. It is one thing to believe a doctrine universally admitted, because we ourselves think it clear; and quite another thing to establish the fact. The Sedition and Alien laws were generally deemed inexpedient, and therefore any allusion to them now rarely occurs, except in political discussions, when they are introduced to add odium to the party, by which they were adopted. But the moat serious doubts may be entertained, whether even in the present day, a majority of constitutional .lawyers, or of judicial opinions, deliberately hold them to be unconstitutional.

If public opinion is to decide constitutional questions, instead of the public functionaries of the government in their deliberate discussions and judgments, (a course quite novel in the annals of jurisprudence,) it would be desirable to have some mode of ascertaining it in a satisfactory, and conclusive form; and some uniform test of it, independent of mere private conjectures. No such mode has, as yet, been provided in the constitution. And, perhaps, it will be found upon due inquiry, that different opinions prevail at the same time on the same subject, in the North, the South, the East, and the West. If the judgments of the Supreme Court (as it is more than hinted) have not, even upon the most

deliberate juridical arguments, been satisfactory, can it be expected that popular arguments will be moro so? It is said, that not a single constitutional question, except that of the Alien and Sedition laws, has ever been settled. If by this no more is meant, than that all minds have not

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acquiesced in the decisions, the statement must be admitted to be correct. And such must, under such a postulate, be for ever the case with all constitutional questions. It is utterly hopeless in any way to satisfy all minds upon such a subject. But if it be meant, that these decisions have not been approved, or acquiesced in, by a majority of the Union, as correct expositions of the constitution, that is a statement, which remains to be proved; and is certainly not to be taken for granted. In truth, it is obvious, that so long as statesmen deny, that any decision of the Supreme Court is conclusive upon the interpretation of the constitution, it is wholly impossible, that any constitutional question should ever, in their view, be settled. It may always be controverted; and if so, it will always be controverted by some persons. Human nature never yet presented the extraordinary spectacle of all minds, agreeing in all things; nay not in all truths, moral, political, civil, or religious. Will the case be better, when twenty-four different states are to settle such questions, as they may p]ease, from day to day, or year to year; holding one opinion at one time, and another at another? If constitutional questions are never to be deemed settled, while any persons shall. be found to avow a doubt, what is to become of any government, national or state? Did any statesmen ever conceive the project of a constitution of government for a nation or state, every one of whose powers and operations should be liable to be suspended at the will of any one, who should doubt their constitutionality? Is a constitution of government made only, as a text, about which, casuistry and ingenuity may frame endless doubts, and endless questions? Or is it made, as a fixed system to guide, to cheer, to support, and to protect the people? Is there any gain to rational liberty, by perpetuating doctrines, which leave obedience an affair of mere choice or speculation, now and for ever?

CHAPTER XXVIII.

POWER OF CONGRESS TO PUNISH TREASON.

§ 1290. AND here, in the order of the constitution, terminates the section, which enumerates the powers of congress. There are, however, other clauses detached from their proper connexion, which embrace other powers delegated to congress; and which for no apparent reason have been so detached. As it will be more convenient to bring the whole in review at once, it is proposed (though it is a deviation from the general method of this work) to submit them in this place to the consideration of the reader.

§ 1291. The third section of the fourth article gives a constitutional definition of the crime of treason, (which will be reserved for a separate examination,) and then provides: "The congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

§ 1292. The propriety of investing the national government with authority to punish the crime of treason against the United States could never become a question with any persons, who deemed the national government worthy of creation, or preservation. If the power had not been expressly granted, it must have been implied, unless all the powers of the national government might be put at defiance, and prostrated with impunity. Two motives, probably, concurred in introducing it, as an express power. One was, not to leave it open to implication, whether it was to be exclusively punishable with death according to the, known rule of the

common law, and with the barbarous accompaniments pointed out by it; but to confide the punishment to the discretion of congress. The other was, to impose some limitation upon the nature and extent of the punishment, so that it should not work corruption of blood or forfeiture beyond the life of the offender.

§ 1293. The punishment of high treason by the common law, as stated by Mr. Justice Blackstone,1 is as follows: 1. That the offender be drawn to the gallows, and not be carried or walk, though usually (by connivance at length ripened into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and cut down alive. 3. That his entrails be taken out and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters he at the king's disposal. These refinements in cruelty (which if now practised would be disgraceful to the character of the age) were, in former times, literally and studiously executed; and indicate at once a savage and ferocious spirit, and a degrading subserviency to royal resentments, real or supposed. It was wise to

place the punishment solely in the discretion of congress; and the punishment has been since declared, to be simply death by hanging;2 thus inflicting death in a manner becoming the humanity of a civilized society.

§ 1294. It is well known, that corruption of blood, and forfeiture of the estate of the offender followed, as a necessary consequence at the common law, upon every attainder of treason. By corruption of blood all

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1 4 Black. Comm. 92.

2 Act of 3Oth April, 1790, ch. 36.

inheritable qualities are destroyed; so, that an attainted person can neither inherit lands, nor other hereditaments from his ancestors, nor retain those, he is already in possession of, nor transmit them to any heir. And this destruction of all inheritable qualities is so complete, that it obstructs all descents to his posterity, whenever they are obliged to derive a title through him to any estate of a remoter ancestor. So, that if a father commits treason, and is attainted, and suffers death, and then the grandfather dies, his grandson cannot inherit any estate from his grandfather; for he must claim through his father, who could convey to him no inheritable blood.1 Thus the innocent are made the victims of a guilt, in which they did not, and perhaps could not, participate; and the sin is visited upon remote generations. In addition to this most grievous disability, the person attainted forfeits, by the common law, all his lands, and tenements, and rights of entry, and rights of profits in lands or tenements, which he possesses. And this forfeiture relates back to the time of the treason committed, so as to avoid all intermediate sales and incumbrances; and he also forfeits all his goods and chattels from the time of his conviction.2

§ 1295. The reason commonly assigned for these severe punishments, beyond the mere forfeiture of the life of the party attainted, are these: By committing treason the party has broken his original bond of allegiance, and forfeited his social rights. Among these social rights, that of transmitting property to others is deemed one of the chief and most valuable. Moreover, such forfeitures, whereby the posterity of the

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1 2 Black. Comm. 252, 253; 4 Black. Comm. 388, 389.

2 4 Black. Comm. 381 to 388.

offender must suffer, as Well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation, he has, to keep him. from offending.1 But this view of the subject is wholly unsatisfactory. It looks. only to the offender himself, and is regardless of his innocent posterity. It really operates, as a posthumous punishment upon them; and compels them to bear, not only the disgrace naturally attendant upon such flagitious crimes; but takes from them the common rights and privileges enjoyed by all other citizens, where they are wholly innocent, and however remote they may be in the lineage from the first offender. It surely is enough for society to take the life of the offender, as a just punishment of his crime, without taking from his offspring and relatives that property, which may be the only means of saving them from poverty and ruin. It is bad policy too; for it cuts off all the attachments, which these unfortunate victims might otherwise feel for their own government, and prepares them to engage in any other service, by which their supposed injuries may be redressed, or their hereditary hatred gratified.2 Upon these and similar grounds, it may be presumed, that the clause was first introduced into the original draft of the constitution; and, after some amendments, it was adopted without any apparent resistance.3 By the laws since passed by congress, it is declared, that no conviction or judgment, for any capital or other offences, shall work corruption of blood, or any

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1 4 Black. Comm. 382. Bee also York, on Forfeitures.

2 See Rawle on Const. ch. 11, p. 145, 146.

3 Journal of Convention, 221, 269, 270, 271.

forfeiture of estate.1 The history of other countries abundantly proves, that one of the strong incentives to prosecute offences, as treason, has been the chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge; of gratifying its envy of the rich, and good; and of increasing its means to reward favourites, and secure retainers for the worst deeds.2

§ 1296. The power of punishing the crime of treason against the United States is exclusive in congress; and the trial of the offence belongs exclusively to the tribunals appointed by them. A state cannot take cognizance, or punish the

offence; whatever it may do in relation to theoff ence of treason, committed exclusively against itself if indeed any case can, under the constitution, exist, which is not at the same time treason against the United States.3

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1 Act of 1790, ch. 36 § 24.

2 See 1 Tuck. Black. Comm. App. 275, 276; Rawle on Coast ch. 11, p. 143 to 115.

3 See The People v. Lynch, 11 Johns. R. 553; Rawle on Const. ch. 11, p. 140, 142, 143; Id. ch. 21, p. 207; Sergeant on Const. ch. 30, [ch. 32.]

CHAPTER XXIX.
POWER OF CONGRESS AS TO PROOF OF STATE RECORDS AND PROCEEDINGS.

§ 1297. THE first section of the fourth article declares: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner, in which such acts, records, and proceeding shall be proved, and the effect thereof."

§ 1298. The articles of confederation contained a provision on the same subject. It was, that "full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state."1 It has been said, that the meaning of this clause is extremely indeterminate; and that it was of but little importance under any interpretation, which it would bear.2 The latter remark may admit of much question, and is certainly quite too loose and general in its texture. But there can be no difficulty in affirming, that the authority given to congress, under the constitution, to prescribe the form and effect of the proof is a valuable improvement, and confers additional certainty, as to the true nature and import of the clause. The clause, as reported in the first draft of the constitution, was, "that full faith and credit shall be given in each state to the acts of the legislature, and to the records and judicial proceedings of the courts and magistrates of every other state." The amendment was subsequently

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1 Art. 4.

2 The Federalist, No. 42.

reported, substantially in the form, in which it now stands, except that the words, in the introductory clause, were, "Full faith and credit ought to be given, (instead of "shall "); and, in the next clause, the legislature shall, (instead of, the congress "may"); and in the concluding clause, "and the effect, which judgments obtained in one state shall have in another," (instead of, "and the effect thereof.") The latter was substituted by the vote of six states against three; the others were adopted without opposition; and the whole clause, as thus mended, passed without any division.1

§ 1299. It is well known, that the laws and acts of foreign nations are not judicially taken notice of in any other nation; and that they must be proved, like any other facts, whenever they come into operation or examination in any forensic controversy. The nature and mode of the proof depend upon the municipal law of the country, where the suit is depending; and there are known to be great diversities in the practice of different nations on this subject. Even in England and America the subject, notwithstanding the numerous judicial decisions, which have from time to time been made, is not without its difficulties and embarrassments.2

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1 Journal of Convention, p. 228, 305, 320, 321.

2 See Starkie on Evid. P. 9. § 92, p. 251, and note to American ed. P. 4, p. 569; Appleton v. Braybrook, 6 M. & Selw. 34,; Livingston v. Maryland Insurance Company, 6 Cranch, 274; S.C. 2. Peters's Cond. R. 370; Talbot v. Seeman, 1 Cranch, 1, 38; S.C. 1 Peters's Cond. R. 229; Raynham v. Canton, 8 Pick. R. 293; Conseequa v. Willings, 1 Peters's Cir. R. 225, 229; Church v. Hubbard, 2 Cranch, 187, 238; S. C. 1 Peters's Cond. R. 385; Yeaton v. Fry, 5 Cranch, 335, 343; S. C. 2 Peters's Cond. R. 273; Picton's case, 24, Howell's State Trials, 494, &c.; Vandervoorst v. Smith, 3 Caine's R. 155; Delafield v. Hurd, 3 Johns.R. 310. See also Pardessus Cours de Droit. Cornmet. P. 6. tit. 7, ch. 2, partout.

§ 1300. Independent of the question as to proof, there is another question, as to the effect, which is to be given to foreign judgments, when duly authenticated, in the tribunals of other nations, either as matter to maintain a suit, or to found a defence to a suit. Upon this subject, also, different nations are not entirely agreed in opinion or practice. Most, if not all of them, profess to give some effect to such judgments; but many exceptions are allowed, which either demolish the whole efficiency of the judgment, as such, or leave it open to collateral proofs, which in a great

measure impair its validity. To treat suitably of this subject would require a large dissertation, and appropriately belongs to another branch of public law.1

§ 1301. The general rule of the common law, recognised both in England and America, is, that foreign judgments are prims facie evidence of the right and matter, which they purport to decide. At least, this may be asserted to be in England the preponderating weight Of opinion; and in America it has been held, upon many occasions,2 though its correctness has been recently questioned, upon principle and authority, with much acuteness.3

§ 1309. Before the revolution, the colonies were deemed foreign to each other, as the British colonies

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1 See authorities in preceding note, and Walker v. Whittier, 1 Doug. R. 1; Phillips v. Hunter, 2 H. BI. 409; Johnson's Dig. of New-York Rep. Evid. V; Starkie on Evidence, P. 2, § 67, 206; Id. § 68, p. 214; Bissell v. Briggs, 9 Mass. R. 462; Bigelow's Dig. Evid. C., Judgment, D. E. F. H. I.; Hitchrock v. Aickin, 1 Caine's R. 460.

2 See authorities in preceding notes; and Starkie on Evid. P. 2, § 67; p. 206 to 216, and Notes of American Ed. ibid.; Plummer v. Woodbourne, 4 Barn. Cresw. 625.

3 Starkie on Evid. P. 2, § 67. p. 206 to 216; Bigelow's Dig. Evid. C. and cases cited in Kaims's Equity, B. 3, ch. 8, p. 375.

are still deemed foreign to the mother country, and, of course, their judgments were deemed foreign judgments within the scope of the foregoing rule.1 It followed, that the judgments of one colony were deemed re-examinable in another, not only as to the jurisdiction of the court, which pronounced them; but also as to the merits of the controversy, to the extent, in which they were then understood to be re-examinable in England. In some of the colonies, however, laws had been passed, which put judgments in the neighbouring colonies upon a like footing with domestic judgments, as to their conclusiveness, when the court possessed jurisdiction.2 The reasonable construction of the article of the confederation on this subject is, that it was intended to give the same conclusive effect to judgments of all the states, so as to promote uniformity, as well as certainty, in the rule among them. It is probable, that it did not invariably, and perhaps not generally, receive such a construction; and the amendment in the constitution was, without question, designed to cure the defects in the existing provision.3

§ 1302. The clause of the constitution propounds three distinct objects; first, to declare, that full faith and credit shall be given to the records, &c. of every other state; secondly, to prescribe the manner of authenticating them; and thirdly, to prescribe their effect, when so

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1 Bissell v. Briggs, 9 Mass. R. 462; Commonwealth v. Green, 17 Mass. R. 515, 543.

2 This was done in Massachusetts by the Provincial act of 14 Geo. 3, ch. 2, as to judgments of the courts of the neighbouring colonies. See Bissell v. Briggs, 9 Mass. R. 462, 465; Ancient Colony and Province Laws, [ed. 1814,] p. 684.

3 See Kibbe v. Kibbe, 1786, Kirby R. 119; James v. Allen, 1786, 1 Dall. R. 188; Phelps v. HoIker, 1788, 1 Dall. R. 261; 3 Jour. of Cong. 12 Nov. 1777, p. 493; S. C. 1 Secret Journal, p. 366; Hitchcock v. Aicken, 1 Caine's R. 460, 478, 479.

authenticated. The first is declared, and established by the constitution itself, and is to receive no aid, nor is it susceptible of any qualification by congress. The other two are expressly subjected to the legislative power.

§ 1303. Let us then examine, what is the true meaning and interpretation of each section of the clause. "Full faith and credit. shall be given in each state to the public acts, records, and judicial proceedings of every other state." The language is positive, and declaratory, leaving nothing to future legislation. "Full faith and credit shall be given;" what, then, is meant by full faith and credit? Does it import no more than, that the same faith and credit are to be given to them, which, by the comity of nations, is ordinarily conceded to all foreign judgments? Or is it intended to give them a more conclusive efficiency, approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive, as to the merits? The latter seems to be the true object of the clause; and, indeed, it seems difficult to assign any other adequate motive for the insertion of the clause, both in the confederation and in the constitution. The framers of both instruments must be presumed to have known, that by the general comity of nations, and the long established rules of the common law, both in England and America, foreign judgments were prima facie evidence of their own correctness. They might be impugned for their injustice, or irregularity; but they were admitted to be a good ground of action here, and stood firm, until impeached and overthrown by competent evidence, introduced by the adverse party. It is hardly conceivable, that so much solicitude should have been exhibited to introduce, as

between confederated states, much less between states united under the same national government, a clause merely affirmative of an established rule of law, and not denied to the humblest, or most distant foreign nation. It was hardly supposable, that the states would deal less favourably with each other on such a subject, where they could not but have a common interest, than with foreigners. A motive of a higher kind must naturally have directed them to the provision. It must have been, "to form a more perfect Union;" and to give to each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings of all. There could be no reasonable objection to such a course. On the other hand, there were Tanny reasons in its favour. The states were united in an indissoluble bond with each other. The commercial and other intercourse with each other would be constant, and infinitely diversified. Credit would be every where given and received; and rights and property would belong to citizens of every state in many other states than that, in which they resided. Under such circumstances it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one state, should be open to litigation again and again, as often as either of the parties, or their privies, should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and re-examine all the merits of the case. It might be done at a distance from the original place of the transaction;after the removal or death of witnesses, or the loss of other testimony; after a long lapse of time, and under cir-

cumstances wholly unfavourable to a just understanding of the case.

§ 1304. If it should be said, that the judgment might be unjust upon the merits, or erroneous in point in law, the proper answer is, that if true, th at would furnish no ground for interference; for the evils of a new trial would be greater, than it would cure. Every such judgment ought to be presumed to be correct, and founded in justice. And what security is there, that the new judgment, upon the re-examination, would be more just, or more conformable to law, than the first? What state has a right to proclaim, that the judgments of its own courts are better founded in law or in justice, than those of any other state? The evils of introducing a general system of re-examination of the judicial proceedings of other states, whose connexions are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases.1 Motives of this sort, founded upon an enlarged confidence, and reciprocal duties, might well be presumed to have entered into the minds of the framers of the confederation, and the constitution. They intended to give, not only faith and credit to the public acts, records, and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals; but to give to them full faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the state, where they originated.2

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1 Green v. Sarmiento, 1 Peters's Cir. R. 74, 78 to 80; Hitchcick v. Aicken, 1 Caine's R. 462.

2 Green v. Sarmiento, 1 Peters's Cir. R. 74, 80, 81; Bissell v. Briggs, 9 Mass. R. 462, 467; Commonwealth v. Green, 17 Mass. R. 515, 544, 545.

§ 1305. The next section of the clause is, "And the congress may by general laws prescribe the manner, in which such acts, records, and proceedings shall be proved, -- and the effect thereof." It is obvious, that this clause, so far as it authorizes congress to prescribe the mode of authentication, is wholly beside the purpose of the preceding. Whatever may. be the faith and credit due to the public acts, records, and proceedings of other states, whether prima facie evidence only, or conclusive evidence; still the mode of establishing them in proof is of very great importance, and upon which a diversity of rules exists in different countries. The object of the present provision is to introduce uniformity in the rules of proof, (which could alone be done by congress.) It is certainly a great improvement upon the parallel article of the confederation. That left it wholly to the states themselves to require any proof of public acts, records, and proceedings, which they might from time to time deem advisable; and where no rule was prescribed, the subject was open to the decision of the judicial tribunals, according to their own views of the local usage and jurisprudence. Many embarrassments must necessarily have grown out of such a state of things. The provision, therefore, comes recommended by every consideration of wisdom and convenience, of public peace, and private security.

§ 1306. But the clause does not stop here. The words added are, "and the effect thereof." Upon the proper interpretation of these words some diversity of opinion has been judicially expressed. Some learned judges have

thought, that the word "thereof" had reference to the proof, or authentication; so as to read, "and to prescribe the effect of such proof, or authentication." Others have thought, that it referred to the

antecedent words, "acts, records, and proceedings;" so as to read, "and to prescribe the effect of such acts, records, and proceedings."1 Those, who were of opinion, that the preceding section of the clause made judgments in one state conclusive in all others, naturally adopted the former opinion; for otherwise the power to declare the effect would be wholly senseless; or congress could possess the power to repeal, or vary the full faith and credit given by that section. Those, who were of opinion, that suchjudgment s were not conclusive, but only prima facie evidence, as naturally embraced the other opinion; and supposed, that until congress should, by law, declare what the effect of such judgment should be, they remained only prima facie evidence.

§ 1307. The former seems now to be considered the sounder interpretation. But it is not, practically speaking, of much importance, which interpretation prevails;since each admits the competency of congress to declare the effect of judgments, when duly authenticated; so always, that full faith and credit are given to them; and congress by their legislation have already carried into operation the objects of the clause. The act of 26th of May, 1790, (ch. 11,) after providing for the mode of authenticating the acts, records, and judicial proceedings of the states, has declared, "and the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in. the courts of the state,

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1 See Bissell v. Briggs, 9 Mass. R. 462, 467; Hitchcock v. Aicken, 1 Caine's R. 460; Green v. Sarmiento, 1 Peters's Circt. R. 74; Field v. Gibbs, Id. 155; Commonwealth v. Green, 17 Mass. R. 515, 544, 545.

from whence the said records are or shall be taken."1 It has been settled upon solemn argument, that this enactment does declare the effect of the records, as evidence, when duly authenticated. It gives them the same faith and credit, as they have in the state court, from which they are taken. If in such court they have the faith and credit of the highest nature, .that is to say, of record evidence, they must have the same faith and credit in every other court. So, that congress have declared the effect of the records, by declaring, what degree of faith and credit shall be given to them. If a judgment is conclusive in the state, where it is pronounced, it is equally conclusive every where. If re-examinable there, it is open to the same inquiries in every other state.2 It is, therefore, put upon the same footing, as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it; or the right of the state itself to exercise authority over the persons, or the subject matter. The constitution did not mean to confer a new power or jurisdiction; but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory.3

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1 By the act of 27th March, 1804, ch. 56, the provisions of the act of 1790 are enlarged, so as to cover some omissions, such as state office book's, the records of territorial courts, &c.

2 MiIls v. Duryee, 7 Cranch. R. 481; Hampden v. M'Connell, 3 Wheat. R. 234; 1 Kent's Comm. Lect. 12, p. 243, 244; Sergeant on Const. ch. 31, [ch. 33.]

3 Bissell v. Briggs, 9 Mass. R. 462, 467; Shumway v. Stillman, 4 Cowen's R. 292; Borden v. Fitch, 13 Johns. E. 121.

CHAPTER XXX.

POWERS OF CONGRESS--ADMISSION OF NEW STATES, AND ACQUISITION OF TERRITORY.

§ 1308. THE third section of the fourth article contains two distinct clauses. The first is --"New states may be admitted by the congress into this Union. But no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the jurisdiction of two or more states, or parts of states, without the consent of the legislature of the states concerned, as well as of the congress." § 1309. A clause on this subject was introduced into the original draft of the constitution, varying in some respects from the present, and especially in requiring the consent of two thirds of the members present of both houses to the admission of any new state. After various modifications, attempted or carried, the clause substantially in its present form was agreed to by the vote of eight states against three.1

§ 1310. In the articles of confederation no provision is to be found on this important subject. Canada was to be admitted of right, upon her acceding to the measures of the United States. But no other colony (by which was evidently meant no other British colony) was to be admitted, unless by the consent of nine states.2 The eventual

establishment of new states within the limits of the Union seems to have been wholly overlooked by the framers of that instrument.3 In the pro

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1 Journal of Convention, p. 222, 307, 308, 309, 310, 311, 365, 385.

2 Article 11.

3 The Federalist, No. 43.

gress of the revolution it was not only perceived, that from the acknowledged extent of the territory of several of the states, and its geographical position, it might be expedient to divide it into two states; but a much more interesting question arose, to whom of right belonged the vacant territory appertaining to the crown at the time of the revolution, whether to the states, within whose chartered limits it was situated, or to the Union in its federative capacity. This was a subject of long and ardent controversy, and (as has been already suggested) threatened to disturb the peace, if not to overthrow the government of the Union.1 It was upon this ground, that several of the states refused to ratify the articles of confederation, insisting upon the right of the confederacy to a portion of the vacant and unpatented territory included within their chartered limits. Some of the states most interested in the vacant and unpatented western territory, at length yielded to the earnest solicitations of congress on this subject.2 To induce them to make liberal cessions, congress declared, that the ceded territory should be disposed of for the common benefit of the Union, and formed into republican states, with the same rights of sovereignty, freedom, and independence, as the other states; to be of a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square; and that the reasonable expenses incurred by the state, since the commencement of the war, in subduing Brit-

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1 2 Pitk. Hist. ch. 11, p. 17, 19, 24, 27, 28, 29 to 32; Id. 32 to 36; 1 Kent's Comm. Lect. 10, p. 197, 198. See also 1 Secret Journals of Congress in 1775, p. 368 to 386; Id. 433 to 438; Id. 445, 446.

2 1 Tuck. Black. Comm. App. 283, 284, 285, 286; 2 Pitkin's Hist. ch. 11, p. 33 to 36; 1 U.S. Laws, (Duane &, Bioren's Edition,) p. 467, 472; ante vol. 1, § 227, 228.

ish posts, or in maintaining and acquiring the territory, should be reimbursed.1

§ 1311. Of the power of the general government thus constitutionally to acquire territory under the articles of the confederation, serious doubts were at the time expressed; more serious than, perhaps, upon sober argument, could be justified. It is difficult to conceive, why the common attribute of sovereignty, the power to acquire lands by cession, or by conquest, did not apply to the government of the Union, in common with other sovereignties; unless the declaration, that every power not expressly delegated was retained by the states, amounted to (which admitted of some doubt) a constitutional prohibition.2 Upon more than one occasion it has been boldly pronounced to have been founded in usurpation. "It is now no longer," said the Federalist in 1788, "a point of speculation and hope, that the western territory is a mine of vast wealth to the United States; and although it is not of such a nature, as to extricate them from their present distresses, or for some time to come to yield any regular supplies for the public expenses; yet it must hereafter be able, under proper management, both to effect a gradual discharge of the domestic debt, and to furnish for a certain period liberal tributes to the federal treasury. A very large proportion of this fund has been already surrendered by individual states; and it may with reason be expected, that the remaining states will not persist in withholding similar proofs of their equity and generosity.

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1 See 1 Secret Journals of Congress, 6th Sept. 1780, p. 440 to 444; 6 Journal of Congress, 10th Oct. 1780. p. 213; 2 Pitkin's Hist. ch. 11, p. 34, 35, 36; 7 Journal of Congress, 1st March, 1781, p. 43 to 48; Land Laws of U. S. Introductory chapter, 1 U. S. Laws, p. 452, (Duane & Bioren's Edition.)

2 See Amer. Insur. Company v. Carter, 1 Peters's Sup. R. 511, 549.

We may calculate, therefore, that a rich and fertile soil of an area equal to the inhabited extent of tim United States will soon become a national stock. Congress have assumed the administration of this stock. They have begun to make it productive. Congress have undertaken to do more; they have proceeded to form new states; to erect temporary governments; to appoint officers for them; and to prescribe the conditions, on which such states shall be admitted into the confederacy. All this has been done, and done without the least colour of constitutional authority. Yet no blame has been whispered, and no alarm has been sounded."1

§ 1312. The truth is, that the importance, and even justice of the title to the public lands on the part of the federal government, and the additional security, which it gave to the Union, overcame all scruples of the people, as to its

constitutional character. The measure, to which the Federalist alludes in such emphatic terms, is the famous ordinance of congress, of the 13th of July, 1787, which has ever since constituted, in most respects, the model of all our territorial governments; and is equally remarkable for the brevity and exactness of its text, and for its masterly display of the fundamental principles of civil and religious liberty. It begins by providing a scheme for the descent and distributions of estates equally among all the children, and their representatives, or other relatives of the deceased in equal degree, making no distinction between the whole and half blood; and for the mode of disposing of real estate by will, and by conveyances. It then proceeds to provide for the organization of the territorial

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1 The Federalist, No. 38, 42, 43.

governments, according to their progress in population, confiding the whole power to a governor and judges in the first instance, subject to the control of congress. As soon as the territory contains five thousand inhabitants, It provides for the establishment of a general legislature, to consist of three. branches, a governor, a legislative council, and a house of representatives; with a power to the legislature to appoint a delegate to congress. It then proceeds to state certain fundamental articles of compact between the original states, and the people and states in the territory, which are to remain unalterable, unless by common consent. The first provides for freedom of religious opinions and worship. The second provides for the right to the writ of habeas corpus; for the trial by jury; for a proportionate representation in the legislature; for Judicial proceedings according to the course of the common law; for capital offences being bailable; for fines being moderate, and punishments not cruel or unusual; for no man's being deprived of his liberty or property, but by the judgment of his peers, or the law of the land; for full compensation for property taken, or services demanded for the public exigencies; "and for the just preservation of rights and property, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide, and without fraud previously formed." The third provides for the encouragement of religion, and education, and schools, and for good faith and due respect for the rights and property of the Indians. The fourth provides, that the territory and states formed therein shall for ever remain a part of the confederacy, subject to the constitutional authority of congress; that the inhabitants shall

be liable to be taxed proportionately for the public expenses; that the legislatures in the territory shall never interfere with the primary disposal of the soil by congress, nor with their regulations for securing the title to the soil to purchasers; that no tax shall be imposed on lands, the property of the United States; and nonresident proprietors shall not be taxed more than residents; that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and for ever free. The fifth provides, that there shall be formed in the territory not less than three, nor more than five states with certain boundaries; and whenever any of the said states shall contain 60,000 free inhabitants, such state shall (and may before) be admitted by its delegates into congress on an equal footing with the original states in all respects whatever, and shall be at liberty to form a permanent constitution and state government, provided it shall be republican, and in conformity to these articles of compact. The sixth and last provides, that there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes; but fugitives from other states, owing service therein, may be reclaimed.1 Such is a brief outline of this most important ordinance, the effects of which upon the destinies of the country have already been abundantly demonstrated in the territory, by an almost unexampled prosperity and rapidity of population, by the formation of republican governments, anti by an enlightened system of jurisprudence. Already three states, composing a part of that territory,

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1 See 3 Story's Laws of United States App. 2073, &c.; 1 Tucker's Black. Comm. App. 278, 282.

have been admitted into the Union; and others are fast advancing towards the same grade of political dignity.1

§ 1313. It was doubtless with reference principally to this territory, that the article of the constitution, now under consideration, was adopted. The general precaution, that no new states shall be formed without the concurrence of the national government, and of the states concerned, is consonant to the principles, which ought to govern all such transactions. The particular precaution against the erection of new states by the partition of a state without its own consent, will quiet the jealousy of the larger states; as that of the smaller will also be quieted by a like precaution against a junction of states without their consent.2 Under this provision no less than eleven states have, in the space of little more than forty years, been admitted into the Union upon an equality with the original states. And it scarcely requires. the spirit of prophecy to foretell, that in a few years the predominance of numbers, of population,

and of power will be unequivocally transferred from the old to the new states. May the patriotic wish be for ever true to the fact, felix prole parens.

§ 1314. Since the adoption of the constitution large acquisitions of territory have been made by the United States, by the purchase of Louisiana and Florida, and by the cession of Georgia, which have greatly increased the contemplated number of states. The constitution-

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1 In Mr. Webster's Speech on Mr. Foote's Resolution, in Jan. 1830, there is a very interesting and powerful view of this subject, which will amply repay the diligence of a deliberate perusal. See Webster's Speeches, &c. p. 360 to 364; Id. 369. It is well known, that the ordinance of 1787 was drawn by the Hon. Nathan Dane of Massachusetts, and adopted with scarcely a verbal alteration by Congress. It is a noble and imperishable monument to his fame.

2 The Federalist, No. 43.

ality of the two former acquisitions, though formerly much questioned, is now considered settled beyond any practical doubt.1

§ 1315. At the time, when the preliminary measures were taken for the admission of the state of Missouri into the Union, an attempt was made to include a restriction, prohibiting the introduction of slavery into that state, as a condition of the admission. On that occasion the question was largely discussed, whether congress possessed a constitutional authority to impose such a restriction, upon the ground, that the prescribing of such a condition is inconsistent with the sovereignty of the state to be admitted, and its equality with the other states. The final result of the vote, which authorized the erection of that state, seems to establish the rightful authority of congress to impose such a restriction, although it was not then applied. In the act passed for this purpose, there is an express clause, that in all the territory ceded by France to the United States under the name of Louisiana, which lies north of 360 30' N. Lat., not included within the limits of the state of Missouri, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shah be, and is hereby for ever prohibited.2 An objection of a similar character was taken to the compact between Virginia and Kentucky upon the ground, that it was a restriction upon state sovereignty. But the Supreme Court had no hesita-

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1 See Ante, Vol. iii. p. 156, § 1278 to § 1283; American Insurance Company v. Canter, 1 Peters's Sup. R. 511, 542.

2 Act. 6, March 1820, ch. 20. -- The same subject was immediately afterwards much discussed in the state legislatures; and opposite opinions were expressed by different states in the form of solemn resolutions.

tion in overruling it, considering it as opposed by the theory of all free governments, and especially of those, which constitute the American Republics.1

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1 Green v. Biddle, 8 Wheat. R. 1, 87, 88.

CHAPTER XXXI.

POWERS OF CONGRESS--TERRITORIAL GOVERNMENTS.

§ 1316. THE next clause of the same article is, "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States; and nothing in this constitution shall be so construed, as to prejudice any claims of the United States, or of any particular state." The proviso thus annexed to the power is certainly proper in itself, and was probably rendered necessary by the jealousies and questions concerning the Western territory, which have been already alluded to under the preceding head.1 It was perhaps suggested by the clause in the ninth article of the confederation, which contained a proviso, "that no state shall be deprived of territory for the benefit of the United States."

§ 1317. The power itself was obviously proper, in order to escape from the constitutional objection already stated to the power of congress over the territory ceded to the United States under the confederation. The clause was not in the original draft of the constitution; but was added by the vote of ten states against one.2

§ 1318. As the general government possesses the right to acquire territory, either by conquest, or by treaty, it would seem to follow, as an inevitable consequence,

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1 The Federalist, No. 43; ante, ch. 30.

2 Journal of Convention, p. 228, 310, 312, 365.

that it possesses the power to govern, what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and it is not subject to the jurisdiction of any state. It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any government at all.1 In cases of conquest, the usage of the would is, if a nation is not wholly subdued, to consider the conquered territory, as merely held by military occupation, until Its fate shall be determined by a treaty of peace. But during this intermediate period it is exclusively subject to the government of the conqueror. In cases of confirmation or cession by treaty, the acquisition becomes firm and stable; and the ceded territory becomes a part of the nation, to which it is annexed, either on terms stipulated in the treaty, or on such, as its new master shall impose. The relations of the inhabitants with each other do not change; but their relations with their former sovereign are dissolved; and new relations are created between them and their new sovereign. The act transferring the country transfers the allegiance of its inhabitants. But the general laws, not strictly political, remain, as they were, until altered by the new sovereign. If the treaty stipulates, that the), shall enjoy the privileges, rights, and immunities of citizens of the United States, the treaty, as a part of the law of the land, becomes obligatory in these respects. Whether the same effects would result from the mere fact of their becoming inhabitants and citizens by the cession, without any express stipulation, may deserve inquiry, if the question should ever occur.

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1 American Insurance Company v. Canter, 1 Peters's Sup. R. 511, 542. 543; Id. 517, Mr. Justice Johnson's Opinion.

But they do not participate in political power; nor can they share in the powers of the general government, until they become a state, and are admitted into the Union, as such. Until that period, the territory remains subject to be governed in such manner, as congress shall direct, under the clause of the constitution now under consideration.1

§ 1319. No one has ever doubted the authority of congress to erect territorial governments within the territory of the United States, under the general language of the clause, "to make all needful rules and regulations." Indeed, with the ordinance of 1787 in the very view of the framers, as well as of the people of the states, it is impossible to doubt, that such a power was deemed indispensable to the purposes of the cessions made by the states. So that, notwithstanding the generality of the objection, (already examined,) that congress has no power to erect corporations, and that in the convention the power was refused; we see, that the very power is an incident to that of regulating the territory of the United States; that is, it is an appropriate means of carrying the power into effect.2 What shall be the form of government established in the territories depends exclusively upon the discretion of congress. Having a right to erect a territorial government, they may confer on it such powers, legislative, judicial, and executive, as they may deem best. They may confer upon it general legislative powers, subject only to the laws and constitution of the United

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1 American Insurance Company v. Canter, 1 Peters's Sup. R. 511, 542, 543.

2 See ante, § 1260, 1261; 4 Jefferson's Corresp. 523, 525; Hamilton on the Bank of U. S., 1 Hamilton's Works, 121, 127 to 131; Id. 135, 147, 151; Id. 124, 115 Act of Congress, 7th Aug. 1789, ch. 8.

States. If the power to create courts is given to the territorial legislature, those courts are to be deemed strictly territorial; and in no just sense constitutional courts, in which the judicial power conferred by the constitution can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty in the government, or in virtue of that clause, which enables congress to make all needful rules and regulations respecting the territory of the United States.1 The power is not confined to the territory of the United States; but extends to "other property belonging to the United States;" so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood, and acted upon.

§ 1330. As if it were not possible to confer a single power upon the national government, which ought not to be a source of jealousy, the present has not been without objection. It has been suggested, that the sale and disposal of the Western territory may become a source of such immense revenue to the national government, as to make it independent of, and formidable to, the people. To amass immense riches (it has been said) to defray the expenses of ambition, when occasion may prompt, without seeming to oppress the people, has uniformly been the policy of tyrants. Should such a policy creep into our government, and the sales of the public lands, instead of being

appropriated to the discharge of the public debt, be converted to a treasure in a bank, those, who, at any time, can command it, may be tempted to apply it to the most nefarious purposes. The

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1 American Insurance Company v. Canter, 1 Peters's Sup. R. 511, 546,

improvident alienation of the crown lands in England has been considered, as a circumstance extremely favourable to the liberty of the nation, by rendering the government less independent of the people. The same reason will apply to other governments, whether monarchical or republican.1

§ 1321. What a strange representation is this of a republican government, created by, and responsible to, the people in all its departments! What possible analogy can there be between the possession of large revenues in the hands of a monarch, and large revenues in the possession of a government, whose administration is confided to the chosen agents of the people for a short period, and may be dismissed almost at pleasure? If the doctrine be true, which is here inculcated, a republican government is little more than a dream, however its administration may be organized; and the people are not worthy of being trusted with large public revenues, since they cannot provide against corruption, and abuses of them. Poverty alone (it seems) gives a security for fidelity; and the liberties of the people are safe only, when they are pressed into vigilance by the power of taxation. In the view of this doctrine, what is to be thought of the recent purchases of Louisiana and Florida? If there was danger before, how mightily must it be increased by the accession of such a vast extent of territory, and such a vast increase of resources? Hitherto, the experience of the country has justified no alarms on this subject from such a source. On the other hand, the public lands hold out, after the discharge of the national debt, ample revenues to be devoted to the cause of education and sound learning, and to internal improvements, without trenching upon the property, or

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1 1 Tuck. Black. Comm. App. 284.

embarrassing the pursuits of the people by burthensome taxation. The constitutional objection to the appropriation of the other revenues of the government to such objects has not been supposed to apply to an appropriation of the proceeds of the public lands. The cessions of that territory were expressly made for the common benefit of the United States; and therefore constitute a fund, which may be properly devoted to any objects, which are for the common benefit of the Union.1

§ 1322. The power of congress over the public territory is clearly exclusive and universal; and their legislation .is subject to no control; but is absolute, and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled.2 But the power of congress to regulate the other national property (unless it has acquired, by cession of the states, exclusive jurisdiction) is not necessarily exclusive in all cases. If the national government own a fort, arsenal, hospital, or lighthouse establishment, not so ceded, the general jurisdiction of the state is not excluded in regard to the site; but, subject to the rightful exercise of the powers of the national government, it remains in full force.3

§ 1323. There are some other incidental powers given to congress, to carry into effect certain other

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1 1 Kent's Comm. Lect. 12, p. 242, 243, Id. Lect. 17, p. 359.

2 Rawle on Const. ch. 27, p. 237; 1 Kent's Comm. Lect. 12, p. 243; Id. Lect. 17, p. 359, 360.

3 Rawle on Const. ch. 27, p. 240; The People v. Godfrey, 17 Johns. R. 225; Commonwealth v. Young, 1 Hall's Journal of Jurisp. 47. -- Sergeant on Const. ch. 31, [ch. 33.] -- Whether the general doctrine in the case of Commonwealth, v. Young, (1 Hall's Journal 47,) can be maintained, in its application to that case, is quite a different question.

provisions of the constitution. But they will most properly come under consideration in a future part of these Commentaries. At present, it may suffice to say, that with reference to due energy in the government, due protection of the national interests, and due security to the Union, fewer powers could scarcely have been granted, without jeoparding the whole system. Without the power of the purse, the power to declare war, or to promote the common defence, or general welfare, would have been wholly vain and illusory. Without the power exclusively to regulate commerce, the intercourse between the states would have been constantly liable to domestic dissensions, jealousies, and rivalries, and to foreign hostilities, and retaliatory restrictions. The other powers are principally auxiliary to these; and are dictated at once by an enlightened policy, a devotion to justice, and a regard to the permanence (may it ripen into a perpetuity!)of the Union.1

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1 Among the extraordinary opinions of Mr. Jefferson, in regard to government in general, and especially to the government of the United States, none strikes. the calm observer with more force, than the cool and calculating manner, in which lie surveys the probable occurrence of domestic rebellions. "I am," he says, "not a friend to a very energetic government. It is always oppressive. It places the governors, indeed, moro at their ease, at the expense of the people. The late rebellion in Massachusetts (in 1787) has given more alarm, than I think it should have done. Calculate, that one rebellion in thirteen states, in the course of eleven years, is but one for each state, in a century and a half. No country should be so long without one. Nor will any. degree of power in the hands of government prevent insurrections." Letter to Mr. Madison, in 1787, 2 Jefferson's Corresp. 276. Is it not surprising, that any statesman should have overlooked the horrible evils, and immense expenses, which are attendant upon every rebellion? The loss of life, the summary exercise of military power, the desolations of the country, and the inordinate expenditures, to which every rebellion must give rise? Is not the great object of every good government to

§ 1324. As there are incidental powers belonging to the United States in their sovereign capacity, so there are incidental rights, obligations, and duties. It may be asked, how these are to be ascertained. In the first place, as to duties and obligations of a public nature, they are to be ascertained by the law of nations, to which, on asserting our independence, we necessarily became subject. In regard to municipal rights and obligations, whatever differences of opinion may arise in regard to the extent, to which the common law attaches to the national government, no one can doubt, that it must, and ought to be resorted to, in order to ascertain many of its rights and obligations. Thus, when a contract is entered into by the United States, we naturally and necessarily resort to the common law, to interpret its terms, and ascertain its obligations. The same general rights, duties, and limitations, which the common law attaches to contracts of a similar character between private individuals, are applied to the contracts of the government. Thus, if the United States become the holder of a bill of exchange, they are bound to the same diligence, as to giving notice, in order to

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preserve, and perpetuate domestic peace, and the security of property, and the reasonable enjoyment of private rights, and personal liberty? If a state is to be torn into factions, and civil wars, every eleven years, is not the whole Union to become a common sufferer? How, and when are such wars to terminate? Are the insurgents to meet victory or defeat? Has not history established the melancholy truth, that constant wars lead to military dictatorship, and despotism, and are inconsistent with the free spirit of republican governments? If the tranquillity of the Union is to be disturbed every eleventh year by a civil war, what repose can there be for the citizens, in their ordinary pursuits? Will they not soon become tired of a republican government, which invites to such eternal contests, ending in .blood, and murder, and rapine? One cannot but feel far moro sympathy with the opinion of Mr. Jefferson, in the same letter, in which he expounds the great political maxim, "Educate and inform the whole mass of the people." 9 Jefferson's Corrsp. 276.

change an indorser, upon the dishonour of the bill, as a private holder would be.1 In like manner, when a bond is entered into by a surety for the faithful discharge of the duties of an office by his principal, the nature and extent of the obligation, created by the instrument, are constantly ascertained by reference to the common law; though the bond is given to the government in its sovereign capacity.2

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1 United Stales v. Barker, 12 Wheat. R. 559.

2 See, among other cases, United States v. Kirkpatrick, 9 Wheat. R. 720; Furrar v. United States, 5 Peters's R. 373; Smith v. United Stales, 5 Peters's R. 294: United States v. Tingey, 5 Peters's R. 115; United Stales v. Buford, 3 Peters's R. 12, 30.

CHAPTER XXXII.

PROHIBITIONS ON THE UNITED STATES.

§ 1325. Having finished this review of the powers of congress, the order of the subject next conducts us to the prohibitions and imitations upon these powers, which are contained in the ninth section of the first article. Some of these have already been under discussion, and therefore will be pretermitted.1

§ 1326. The first clause is as follows: "The migration, or importation of such persons, as any of the states now existing shall think proper to admit, shall not be prohibited by the congress, prior to the year one thousand eight

hundred and eight; but a tax, or duty, may be imposed on such importation, not exceeding ten dollars for each person."

§ 1327. The corresponding clause of the first draft of the constitution was in these words: "No tax, or duty, shall be laid, &c. on the migration, or importation of such persons, as the several states shall think proper to admit; nor shall such migration, or importation be prohibited." 'In this form it is obvious, that the migration and importation of slaves, which was the sole object of the clause, was in effect perpetuated, so long, as any state should choose to allow the traffic. The subject was afterwards referred to a committee, who reported the clause substantially in its present shape; except that the limitation was the year one thousand eight hundred, instead of one thousand eight hun-

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1 Those, which respect taxation, and the regulation of commerce, have been considered under former heads; to which the learned reader is referred. Ante, Vol. II, ch. 14, 15.

dred and eight. The latter amendment was substituted by the vote of seven states against four; and as thus amended, the clause was adopted by the like vote of the same states.1

§ 1328. It is to the honour of America, that she should have set the first example of interdicting and abolishing the slave-trade, in modern times. It is well known, that it constituted a grievance, of which some of the colonies complained before the revolution, that the introduction of slaves was encouraged by the crown, and that prohibitory laws were negatived.2 It was doubtless to have been wished, that the power of prohibiting the importation of slaves had been allowed to be put into immediate operation, and had not been postponed for twenty years. But it Is not difficult to account, either for this restriction, or for the manner, in which it is expressed.3 It ought to be considered, as a great point gained in favour of humanity, that a period of twenty years might for ever terminate, within the United States, a traffic, which has so long, and so loudly upbraided the barbarism of modern policy. Even within this period, it might receive a very considerable discouragement, by curtailing the traffic between for-

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1 Journ. of Convention, p. 222, 275, 276, 285, 291, 292, 358, 378; 2 Pitk. Hist. ch. 20, p. 261, 262. -- It is well known, as an historical fact, that South-Carolina and Georgia insisted upon this limitation, as a condition of the Union. See 2 Elliot's Deb. 335, 336, 3 Elliot's Deb. 97.

2 See 2 Elliot's Debates, 335; 1 Secret Journal of Congress, 378, 379.

3 See 3 Elliot's Debates, 98, 250, 251; 3 Elliot's Debates, 335 to 338. --

In the original draft of the Declaration of Independence by Mr. Jefferson there is a very strong paragraph on this subject, in which the slave-trade is denounced, "as a piratical warfare, the opprobrium of infidel powers, and the warfare of the Christian king of Great Britain, determined to keep open a market, where men should be bought and sold;" and it is added, that "he has prostituted his negative for suppressing every legislative attempt to prohibit, or restrain this execrable commerce." 1 Jefferson's Corresp. 146, in the fac simile of the original.

eign countries; and it might even be totally abolished by the concurrence of a few states.1 "Happy," it was then added by the Federalist, "would it be for the unfortunate Africans, if an equal prospect lay before them of being redeemed from the oppressions of their European brethren."2 Let it be remembered, that at this period this horrible traffic was carried on with the encouragement and support of every civilized nation of Europe; and by none with more eagerness and enterprize, than by the parent country. America stood forth alone, uncheered and unaided, in stamping ignominy upon this traffic on the very face of her constitution of government, although there were strong temptations of interest to draw her aside from the performance of this great moral duty.

§ 1329. Yet attempts were made to pervert this clause into an objection against the constitution, by representing it on one side, as a criminal toleration of an illicit practice; and on another, as calculated to prevent voluntary and beneficial emigrations to America.3 Nothing, perhaps, can better exemplify the spirit and manner, in which the opposition to the constitution was conducted, than this fact. It was notorious, that the postponement of an immediate abolition was indispensable to secure the adoption of the constitution. It was a necessary sacrifice to the prejudices and interests of a portion of the Southern states.4 The glory of the achievement is scarcely lessened by its having been gradual, and by steps silent, but irresistible.

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1 The Federalist, No. 42.

2 Ibid.

3 The Federalist, No. 42; 2 Elliot's Debates, 335, 336; 3 Elliot's Debates, 250, 251.

4 2 Elliot's Debates, 335, 336; 1 Lloyd's Deb. 305 to 313; 3 Elliot's Debates, 97; Id. 250, 251; 1 Elliot's Debates, 60; 1 Tuck. Black. Comm. App. 290.

§ 1330. Congress lost no time in interdicting the traffic, as far as their power extended, by a prohibition of American citizens Carrying it on between foreign countries. And as soon, as the stipulated period of twenty years had expired, congress, by a prospective legislation to meet the exigency, abolished the whole traffic in every direction to citizens and residents. Mild and moderate laws were, however, found insufficient for the purpose of putting an end to the practice; and at length congress found it necessary to declare the slave-trade to be a piracy, and to punish it with death.1 Thus it has been elevated in the catalogue of crimes to this 'bad eminence' of guilt; and has now annexed to it the infamy, as well as the retributive justice, which belongs to an offence equally against the laws of God and man, the dictates of humanity, and the solemn precepts of religion. Other civilized nations are now alive to this great duty; and by the noble exertions of the British government, there is now every reason to believe, that the African slave-trade will soon become extinct; and thus another triumph of virtue would be obtained over brutal violence and unfeeling cruelty.2

§ 1331. This clause of the constitution, respecting the importation of slaves, is manifestly an exception from the power of regulating commerce. Migration seems appropriately to apply to voluntary arrivals, as importation does to involuntary arrivals; and so far, as an exception from a power proves its existence, this proves, that the power to regulate commerce applies equally to the regulation of vessels employed in trans-

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1 Act of 1820, ch. 113.

2 See 1 Kent's Comm. Lect. 9, p. 179 to 187.

porting men, who pass from place to place voluntarily, as to those, who pass involuntarily.1

§ 1332. The next clause is, "The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

§ 1333. In order to understand the meaning of the terms here used, it will be necessary to have recourse to the common law; for in no other way can we arrive at the true definition of the writ of habeas corpus. At the common law there are various writs, called writs of habeas corpus. But the particular one here spoken of is that great and celebrated writ, used in all cases of illegal confinement, known by the name of the writ of habeas corpus ad subjiciendum, directed to the person detaining another, and commanding him to produce the body. of the prisoner, with the day and cause of his caption and detention, ad faxiendum, subjiciendum, et recipiendum, to do, submit to, and receive, whatsoever the judge or court, awarding such writ, shall consider in that behalf.2 It is, therefore, justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge. This writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may be; for every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner, in which the restraint is effected.3

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1 Gibbons v. Ogden, 9 Wheat. R. 1, 216, 217; Id. 206, 207.

2 3 Black. Comm. 131.

3 2 Kent. Comm. Lect. 24, p. 22, &e. (2 edit. p. 26 to 32.)

§ 1334. Mr. Justice Blackstone has remarked with great force, that "to bereave a man of life, or by violence to confiscate his estate without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary force."1 While the justice of the remark. must be felt by all, let it be remembered, that the right to pass bills of attainder in the British parliament still enables that body to exercise the summary and awful power of taking a man's life, and confiscating his estate, without accusation or trial. The learned commentator, however, has slid over this subject with surprising delicacy.2

§ 1335. In England this is a high prerogative writ, issuing out of the Court of King's Bench, not only in term time, but in vacation, and running into all parts of the king's dominions; for it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained. It is grantable, however, as a matter of right, ex merito justitiae, upon the application of the subject.3 In England, however, the benefit of it was often eluded

prior to the reign of Charles the Second; and especially during the reign. of Charles the First. These pitiful evasions gave rise to the famous Habeas Corpus Act of 31 Car. 2, c. 2, which has been frequently considered, as another magna charta in that kingdom; and has reduced the

1 1 Black. Comm. 136.
2 4 Black. Comm. 259.
3 4 Inst. 290; 1 Kent's Comm. Lect. 94, p. 22, (p. 26 to 32;) 3 Black. Comm. 133.

general method of proceedings on these writs to the true standard of law and liberty.1 That statute has been, in substance, incorporated into the jurisprudence of every state in the Union; and the right to it has been secured in most, if not in all, of the state constitutions by a provision, similar to that existing in the constitution of the United States.2 It is not without reason, therefore, that the common law was deemed by our ancestors a part of the law of the land, brought with them upon their emigration, so far, as it was suited to their circumstances; since it affords the amplest protection for their rights and personal liberty. Congress have vested in the courts of the United States full authority to issue this great writ, in cases falling properly within the jurisdiction of the national government.3

§ 1336. It is obvious, that cases of a peculiar emergency may arise, which may justify, nay even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes, because they were forgotten,4 the right to suspend it is expressly confined to cases of rebellion or invasion, where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in

1 3 Black. Comm. 135, 136; 2 Kent's Comm. Lect. 24, p. 22, 23, (2d edit. p. 26 to 32.)
2 2 Kent's Comm. Lect. 24, p. 23, 24, (2d edit. p. 26 to 32.)
3 Ex parte Bollman, &c. 4 Cranch, 75; S. C. 2 Peters's Cond. R. 33.
4 3 Black. Comm. 137, 138; 1 Tuck. Black. Comm. App. 291, 292.

bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by congress since the establishment of the constitution.1 It would seem, as the power is given to congress to suspend the Writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.2

§ 1337. The next clause is, "No bill of attainder or ex post facto law shall be passed."

§ 1338. Bills of attainder, as they are technically called, are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penal-

1 Mr. Jefferson expressed a decided objection against the power to suspend the writ of habeas corpus in any case whatever, declaring himself in favour of" the eternal and unremitting force of the habeas corpus laws." 2 Jefferson's Corresp. 274, 291. -- "Why," said he on another occasion, "suspend the writ of habeas corpus in insurrections and rebellions?" -- "If the public safety requires, that the government should have a man imprisoned on less probable testimony in those, than in other emergencies, let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages." 2 Jefferson's Corresp. 344. -- Yet the only attempt ever made in congress to suspend the writ of habeas corpus was during his administration on occasion of the supposed treasonable conspiracy of Col. Aaron Burr. Mr. Jefferson sent a message to congress on the subject of that conspiracy on 22d January, 1807. On the next day, Mr. Giles of the senate moved a committee to consider the expediency of suspending the writ of habeas corpus be appointed, and the motion prevailed. The committee (Mr. Giles, chairman) reported a bill for this purpose. The bill passed the senate, and was rejected in the house of representatives by a vote of 113 for the rejection, against 19 in its favour. See 3 Senate Journal, 22d January, 1807, p. 127; Id. 130, 131. 5 Journ. of House of Representatives, 26th January, 1807, p. 550, 551, 552.
2 Martin v. Mott, 12 Wheat. R. 19. See also 1 Tuck. Black. Comm. App. 292; 1 Kent's Comm. Lect. 12, (2d edit. p. 262 to 265.)

ties.1 But in the sense of the constitution, it seems, that bills of attainder include bills of pains and penalties; for the Supreme Court have said, "A bill of attainder may affect the life of an individual, or may confiscate his property, or both."2 In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions. Such acts have been often resorted to in foreign governments, as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching, as well to the absent and the dead, as to the living. Sir Edward Coke 3 has mentioned it to be among the transcendent powers of parliament, that an act may be passed to attaint a man, after he is dead. And the reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor.4 The punishment has often been inflicted without calling upon the party accused to

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1 2 Woodeson's Law Lect. 625.

2 Fletcher v. Peck, 6 Cranch, R. 138; S.C. 2 Peters's Cond. R. 322; 1 Kent's Comm. Lect. 19, p. 382.

3 4 Coke. Inst. 36, 37.

4 2 Woodeson's Lect. 623, 624.

answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender.1 The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens.2 Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free, as the enslaved) to forget their,duties, and to trample upon the rights. and liberties of others.3

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1 2 Woodeson's Lect. 624.

2 Dr. Paley has strongly shown his disapprobation of laws of this sort. I quote from him a short but pregnant passage. "this fundamental rule of civil jurisprudence is violated in the case of acts of attainder or confiscation, in bills of pains and penalties, and in all ex post facto laws whatever, in which parliament exercises the double office of legislature and judge. And whoever either understands the value of the rule itself, or collects the history of those instances, in which it has been invaded, will be induced, I believe, to acknowledge, that it had been wiser and safer never to have departed from it. He will confess, at least, that nothing but the most manifest and immediate peril of the commonwealth will justify a repetition of these dangerous examples. If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission or future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, .upon which the purity of public justice, and the existence of civil liberty, essentially depend."

3 See 1 Tucker's Black. Comm. App. 292, 293; Rawle on Const. ch. 10, p. 119. See Cooper v. Telfair, 4 Dall. R. 14. --Mr, Woodsson, in his Law Lectures, (Lect- 41,) has devoted a whole lecture to this subject, which is full of instruction, and will reward the diligent perusal of the student. 2 Woodeson's Law Lect. 621. -- During the American revolution this power was used with a meet unsparing hand; and it has

§ 1339. Of the same class axe ex post facto laws, that is to say, (in a literal sense,) laws passed after the act done. The terms, ex post facto laws, in a comprehensive sense, embrace all retrospective laws, or laws governing, or controlling past transactions, whether they are of a civil, or a criminal nature. And there have not been wanting learned minds, that have contended with no. small force of authority and reasoning, that such ought to be the interpretation of the terms in the constitution of the United States.1 As an original question, the argument would be entitled to grave consideration; but the current of opinion and authority has been so generally one way, as to the meaning of this phrase in the state constitutions, as well as in that of the United States, ever since their adoption, that it is difficult to feel, that it is now an open question.2 The general interpretation has been, and is, that the phrase

applies to acts of a criminal nature only; and, that the prohibition reaches every law, whereby an act is declared a crime, and made punishable as such, when it was not a crime, when done; or whereby the act, if a crime, is aggravated in enormity, or punishment; or whereby different, or less evidence, is required to convict an offender, than was required, when the act was committed. The Supreme Court have given the following definition. "An ex post facto law is one, which ren-

been a matter of regret in succeeding times, however much it may have been applauded flagrante bello.
1 Mr. Justice Johnson's Opinion in Satterlee v. Mathewson, 2 Peters's R. 416, and note, id. App. 681, &c.; 2 Elliot's Debates, 353; 4 Wheat. R. 578, note; Ogden v. Saunders, 12 Wheat. R. 286.
2 See Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 6 Cranch, 138; S. C. 1 Peters's Cond. R. 172; 2 Peters's Cond. R,. 308; The Federalist, No. 44, 84; Journ. of Convention, Supp. p. 431; 2 Amer. Mus. 536; 2 Elliot's Debates, 343, 352, 354; Ogden v. ,Saunders, 12 Wheat. R. 266, 303, 329, 330, 335; 1 Kent. Comm. Lect. 19, p. 381, 382.

ders an act punishable in a manner, in which it was not punishable, when it was committed."1 Such a law may inflict penalties on the person, or may inflict pecuniary penalties, which swell the public treasury.2 Laws, however, which mitigate the character, or punishment of a crime already committed, may not fall within the prohibition, for they are in favour of the citizen.3

§ 1340. The next clause (passing by such, as have been already considered) is, "No money shall be drawn from the treasury but in consequence of appropriations made by law. And a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

§ 1341. This clause was not in the original draft of the constitution; but the first part was subsequently introduced, upon a report of a committee; and the latter part was added at the very close of the convention.4

§ 1342. The object is apparent upon the slightest examination. It is to secure regularity, punctuality, and fidelity, in the disbursements of the public money, As all the taxes raised from the people, as well as the revenues arising froth other sources, are to be applied to the discharge of the expenses, and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide, how and when any money should be applied for these purposes. If it were otherwise, the executive would

1 Fletcher v. Peck, 6 Cranch, 138; S. C. 2 Peters's Cond. R. 322.
2 Ibid.
3 Rawle on Constitution, ch. 10, p. 119; 1 Tuck. Black. Comm. App. 293; 1 Kent. Comm. Lect. 19, p. 381, 382; Sergeant on Constitution, ch. 28 [ch. 30]; Calder v. Bull, 3 Dall. R. 386.
4 Journal of Convention. 219, 328, 345, 358, 378.

possess an unbounded power over the public purse or the nation;and might apply all its monied resources at his pleasure. The power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation. In arbitrary governments the prince levies what money he pleases from his subjects, disposes of it,as he thinks proper, and is beyond responsibility or reproof. It is wise to interpose, in a republic, every restraint, by which the public treasure, the common fund Of all, should be applied, with unshrinking honesty to such objects, as legitimately belong to the common defence, and the general welfare. Congress is made the guardian of this treasure; and to make their responsibility complete and perfect, a regular account of the receipts and expenditures is required to be published, that the people may know, what money is expended, for what purposes, and by what authority.

§ 1348. A learned commentator has, however, thought, that the provision, though generally excellent, is defective in not having enabled the creditors of the government, and other. persons having vested claims against it, to recover, and to be paid the amount judicially ascertained to be due to them out of the public treasury, without any appropriation.1 Perhaps it is a defect. And yet it is by no means certain, that evils of an opposite nature might not arise, if the debts, judicially ascertained to be due to, an individual by a regular judgment, were to be paid, of course, out of the public treasury. It might give an opportunity for collusion and corruption in the management of suits between the claimant, and the officers of the

1 1 Tuck. Black. Comm. App. 362 to 364.

government, entrusted with the performance of this duty. Undoubtedly, when a judgment has been fairly obtained, by which a debt against the government is clearly made out, it becomes the duty of congress to provide for its payment; and, generally, though certainly with a tardiness, which has become, in some sort, a national reproach, this duty is discharged by congress in a spirit of just liberality. But still, the known fact, that the subject must pass in review before congress, induces a caution and integrity in making and substantiating claims, which would in a great measure be done away, if the claim were subject to no restraint, and no revision.

§ 1344. The next clause is, "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state".

§ 1345. This clause seems scarcely to require even a passing notice. As a perfect equality is the basis of all our institutions, state and national, the prohibition against the creation of any titles of nobility seems proper, if not indispensable, to keep perpetually alive a just sense of this important truth. Distinctions between citizens, in regard to rank, would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government.1

§ 1346. The other clause, as to the acceptance of any emoluments, title, or office, from foreign govern-

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1 The Federalist, No. 84.

ments, is founded in a just jealousy of foreign influence of every sort. Whether, in a practical sense, it can produce much effect, has been thought doubtful. A patriot will not be likely to be seduced from his duties to his country by the acceptance of any title, or present, from a foreign power. An intriguing, or corrupt agent, will not be restrained from guilty machinations in the service of a foreign state by such constitutional restrictions. Still, however, the provision is highly important, as it puts it out of the power of any officer of the government to wear borrowed honours, which shall enhance his supposed importance abroad by a titular dignity at home.1 It is singular, that there should not have been for the same object, a general prohibition against any citizen whatever, whether in private or public life, accepting any foreign title of nobility. An amendment for this purpose has been recommended by congress; but, as yet, it has not received the ratification of the constitutional number of states to make it obligatory, probably from a growing sense, that it is wholly unnecessary.2

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1 1 Tuck. Black. Comm. App. 295, 296; Rawle on Constitution, ch. 10, p. 119, 120.

2 Rawle on Constitution, ch. p. 10, 120.

CHAPTER XXXIII.
PROHIBITIONS ON THE STATES.

§ 1347. THE tenth section of the first article (to which we are now to proceed) contains the prohibitions and restrictions upon the authority of the states. Some of these, and especially those, which regard the power of taxation, and the regulation of commerce, have already passed under consideration; and will, therefore, be here omitted. The others will be examined in the order of the text of the constitution.

§ 1348. The first clause is, "No state shall enter into any treaty, alliance, or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make any thing but gold and silver coin 'a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."1

§ 1349. The prohibition against treaties, alliances, and confederations, constituted a part of the articles of confederation,2 and was from thence transferred in substance into the constitution. The sound policy,

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1 In the original draft of the constitution, some of these prohibitory clauses wore not inserted; and, particularly, the last clause, prohibiting a state to pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. The former part was inserted by a vote of seven states against three. The latter was inserted in the revised draft of the constitution, and adopted at the close of the convention, whether with, or without opposition, does not appear.* It was probably suggested by the clause in the ordinance of 1787, (Art. 2,) which declared, "that no law ought to be made, &c., that shall interfere with, or affect private contracts, or engagements, bona fide, and without fraud, previously formed."

2 Art. 6.

*** Journal of Convention, p. 227, 302, 377, 379.**

nay, the necessity of it, for the preservation of any national government, is so obvious, as to strike the most careless mind. If every state were at liberty to enter into any treaties, alliances, or confederacies, with any foreign state, it would become utterly subversive of the power confided to the national government on the same subject. Engagements might be entered into by different states, utterly hostile to the interests of neighbouring or distant states; and thus the internal peace and harmony of the Union might be destroyed, or put in jeopardy. A foundation might thus be laid for preferences, and retaliatory systems, which would render the power of taxation, and the regulation of commerce, by the national government, utterly futile. Besides; the intimate dangers to the Union ought not to be overlooked, by thus nourishing within its own bosom a perpetual source of foreign corrupt influence, which in times of political excitement and war, might be wielded to the destruction of the independence of the country. This, indeed, was deemed, by the authors of the Federalist, too clear to require any illustration.1 The corresponding clauses in the confederation were still more strong, direct, and exact, in their language and import.

§ 1350. The prohibition to grant letters of marque and reprisal stands upon the same general ground; for otherwise it would be in the power of a single state to involve the whole Union in war at its pleasure. It is true, that the granting of letters of marque and reprisal is not always a preliminary to war, or necessarily designed to provoke it. But in its essence, it is a hostile measure for unredressed grievances, real or supposed;

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1 The Federalist, No. 44.

and therefore is most generally the precursor of an appeal to arms by general hostilities. The security (as has been justly observed) of the whole Union ought not to be suffered to depend upon the petulance or precipitation of a single state.1 Under the confederation there was a like prohibition in a more limited form. According to that instrument, no state could grant letters of marque and reprisal, until after a declaration of war by the congress of the United States.2 In times of peace the power was exclusively confided to the general government. The constitution has wisely, both in peace and war, confided the whole subject to the general government. Uniformity is thus secured in all operations, which relate to foreign powers; and an immediate responsibility to the nation on the part of those, for whose conduct the nation is itself responsible.3

§ 1351. The next prohibition is to coin money. We have already seen, that the power to coin money, and regulate the value thereof, is confided to the general government. Under the confederation a concurrent power was left in the states, with a restriction, that congress should have the exclusive power to regulate the alloy, and value of the coin struck by the states.4 In this, as in many other cases, the constitution has made a great improvement upon the existing system. Whilst the alloy and value depended on the general government, a right of coinage in the several states could have no other effect, than to multiply expensive mints, and diversify the forms and weights of the circulating coins. The latter inconvenience would defeat one

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1 1 Tucker's Black. Comm. App. 310, 311.

2 Article 6.

3 The Federalist, No. 44; Rawle on Constitution, ch. 10, p. 136.

4 Article 9.

main purpose, for which the power is given to the general government, viz. uniformity of the currency; and the former might be as well accomplished by local mints established by the national government, if it should ever be found inconvenient to send bullion, or old coin for re-coinage to the central mint.1 Such an event could scarcely occur, since the common course of commerce throughout the United States is so rapid and so free, that bullion can with a very slight expense be transported from one extremity of the Union to another. A single mint only has been established, which has hitherto been found quite adequate to all our wants. The truth is, that the prohibition had a higher motive, the danger of the circulation of base and spurious coin connived at for local purposes, or easily accomplished by the ingenuity of artificers, where the coins are very various in value and denomination, and issued from so many independent and unaccountable authorities. 'This subject has, however, been already enlarged on in another place.2

§ 1359. The prohibition to "emit bills of credit" cannot, perhaps, be more forcibly vindicated, than by quoting the glowing language of the Federalist, a language justified by that of almost every contemporary writer, and attested in its truth by facts, from which the mind involuntarily turns away at once with disgust and indignation. "This

prohibition," says. the Federalist, "must give pleasure to every citizen in proportion to his love of justice, and his knowledge of the true springs of public prosperity. The loss, which America has sustained since the peace from the pestilent effects of

1 The Federalist, No. 44.

2 1 Tuck. Black. Comm. App. 311, 312; Id. 261. Ante, Vol. 3, p. 16 to 20.

paper money on the necessary confidence between man and man; on the necessary confidence in the public councils; on the industry and morals of the people; and on the character of republican government, constitutes an enormous debt against the states, chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise, than by a voluntary sacrifice on the altar of justice of the power, which has been the instrument of it. In addition to these persuasive considerations, it may be observed, that the same reasons, which show the necessity of denying to the states the power of regulating coin, prove with equal force, that they ought not to be at liberty to substitute a paper medium, instead of coin. Had every state a right to regulate the value of its coin, there might be as many different currencies, as states; and thus the intercourse among them would be impeded. Retrospective alterations in its value might be made; and thus the citizens of other states be injured, and animosities be kindled among the states themselves. The subjects of foreign powers might suffer from the same cause; and hence the Union be discredited and embroiled by the indiscretion of a single member. No one of these mischiefs is less incident to a power in the states to emit paper money, than to coin gold or silver."1

§ 1353. The evils attendant upon the issue of paper money by the states after the peace of 1783, here spoken of, are equally applicable, and perhaps apply with even

1 The Federalist, No. 44; 2 Elliot's Debates, 83. -- See in Mr. Webster's Speeches on the Bank of United States, in Senate, 25th and 28th of May, 1832, some cogent remarks on the same subject. See also Mr. Madison's Letter to Mr. C.J. Ingersoll, 2d of February, 1811.

increased force to the paper issues of the states and the Union during the revolutionary war. Public, as well as private credit, was utterly prostrated.1 The fortunes of many individuals were destroyed; and those of all persons were greatly impaired by the rapid and unparalleled depreciation of the paper currency during this period. In truth, the history of the paper currency, which during the revolution was issued by congress alone, is full of melancholy instruction. It is at once humiliating to our pride, and disreputable to our national justice. Congress at an early period (November, 1775,) directed an emission of bills of credit to the amount of three millions of dollars; and declared on the face of them, that "this bill entitles the bearer to receive ---Spanish milled dollars, or the value thereof in gold or silver, according to a resolution of congress, passed at Philadelphia, November 29th, 1775." And they apportioned a tax of three millions on the states, in order to pay these bills, to be raised by the states according to their quotas at future designated periods. The bills were directed to be receivable in payment of the taxes; and the thirteen colonies were pledged for their redemption.2 Other emissions were subsequently made. The depreciation was a natural, and indeed a necessary consequence of the fact, that there was no fund to redeem them. Congress endeavoured to give them additional credit by declaring, that they ought to be a tender in payment of all private and public debts; and that a refusal to receive the tender ought to be an extinguishment of the debt, and recommending the states to pass such tender laws. They went even farther, and

1 See Sturgis v. Crowninshield, 4 Wheat. R. 204, 205.

2 1 Journal of Congress, 1775, p. 186, 280, 304.

thought proper to declare, that whoever should refuse to receive this paper in exchange for any property, as gold and silver, should be deemed "an energy to the liberties of these United States."1 This course of violence and terror, so far from aiding the circulation of the paper, led on to still farther depreciation. New issues continued to be made, until in September, 1779, the whole emission exceeded one hundred and sixty millions of dollars. At this time congress thought it necessary to declare, that the issues on no account should exceed two hundred millions; and still held out to the public the delusive hope of an ultimate redemption of the whole at par. They indignantly repelled the idea, in a circular address, that there could be any violation of the public faith, pledged for their redemption; or that there did not exist ample funds to redeem them. They indulged in still more extraordinary delusions, and ventured to

recommend paper money, as of peculiar value. "Let it be remembered," said they, "that paper money is the only kind of money, which cannot make to itself wings and fly away." 2

§ 1354. The states still continued to fail in complying with the requisitions of congress to pay taxes; and congress, notwithstanding their solemn declaration to the contrary, increased the issue of paper money, until it amounted to the enormous sum of upwards of three hundred millions.3 The idea was then abandoned of

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1 2 Journal of Congress, 11th January, 1776, p. 21; 14th January, 1777; 3 Journal of Congress, p.19, 20; 2 Pitk. Hist. ch. 16, p. 155, 156.

2 See 4 Journal of Congress, 9th Dec. 1778, p. 742, and 5 Journal or Congress, 13th Sept. 1779, p. 341 to 353; 2 Pitk. Hist. ch. 16, p. 156, 157.

3 In the American Almanac for 1830, p. 183, the aggregate amount is given at 357,000,000 of the old emission, and 2,000,000 of the new emission; upon which the writer adds, "there was an average depreciation of two thirds of its original value." Mr. Jefferson has given an in-

any redemption at par. In March, 1780, the states were required to bring in the bills at forty for one; and new bills were then to be issued in lieu of them, bearing an interest of five per cent, redeemable in six years, to be issued on the credit of the individual states, and guaranteed by the United States.1 This new scheme of finance was equally unavailing. Few of the old bills Were brought in; and of course few of the new were issued. At last the continental bills became of so little value, that they ceased to circulate; and in the course of the year 1780, they quietly died in the hands of their possessors.2 Thus were redeemed the solemn pledges of the national government!3 Thus, was a paper currency, which was declared to be equal to gold and silver, suffered to perish in the hands of persons compelled to take it; and the very enormity of the

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teresting account of the history of paper money during the revolution, in an article written for the Encyclopedia Methodique. 1 Jefferson's Corresp. 398, 401, 411, 412. 1 6 Journal of Convention, 18th March, 1780, p. 45 to 48.

2 2 Pitkin's Hist. ch. 16, p. 156, 157; 1 Jefferson's Corresp. 401, 402, 411, 412. 3 The twelfth article of the confederation declare, "that all bills of credit emitted, &c. by or under the authority of congress, &c. shall be deemed and considered, u a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged." When was this pledge redeemed? The act of congress of 1790, ch. 61, for the liquidation of the public debt, directs bills of credit to be estimated at the rate of one hundred dollars for one dollar in specie. In Mr. Secretary Hamilton's Report on the public debt and credit in January, 1790, the unliquidated part of the public debt, consisting chiefly of continental bills of credit, was estimated at two millions of dollars. What was the nominal amount of the bills of credit, which this sum of two millions was designed to cover at its specie value, does not appear in the Report. But in the debates in congress, upon the bill founded on it, it was asserted, that it was calculated, that there were about 78 or 80 millions of paper money then outstanding, valued at a depreciation of 40 for 1.

3 Lloyd's Deb. 282, 283, 288.

wrong made the ground of an abandonment of every attempt to redress it!

§ 1355. Without doubt the melancholy shades of this picture were deepened by the urgent distresses of the revolutionary war, and the reluctance of the states to perform their proper duty. And some apology, if not some justification of the proceedings, may be found in the eventful transactions and sufferings of those times. But the history of paper money, without any adequate funds pledged to redeem it, and resting merely upon the pledge of the national faith, has been in all ages and in all nations the same. It has constantly become more and more depreciated; and in some instances has ceased from this cause to have any circulation whatsoever, whether issued by the irresistible edict of a despot, or by the more alluring order of a republican congress. There is an abundance of illustrative facts scattered over the history of those of the American colonies, who ventured upon this pernicious scheme of raising money to supply the public wants, during their subjection to the British crown; and in the several states, from the declaration of independence down to the present times. Even the United States, with almost inexhaustible resources, and with a population of 9,000,000 of inhabitants, exhibited during the late war with Great-Britain the humiliating spectacle of treasury notes, issued and payable in a year, remaining unredeemed, and sunk by depreciation to about haft of their nominal value!

§ 1356. It has been stated by a very intelligent historian, that the first case of any issue of bills of credit in any of the American colonies, as a substitute for money, was by Massachusetts to pay the soldiers, who returned unexpectedly from an unsuccessful expedition

against Canada, in 1690. The debt, thus due to the soldiers, was paid by paper notes from two shillings to ten pounds denomination, which notes were to be received for payment of the tax, which was to be levied, and all other payments into the treasury.1 It is added, that they had better credit than King James's leather money in Ireland about the same time. But the notes could not command money, nor any commodities at money price.2 Being of small amount, they were soon absorbed in the discharge of taxes. At subsequent periods the government resorted to similar expedients. In 1714, there being a cry of a scarcity of money, the government caused £50,000 to be issued in bills of credit, and in 1716, £100,000 to be lent to the inhabitants for a limited period, upon lands mortgaged by them, as security, and in the mean time to pass as money.3 These bills were receivable into the treasury in discharge of taxes, and also of the mortgage debts so contracted. Other bills were afterwards issued; and, indeed, we are informed, that, for about forty years, the currency of the province was in much the same state, as if £100,000 sterling had been stamped on pieces of leather or paper, of various denominations, and declared to be the money of the government, receivable in payment of taxes, and in discharge of private debts.4 The consequence was a very great depreciation, so that an ounce of silver, which, in 1702, was worth six shillings and eight pence, was, in 1749, equal to fifty shillings of this paper currency.5 It seems, that all the other

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1 1 Hutch. Hist. ch. 3, p. 402.

2 Ibid.

3 1 Hutch. Hist. ch. 3, p. 403, note; 2 Hutch. Hist. 208, 245, and note; Id. 380, 381, 403, 404.

4 1 Hutch. Hist. ch. 3, p. 402, 403, and note ibid.

5 Ibid. -- Hutchinson says, that, in 1747, the currency had sunk to sixty shillings for an ounce of silver. 2 Hutch. Hist. 438.

colonies, except Nova Scotia, at different times and for various purposes, authorized the issue of paper money.1 There was a uniform tendency to depreciation, wherever it was persisted in.2

§ 1357. It would seem to be obvious, that, as the states are expressly prohibited from coining money, the prohibition would be wholly ineffectual, if they might create a paper currency, and circulate it as money. But, as it might become necessary for the states to borrow money, the prohibition could not be intended to prevent such an exercise of power, on giving to the lender a certificate of the amount borrowed, and a promise to repay it.

§ 1358. What, then, is the true meaning of the phrase "bills of credit" in the constitution? In its enlarged, and perhaps in its literal sense, it may comprehend any instrument, by which a state engages to pay money at a future day (and of course, for which it obtains a present credit;) and thus it would include a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts, by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use. Nor are instruments, executed for such purposes, in common language denominated "bills of credit." To emit bills of credit conveys to the mind the idea of issuing paper, intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense,

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1 1 Hutch. Hist. ch. 3, p. 402 403, and note ibid.

2 4 Peters's Sup. Ct. R. 435.

in which the terms of the constitution have been generally understood.1 The phrase (as we have seen) was well known, and generally used to indicate the paper currency, issued by the states during their colonial dependence. During the war of our revolution the paper currency issued by congress was constantly denominated, in the acts of that body, bills of credit; and the like appellation was applied to similar currency issued by the states. The phrase had thus acquired a determinate and appropriate meaning. At the time of the adoption of the constitution, bills of credit were universally understood to signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has always been liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense losses, are the sources of ruinous speculations, and destroy all proper confidence between

man and man.2 In no country, more than our own, had these truths been felt in all their force. In none had more intense suffering, or more wide spreading ruin accompanied the system. It was, therefore, the object of the prohibition to cut up the whole mischief by the roots, because it had been deeply felt throughout all the states, and had deeply affected the prosperity of all. The object of the prohibition was not to prohibit the thing, when it bore a particular name; but to prohibit the thing, whatever form or name it might assume. If the words are not merely empty sounds, the prohibition must comprehend the emission of any paper medium by a state government for the purposes

1 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 410, 432.

2 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 432, 441, 442.

of common circulation.1 It would be preposterous to suppose, that the constitution meant solemnly to prohibit an issue under one denomination, leaving the power complete to issue the same thing under another. It can never be seriously contended, that the constitution means to prohibit names, and not things; to deal with shadows, and to leave substances. What would be the consequence of such a construction? That a very important act, big with great and ruinous mischief, and on that account forbidden by words the most appropriate for its description, might yet be performed by the substitution of a name. That the constitution, even in one of its vital provisions, might be openly evaded by giving a new name to an old thing. Call the thing a bill of credit, and it is prohibited. Call the same thing a certificate, and it is constitutional.2

§ 1359. But it has been contended recently, that a bill of credit, in the sense of the constitution, must be such a one, as is, by the law of the state, made a legal tender. But the constitution itself furnishes no countenance to this distinction. The prohibition is general; it extends to all bills of credit, not to bills of a particular description. And surely no one in such a case is at liberty to interpose a restriction, which the words neither require, nor justify. Such a construction is the less admissible, because there is in the same clause

1 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 432, 441, 442.

2 Id. 432, 433, 441, 442, 443. An act of parliament was passed, (24 Gee. 2, ch. 53,) regulating and restraining the issues of paper money and bills of credit in the New-England colonies, in which the language used demonstrates, that bills of credit was a phrase constantly used and understood, as equivalent to paper money. The prohibitory clauses forbid the issue of "any paper bills, or bills of credit of any kind, or denomination whatsoever," &e., and constantly speak of "paper bills or bills of credit." as equivalents. See Deering v. Parker, 4 Dell. (July 1760,) p. xiii.

an express and substantive prohibition of the enactment of tender laws. If, therefore, the construction were admissible, the constitution would be chargeable with the folly of providing against the emission of bills of credit, which could not, in consequence of another prohibition, have any legal existence. The Constitution considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be frequently performed. Both are forbidden. To sustain the one, because it is not also the other; to say, that bills of credit may be emitted, if they are not made a tender in payment of debts, is, ira effect, to expunge that distinct, independent prohibition, and to read the clause, as if it had been entirely omitted.1 No principle of interpretation can justify such a course.

§ 1360. The history of paper money in the American colonies and states is often referred to for the purpose of showing, that one of its great mischiefs was its being made a legal tender in the discharge of debts; and hence the conclusion is attempted to be adduced, that the words of the constitution may be restrained to this particular intent. But, if it were true, that the evils of paper money resulted solely from its being made a tender, it would be wholly unjustifiable on this account to narrow down the words of the constitution, upon a mere conjecture of intent, not derivable from those words. A particular evil may have induced a legislature to enact a law; but no one would imagine, that its language, if general, ought to be confined to that single case. The leading motive for a constitutional provision may have been a particular mischief; but it may yet have been intended to cut down all others of a like na-

1 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 433, 434.

ture, leading more or less directly to the same general injury to the country. That the making of bills of credit a tender was the most pernicious of their characteristics, will not authorize us to convert a general prohibition into a particular one.1

§ 1361. But the argument itself is not borne out by the facts. The history of our country does not prove, that it was an essential quality of bills of credit, that they should be a tender in payment of debts; or that this was the only mischief resulting from them. Bills of credit were often issued by the colonies, and by the several states afterwards, which were not made a legal tender; but were made current, and simply receivable in discharge of taxes and other dues to the public.2 None of the bills of credit, issued by congress during the whole period of the revolution, were made a legal tender; and indeed it is questionable, if that body possessed the constitutional authority to make them such. At all events they never did attempt it; but recommended, (as has been seen,) that the states should make them a tender.3 The act of parliament

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1 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 433, 434.

2 The bills of credit issued by Massachusetts in 1690 (the first ever issued in any colony) were in the following form: "No. -- , 10s. This indented bill often shillings, due from the Massachusetts Colony to the possessor, shall be in value equal to money, and shall be accordingly accepted by the treasurer, and receivers subordinate to him, in all public payments, and for any stock at any time in the treasury, Boston, in New-England, Dec. the loth, 1690. By order of the General Court: Peter Townsend, Adam Winthrop, Tim. Thornton, Committee." So, that it was not, in any sense, a tender, except in discharge of public debts. 3 Mass. Hist. Collections, (2d series,) p. 260, 261. The bills of credit of Connecticut, passed before the revolution, were of the same general character and operation. They were not made a tender in payment of private debts. The emission of them was begun in 1709, and continued, at least, for nearly a half century. The acts, authorizing the emission, generally contained a clause for raising a tax to redeem them.

3 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 434, 435, 436, 442, 443.

of 24 Geo. 2, ch. 53, is equally strong on this point. It prohibited any of the New-England colonies from issuing any new paper bills, or "bills of credit," except upon the emergencies pointed out in the act; and required those colonies to call in, and redeem all the outstanding bills. It then proceeded to declare, that after September, 1751, no "paper currency or bills of credit," issued, or created in any of those colonies, should be a legal tender, with a proviso, that nothing therein contained should be construed to extend to make any of the bills, then subsisting, a legal tender.

§ 1362. Another suggestion has been made; that paper currency, which has a fund assigned for its redemption by the state, which authorizes its issue, does not constitutionally fail within the description of "bills of credit." The latter words (it is said) appropriately import. bills drawn on credit merely, and not bottomed upon any real or substantial fund for their redemption; and there is a material, and well known distinction between a bill drawn upon a fund, and one drawn upon credit only.1 In confirmation of this reasoning, it has been said, that the emissions of paper money by the states, previous to the adoption of the constitution, were, properly speaking, bills of credit, not being bottomed upon any fund constituted for their redemption, but resting solely, for that purpose, upon the credit of the state issuing the same. But this argument has been deemed unsatisfactory in its own nature, and not sustained by historical facts. All bills issued by a state, whether special funds are assigned for the redemption of them or not, are in fact issued on the credit of the state. If these funds should from any cause fail, the bills would be still payable by the state.

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1 Craig v. State of Missouri, 4 Peters's Sup. Ct. R. 447.

If these funds should be applied to other purposes, (as they may be by the state,) or withdrawn from the reach of the creditor, the state is not less liable for their payment. No exclusive credit is given, in any such case, to the fund. If a bill or check is drawn on a fund by a private person, it is drawn also on his credit, and if the bill is refused payment out of the fund, the drawer is still personally responsible. Congress has, under the constitution, power to borrow money on file credit of the United States. But it would not be less borrowing on that credit, that funds should be pledged for the re-payment of the loan; such, for instance, as the revenue from duties, or the proceeds of the public lands. If these funds should fail, or be diverted, the lender would still trust to the credit of the government. But, in point of fact, the bills of credit, issued by the colonies and states, were sometimes with a direct or implied pledge of funds for their redemption. The constitution itself points out no distinction between bills of the one sort or the other. And the act of 94 Geo. 2d. ch. 53 requires, that when bills of credit are issued by the colonies in the emergencies

therein stated, an ample and sufficient fund shall, by the acts authorizing the issue, be established for the discharge of the same within five years at the farthest. So, that there is positive evidence, that the phrase, "bills of credit," was understood in the colonies to apply to all paper money, whether funds were provided for the repayment or not.1

§ 1363. This subject underwent an ample discussion in a late case. The state of Missouri, with a view to relieve the supposed necessities of the times, au-

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1 See 2 Hutch. Hist. 208, 381.

thorized the establishment of certain loan-offices to loan certain sums to the citizens of that state, for which the borrowers were to give security by mortgage of real estate, or personal property, redeemable in a limited period by instalments. The loans were to be made in certificates, issued by the auditor and treasurer of the state, of various denominations, between ten dollars and fifty cents, all of which, on their face, purported to be receivable at the treasury, or any of the loan offices of the state, in the discharge of taxes or debts due to the state for the sum of -- with interest for the same at two per centum per annum. These certificates were also made receivable in payment of all salt at the salt springs; and by all public officers, civil and military, in discharge of their salaries and fees of office. And it was declared, that the proceeds of the salt springs, the interest accruing to the state, and all estates purchased under the same act, and all debts due to the state, should be constituted a fund for the redemption of them. The question made was, whether they were "bills of credit," within the meaning of the constitution. It was contended, that they were not; they were not made a legal tender, nor directed to pass as money, or currency. They were mere evidences of loans made to the state, for the payment of which specific and available funds were pledged. They were merely made receivable in payment of taxes, or other debts due to the state.

§ 1364. The majority of the Supreme Court were of opinion, that these certificates were bills of credit within the meaning of the constitution. Though not called bills of credit, they were so in fact. They were designed to circulate as currency, the certificates being to be issued in various denominations, not exceeding

ten dollars, nor less than*fifty cents. Under such circumstances, it was impossible to doubt their real character and object, as a paper currency. They were to be emitted by the government; and they were to be gradually withdrawn from circulation by an annual withdrawal of ten percent. It was wholly unnecessary, that they should be declared to be a legal tender. Indeed, so far as regarded the fees and salaries of public officers, they were so.1 The minority were of a different opinion, upon various grounds. One was, that they were properly to be deemed a loan by the state, and not designed to be a circulating currency, and not declared to be so by the act. Another was, that they bore on their face an interest, and for that reason varied in value every moment of their existence, which disqualified them for the uses and purposes of a circulating medium. Another was, that all the bills of credit of the revolution contained a promise to pay, which these certificates did not, but were merely redeemable in discharge of taxes, &c. Another was, that they were not issued upon the mere credit of the state; but funds were pledged for their redemption. Another was, that they were not declared to be a legal tender. Another was, that their circulation was not enforced by statutory provisions. No creditor was under any obligation to receive them. In their nature and character, they were not calculated to produce any of the evils, which the paper money issued in the revolution did, and which the constitution intended to guard against.2

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1 Craig v. The State of Missouri, 4 Peters's Sup. Ct. R. 410, 425 to 438.

2 Some of these grounds apply equally to some of the "bills of credit," issued by the colonies. In fact, these certificates seem to have differed in few, if any essential circumstances, from those issued by the

§ 1365. The next prohibition is, that no state shall "make any thing but gold and silver coin, a tender in payment of debts." This clause was manifestly founded in the same general policy, which procured the adoption of the preceding clause. The history, indeed, of the various laws, which were passed by the states in their colonial arid independent character upon this subject, is startling at once to our morals, to our patriotism, and to our sense of justice. Not only was paper money issued, and declared to be a tender in payment of debts; but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws, were from time to time enacted, which prostrated all private credit, and all private morals. By some of these laws, the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts; and the creditor was compelled to take the

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Province of Massachusetts in 1714 and 1716, and had the same general objects in view by the same means, viz. to make temporary loans to the inhabitants to relieve their wants by an issue of paper money.* The bills of credit issued by congress in 1780 were payable with interest, So were the treasury notes issued by congress in the late war with Great Britain. Yet both circulated and were designed to circulate as currency. The bills of credit issued by congress in the revolution were not made a legal tender.+ It has also been already seen, that the first bills of credit ever issued in America, in 1690, contained no promise of payment by the state, and were simply receivable in discharge of public dues.# Mr. Jefferson, in the first volume of his Correspondence, (p. 401, 402,) has ,given a succinct history of paper money in America, especially in the revolution. It is a sad but instructive account.

*** 1 Hutch. History, 402, 403, and note; 2 Hutch. History, 208.**

+ Ante, &$167; 1361.

#3 Mass. Hist. Collection, (2d series) 260, 261. Ante, § 1353, 1361. See 4 Mass. Hist. Coll. (2d series,) 99.

property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value.1 Such grievances, and oppressions, and others of a like nature, were the ordinary results of legislation during the revolutionary war, and the intermediate period down to the formation of the constitution. They entailed the most enormous evils on the country; and introduced a system of fraud, chicanery, and profligacy, which destroyed all private confidence, and all industry and enterprise.2

§ 1366. It is manifest, that all these prohibitory. clauses, as to coining money, emitting bills of credit, and tendering any thing, but gold and silver, in payment of debts, are founded upon the same general policy, and result from the same general considerations. The policy is, to provide a fixed and uniform value throughout the United States, by which commercial and other dealings of the citizens, as well as the monied transactions of the government, might be regulated. For it may well be asked, why vest in congress the power to establish a uniform standard of value, if the states might use the same means, and thus defeat the uniformity of the standard, and consequently the standard itself? And why establish a standard at all for the government of the various contracts, which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that, which is not money, under the authority of state tender laws? All these prohibitions are, therefore, entirely homogeneous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts. For this reason, as well as others derived from the

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1 3 Elliot's Debates, 144.

2 See Sturgis v. Crowninshield, 4 Wheat. R. 204.

phraseology employed, the prohibition of 'state tender laws will admit of no construction confining it to state laws, which have a retrospective operation.1 Accordingly, it has been uniformly held, that the prohibition applies to all future laws on the subject of tender; and therefore no state legislature can provide, that future pecuniary contracts may be discharged by any thing, but gold and silver coin.2 § 1367. The next prohibition is, that no state shall "pass any bill of attainder, ex post facto law, or law inspiring the obligation of contracts." The two former require no commentary, beyond what has been already offered, under a similar prohibitory clause applied to the government of the United States. The same policy and principles apply to each.3 It would have been utterly useless, if not absurd, to deny a power to the Union, which might at the same time be applied by the states, to purposes equally mischievous, and tyrannical; and which might, when applied by the states, be for the very purpose of subverting the Union. Before the constitution of the United States was adopted, every state, unless prohibited by its own constitution, might pass a bill of attainder, or ex post facto law, as a general result of its sovereign legislative power. And such a prohibition would not be implied from a constitutional provision, that the legislative, executive, and judiciary departments shall be separate, and distinct; that crimes shall be tried in the county, where they are committed; or that the trial by jury shall remain invio-

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1 Ogden v. Saunders, 12 Wheat R. 265, per Washington J.

2 Ogden v. Saunders, 12 Wheat. R. 265, 269, 288, 289, 305, 306, 328, 335, 336, 339.

3 See The Federalist, No. 44, 84.

late. The power to pass such laws would still remain, at least so far as respects crimes committed without the state.1 During the revolutionary war, bills of attainder, and ex post facto acts of confiscation, were passed to a wide extent;

and the evils resulting therefrom were supposed, in times of more cool reflection, to have far outweighed any imagined good;

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1 Cooper v. Telfair, 4 DaII R. 14; S. C. 1 Peters's Cond. R. 211.

CHAPTER XXXIV.
PROHIBITIONS ON THE STATES.--IMPAIRING CONTRACTS.

§ 1368. The remaining clause, as to impairing the obligation of contracts, will require a more full and deliberate examination. The Federalist treats this subject in the following brief, and general manner. "Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions; and all of them are prohibited by the spirit and scope of their fundamental character. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark, in favour of personal security, and private rights, &c. The sober people of America are weary of the fluctuating policy, which has directed the public councils. They have seen with regret and indignation, that sudden changes and legislative interferences in cases affecting personal rights became jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link in a long chain of repetitions, every subsequent interference being naturally provoked by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will

CHAPTER XXXIV.
PROHIBITIONS ON THE STATES.--IMPAIRING CONTRACTS.

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banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.1

§ 1369. With these remarks the subject is dismissed. And yet, perhaps, there is not a single clause of the constitution, which has given rise to more acute and vehement controversy; and the 'nature and extent of whose prohibitory force has called forth more ingenious speculation, and more animated juridical discussion.2 What is a contract? What is the obligation of a contract? What is impairing a contract? To what classes of laws does the prohibition apply? To what extent does it reach, so as to control prospective legislation on the subject of contracts? These and many other questions, of no small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculation.

§ 1370. In the first place, what is to be deemed a contract, in the constitutional sense of this clause? A contract is an agreement to do, or not to do, a particular thing;3 or (as was said on another occasion) a contract is a compact between two or moro persons.4 A contract is either executory, or executed. An executory contract is one, in which a party binds himself to do, or not to do a particular thing. An executed contract is one, in which the object of the contract is performed. This differs in nothing from a grant;5 for a contract

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1 The Federalist, No. 44.

2 1 Kent's Comm. Lect 19, p. 387.

3 Sturgis v. Crowninshield, 4 Wheaton's R. 197. See also Green v. Biddle, 8 Wheat R. 92; Ogden v. Saunders, 12 Wheat. R. 256, 297, 302, 316, 335; Gorden v. Prince, 3 Wash. Cir. Ct. R. 319.

4 Fletcher v. Peck, 6 Cranch, 136; S.C. 2 Peters's Cond. R. 321.

5 Id. and 2 Black. Comm. 443.

executed conveys a chose in possession; a contract executory conveys only a chose in action.1 Since, then, a grant is in fact a contract executed, the obligation of which continues; and since the constitution uses the general term, contract, without distinguishing between those, which are executory and those, which are executed; it must be construed to comprehend the former, as well as the latter. A state law, therefore; annulling conveyances between individuals, and declaring, that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution, as a state law discharging the vendors from the obligation of executing their contracts of sale by conveyances. It would be strange, indeed, if a contract to convey were secured by the constitution, while an absolute conveyance remained unprotected.2 That the contract, while executory, was obligatory; but when executed, might be avoided.

§ 1371. Contracts, too, are express, or implied. Express contracts are, where the terms of the agreement are openly avowed, and uttered at the time of the making of it. Implied contracts are such, as reason and justice dictate from the nature of the transaction, and which therefore the law presumes, that every man undertakes to perform.3 The constitution makes no distinction between the one class of contracts and the other. It then equally embraces, and applies to both. Indeed, as by far the largest class of contracts in civil society, in the ordinary transactions of life, are implied, there would be very little object in securing the inviola-

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1 2 Black. Comm. 443.

2 Fletcher v. Peck, 6 Cranch's R. 137; 8. C. 2 Peters's Cond. R. 321, 322.

3 2 Black. Comm. 443.

bility of express contracts, if those, which are implied, might be impaired by state legislation. The constitution is not chargeable with such folly, or inconsistency. Every grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert it. A party is, therefore, always estopped by his own grant.1 How absurd would it be to provide, that an express covenant by him, as a muniment attendant upon the estate, should bind him for ever, because executory,and resting in action; and yet, that he might re-assert his title to the estate, and dispossess his grantee, because there was only an implied covenant not to re-assert it.

§ 1372. In the next place, what is the obligation of a contract? It would seem difficult to substitute words more intelligible, or less liable to misconstruction, than these. And yet they have given rise to much acute disquisition, as to their real meaning in the constitution. It has been said, that right and obligation are correlative terms. Whatever I, by my contract, give another a right to require of me, I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract, then, will consist of that right, or power over ray will or actions, which I, by ray contract, confer on another. And that right and power will be found to be measured, neither by moral law alone, nor by universal law alone, nor by the laws of society alone; but by a combination of the three; an operation, in which the moral law is explained, and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. In an advanced

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1 Fletcher v. Peck, 6 Cranch's R. 137; S. C. 2 Peters's Cond. R. 321, 322; Dartmouth College v. Woodward, 4 Wheat. R. 657, 658, 688, 689.

state or society, all contracts or men receive a relative, and not a positive interpretation. The state construes them, the state applies them, the state controls them, and the state decides, how far the social exercise of the rights, they give over each other, can be justly asserted.1 Again, it has been said, that the constitution distinguishes between a contract, and the obligation of a contract. The latter is the law, which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape, in which it is intended to bear upon it.2 Again, it has been said; that the obligation of a contract consists in the power and efficacy of the law, which applies to, and enforces performance of it, or an equivalent for non-performance. The obligation does not inhere, and subsist in the contract itself, proprio vigore, but in the law applicable to the contract.3 And again, it has been said, that a contract is an agreement of the parties; and if it be not illegal, it binds them to the

extent of their stipulations. Thus, if a party contracts to pay a certain sum on a certain day, the contract binds him to perform it on that day, and this is its obligation.4

§ 1373. Without attempting to enter into a minute examination of these various definitions, and explanations of the obligation of contracts, or of the reasoning, by which they are supported and illustrated; there are some considerations, which are pre-supposed by all

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1 Per Johnson J. in Ogden v. Saunders, 12 Wheat. R. 281, 282.

2 Id. Washington J., p. 257, 258, 259; Thompson J., p. 300, 302; Trimble J., p. 316.

3 Id. Trimble J., p. 317, 318.

4 Id. Marshall C.J., p. 335, 314 to 346; Sturgis v. Crowninshield, 4 Wheat. R. 197; Fletcher v. Peck, 6 Cranch's R. 137.

of them; and others, which enter into some, and are excluded in others.

§ 1374. It seems agreed, that, when the obligation of contracts is spoken of in the constitution, we are to understand, not the mere moral, but the legal obligation of contracts. The moral obligation of contracts is, so far as human society is concerned, of an imperfect kind, which the parties are left free to obey or not, as they please. It is addressed to the conscience of the parties, under the solemn admonitions of accountability to the Supreme Being. No human lawgiver can either impair, or reach it. The constitution has not in contemplation any such obligations, but such only, as might be impaired by a state, if not prohibited.1 It is the civil obligation of contracts, which it is designed to reach, that is, the obligation, which is recognised by, and results from the law of the state, in which it is made. If, therefore, a contract, when made, is by the law of the place declared to be illegal, or deemed to be a nullity, or a nude pact, it has no civil obligation, because the law in such cases forbids its having any binding efficacy, or force. It confers no legal right on the one party, and no correspondent legal duty on the other. There is no means allowed, or recognised to enforce it; for the maxim is, ex nudo pacto non oritur actio. But when it does not fall within the predicament of being either illegal, or void, its obligatory force is coextensive with its stipulations.

§ 1375. Nor is this obligatory force so much the result of the positive declarations of the municipal law, as of the general principles of natural, or (as it is some-

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1 Ogden v. Saunders, 12 Wheaton's R. 257, 258, 280, 281, 300, 316 to 318, 337, 338.

times called) universal law. In a state of nature, independent, of the obligations of positive law, contracts may, be formed, and their obligatory force be complete.1 Between independent nations, treaties and compacts are formed, which are deemed universally obligatory; and yet in no just sense can they be deemed dependent on municipal law.2 Nay, there may exist (abstractly speaking) a perfect obligation in contracts, where there is no known and adequate means to enforce them. As, for instance, between independent nations, where their relative strength and power preclude the possibility, on the side of the weaker party, of enforcing them. So in the same government, where a contract is made by a state with one of its own citizens, which yet its laws do not permit to be enforced by any action or suit. In this predicament are the United States, who are not suable on any contracts made by themselves; but no one doubts, that these are still obligatory on the United States. Yet their obligation is not recognised by any positive municipal law in a great variety of cases. It depends altogether upon principles of public or universal law. Still, in these cases there is a right in the one party to have the contract performed, and a duty on the other side to perform it. But, generally speaking, when we speak of the obligation of a contract, we include in the idea some known means acknowledged by the municipal law to enforce it. Where all such means are absolutely denied, the obligation of the contract is understood to be impaired, though it may not be completely annihilated. Rights may, indeed, exist without any present adequate

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1 Ogden v. Saunders, 12 Wheat. R. 281, 282; Id. 344 to 346; Id. 350.

2 Ogden v. Saunders, 12 Wheat. R. 280, 281, 344 to 346.

correspondent remedies between private persons. Thus, a state may refuse to allow imprisonment for debt; and the debtor may have no property. But still the right of the creditor remains; and he may enforce it against the future property of the debtor.1 So a debtor may die without leaving any known estate, or without any known representative. In such cases we should not say, that the right of the creditor was gone; but only, that there was nothing, on which it could presently operate. But suppose an administrator should be appointed, and property in contingency should fall in, the right might then be enforced to the extent of the existing means.

§ 1376. The civil obligation of a contract, then, though it can never arise, or exist contrary to positive law, may arise or exist independently of it;2 and it may be, exist, notwithstanding there may be no present adequate remedy to enforce it. Wherever the municipal law recognises an absolute duty to perform a contract, there the obligation to perform it is complete, although there may not be a perfect remedy.

§ 1377. But much diversity of opinion has been exhibited upon another point; how far the existing law enters into, and forms a part of the contract. It has been contended by some learned minds, that the municipal law of the place, where a contract is made, forms a part of it, and travels with it, wherever the parties to it may be found.3 If this were admitted to be true, the consequence would be, that all the existing laws of a state, being incorporated into the contract, would con-

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1 See Sturgis v. Crowninshield, 4 Wheat. 200, 201; Mason v. Haile, 12 Wheat R. 370.

2 Ogden v. Sunders, 12 Wheat. R. 344 to 346; Id. 350.

3 Ogden v. ,Saunders, 12 Wheat. R. 259, 260; Id. 297, 298, 302.

statute a part of its stipulations, so that a legislative repeal of such laws would not in any manner affect it.1 Thus, if there existed at the time a statute of limitations, operating on such contracts, or an insolvent act, under which they might be discharged, no subsequent repeal of either could vary the rights of the parties, as to using them, as a bar to a suit upon such contracts. If, therefore, the legislature should provide by a law, that all contracts thereafter made should be subject to the entire control of the legislature, as to their obligation, validity, and execution, whatever might be their terms, they would be completely within the legislative power, and might be impaired, or extinguished by future laws; thus having, a complete ex post facto operation. Nay, if the legislature should pass a law declaring, that all future contracts might be discharged by a tender of any thing, or things, besides gold and silver, there would be great difficulty in affirming them to be unconstitutional; since it would become a part of the stipulations of the contract. And yet it is obvious, that it would annihilate the whole prohibition of the constitution upon the subject of tender laws.2

§ 1378. It has, therefore, been judicially held by a majority of the Supreme Court, that such a doctrine is untenable. Although the law of the place acts upon a contract, and governs its construction, validity, and obligation, it constitutes no part of it. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal, or modify such laws with respect to existing contracts.3

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1 Ogden v. Saunders, 12 Wheat. R. 260, 261, 262, 284, 336 to 339.

2 Ogden v. Saunders, 12 Wheat. R. 284, 324, 325, 336 to 339.

3 Ogden v. Saunders, 12 Wheat. R. 343.

The law necessarily steps in to explain, and construe the stipulations of parties, but never to supersede, or vary them. A great mass of human transactions depends upon implied contracts, upon contracts, not written, which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations, which, as honest, fair, and just men, they ought to have made. When the law assumes, that the parties have made these stipulations, it does not vary their contract, or introduce new terms into it; but it declares, that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this, and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed every thing, that is to be done by either.1 So, if there be a written contract, which does not include every term, which is ordinarily and fairly to be implied, as accompanying what is stated, the law performs the office only of expressing, what is thus tacitly admitted by the parties to be a part of their intention. To such an extent the law acts upon contracts. It performs the office of interpretation. But this is very different from supposing, that every law, applicable to the subject matter, as a statute of limitations, or a statute of insolvency, enters into the contract, and becomes a part of the contract. Such a supposition is neither called for by the terms of the contract, nor can be fairly presumed to be contemplated by the parties, as matters ex contractu. The parties know, that they must obey the laws; and that

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1 Ogden v. Saunders, 12 Wheat. R. 341, 342.

the laws act upon their contracts, whatever may be their intention.1

§ 1379. In the next place, what may properly be deemed impairing the obligation, of contracts in the sense of the constitution? It is perfectly clear, that any law, which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree, in which this change is effected, can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge, or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases.2 Any deviation from its terms by postponing, or accelerating the period of performance, which it prescribes; imposing conditions not expressed in the contract; or dispensing with the performance of those, which are a part of the contract; however minute or apparently immaterial in their effect upon it, impair its obligation.3 A fortiori, a law, which makes the contract wholly invalid, or extinguishes, or releases it, is a law impairing it.4 Nor is this all. Although there is a distinction between the obligation of a contract, and a remedy upon it; yet if there are certain remedies existing at the time, when it is made, all of which are afterwards wholly extinguished by new laws, so that there remain no means or enforcing its obligation, and no redress; such an abolition of all remedies, operating in presenti, is also an im-

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1 Ogden v. Saunders, 12 Wheat. R. 284, 324, 325, 338, 339, 340, 343, 354.

2 Id. 256; Id. 327; Golden v. Prince, 3 Wash. Cir. R. 319.

3 Green v. Biddle, 8 Wheat. R. 1, 84.

4 Sturgis v. Crowninshield, 4 Wheat. R. 197, 198.

pairing of the obligation of such contract.1 But every change and modification of the remedy does not involve such a consequence. No one will doubt, that the legislature may vary the nature and extent of remedies, so always, that some substantive remedy be in fact left. Nor can it be doubted, that the legislature may prescribe the times and modes, in which remedies may be pursued; and bar suits not brought within such periods, and not pursued in such modes. Statutes of limitations are of this nature; and have never been supposed to destroy the obligation of contracts, but to prescribe the times, within which that obligation shall be enforced by a suit; and in default to deem it either satisfied, or abandoned.2 The obligation to perform a contract is coeval with the undertaking to perform it. It originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon the broken contract, and enforces a pre-existing obligation.3 And a state legislature may discharge a party from imprisonment upon a judgment in a civil case of contract, without infringing the constitution; for this is but a modification of the remedy, and does not impair the obligation of the contract.4 So, if a party should be in gaol, and give a bond for the prison liberties, and to remain a true prisoner, until lawfully discharged, a subsequent discharge by an act of the legislature would not impair the contract; for it would be a lawful discharge in the sense of the bond.5

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1 Ogden v. Saunders, 12 Wheat. R. 284, 285, 327, 349, 350, 351, 352, 353; Sturgis v. Crowninshield, 4 Wheat. R. 200, 201, 207.

2 Sturgis v. Crowninshield, 4 Wheat. R. 200, 206, 207; Mason v. Haile, 12 Wheat. R. 370, 380, 381; Ogden v. Saunders, 12 Wheat. R. 262, 263, 349, 350; Hawkins v. Barney's Lessee, 5 Peters's Sup. R. 457.

3 Ogden v. Saunders, 12 Wheat. R. 349, 350.

4 Mason v. Haile, 12 Wheat. R. 370.

5 Ibid.

§ 1380. These general considerations naturally conduct us to some more difficult inquiries growing out of them; and upon which there has been a very great diversity of judicial opinion. The great object of the framers of the constitution undoubtedly was, to secure the inviolability of contracts. This principle was to be protected in whatever form it might be assailed. No enumeration was attempted to be made of the modes, by which contracts might be impaired. It would have been unwise to have made such an enumeration, since it might have been defective; and the intention was to prohibit every mode or device for such purpose. The prohibition was universal.1

§ 1381. The question has arisen, and has been most elaborately discussed, how far the states may constitutionally pass an insolvent law, which shall discharge the obligation of contracts. It is not doubted, that the states may pass insolvent laws, which shall discharge the person, or operate in the nature of a cessio bonorum, provided such laws do not discharge, or intermeddle with the obligation of contracts. Nor is it denied, that insolvent laws, which discharge the obligation of contracts, made antecedently to their passage, are unconstitutional.2 But the question is, how far the states may constitutionally pass insolvent laws, which shall operate upon, and discharge contracts,

which are made subsequently to their passage. After the most ample argument it has at length been settled by a majority of the Supreme Court, that the states may constitutionally pass such laws operating upon future contracts.

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1 Sturgis v. Crowninshield, 4 Wheat. R. 199, 200.

2 Sturgis v. Crowninshield, 4 Wheat. R. 100; Farmers and Mechanics Bank v. Smith, 6 Wheat. R. 131; Ogden v. Saunders, 12 Wheat. R. 213.

§ 1389. The learned judges, who held the affirmative, were not all agreed, as to the grounds of their opinions. But their judgment rests on some one of the following grounds: (1.) Some of the judges held, that the law of the place, where a contract is made, not only regulates, and governs it, but constitutes a part of the contract itself; and, consequently, that an insolvent law, which, in the event of insolvency of the party, authorizes a discharge of the contract is obligatory as a part the contract. (2.) Others held, that, though the law of the place formed no part of the contract, yet the latter derived its whole obligation from that law, and was controlled by its provisions; and, consequently, that its obligation could extend no further, than the law, which caused the obligation; and if it was subject to be discharged in case of insolvency, the law so far controlled, and limited its obligation. (3.) That the connexion with the other parts of the clause, (bills of attainder and ex post facto laws,) as they applied to retrospective legislation, fortified the conclusion, that the intention in this part was only to prohibit the like legislation. (4.) That the known history of the country, as to insolvent taws, and their having constituted a part of the acknowledged jurisprudence of several of the states for a long period, forbade the supposition, that under such a general phrase, as taws impairing the obligation of contracts, insolvent laws, in the ordinary administration of justice, could have been intentionally included. (5.) That, whenever any person enters into a contract, his assent may be properly inferred to abide by those rules in the administration of justice, which belong to the jurisprudence of the country of the contract. And, when he is compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the latter, to

which he subjects himself. (6.) That the law of the contract remains the same every where, and will be the same in every tribunal. But the remedy necessarily varies, and with it the effect of the constitutional pledge, which can only have relation to the lawsof distributive justice, known to the policy of each state severally. These and other auxiliary grounds, which were illustrated by a great variety of arguments, which scarcely admit of abridgment, were deemed satisfactory to the majority of the court.

§ 1383. The minority of the judges maintained their opinions upon the following grounds: (1.) That the words of the clause in the constitution, taken in their natural and obvious sense, admit of a prospective, as well as of a retrospective operation. (2.) That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law. (3.) That contracts derive their obligation from the act of the parties, and not from the grant of the government. And the right of the government to regulate the manner, in which they shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability, after they have been formed. (4.) That the obligation of a contract is not identified with the means, which government may furnish to enforce it. And that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy. Nor does a power to vary the, remedy imply a power to impair the obligation derived from the act of the parties. (5.) That the history of the times justified this interpretation of the clause. The power of changing the relative situation of debtor and creditor, and of interfering with contracts,

had been carried to such an excess by the state legislature, as to break in upon all the ordinary intercourse of society, and to destroy all private confidence. It was a great object to prevent for the future such mischievous measures. (6.) That the clause, in its terms, purports to be perpetual; and the principle, to be of any value, must be perpetual. It is expressed in terms sufficiently broad to operate in all future times; and the just inference, therefore, is, that it was so intended. But if the other interpretation of it be adopted, the clause will become of little effect; and the constitution will have imposed a restriction, in language indicating perpetuity, which every state in the Union may elude at pleasure. The obligation of contracts in force at any given time is but of short duration; and if the prohibition be of retrospective laws only, a very short lapse of time will remove every subject, upon which state laws are forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this noxious character, the constitution will suspend their operation only for a moment, or except pre-existing cases from it. The nature of the provision is thus essentially changed. Instead of being a prohibition to pass laws impairing the obligation of contracts, it is only a prohibition to pass retrospective laws. (7.)

That there is the less reason for adopting such a construction, since the state laws, which produced the mischief, were prospective, as well as retrospective.1

§ 1384. The question is now understood to be finally at rest; and state insolvent laws, discharging the obligation of future contracts, are to be deemed consti-

1 See Ogden v. Saunders, 12 Wheat. R. p. 254 to 357.

tutional. Still a very important point remains to be examined; and that is, to what contracts such laws can rightfully apply. The result of the various decisions on this subject is, (1.)That they apply to all contracts made within the state between citizens of the state. (2.) That they do not apply to contracts made within the state between a citizen of a state, and a citizen of another state. (3.) That they do not apply to contracts not made within the state. In all these cases it is considered, that the state does not possess a jurisdiction, coextensive with the contract, over the parties; and therefore, that the constitution of the United States protects them from prospective, as well as retrospective legislation.1 Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a state, which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act, and be deemed to have abandoned his extra-territorial immunity.2 Of course, the constitutional prohibition does not apply to insolvent, or other laws passed before the adoption of the constitution, operating upon contracts and rights of property vested, and in esse before that time.3 And it may be added, that state insolvent laws have no operation whatsoever on contracts made with the United States; for such contracts are in no manner whatsoever subject to state jurisdiction.4

§ 1385. It has been already stated, that a grant is a contract within the meaning of the constitution, as much as an unexecuted agreement. The prohibition, there

1 Ogden v. Saunders, 12 Wheat. R. 358; McMullan v. Neil, 4 Wheat. R. 209.

2 Clay v. Smith, 3 Peters's Sup. R. 411.

3 Owings v. Speed, 5 Wheat. R. 420.

4 United States v. Wilson, 8 Wheat. R. 253.

fore, equally reaches all interferences with private grants and private conveyances, of whatever nature they may be. But it has been made a question, whether it applies, in the same extent, to contracts and grants of a state created directly by a law, or made by some authorized agent in pursuance of a law. It has been suggested, that, in such cases, it is to be deemed an act of the legislative power; and that all laws are repealable by the same authority, which enacted them. But it has been decided upon solemn argument, that contracts and grants made by a state are not less within the reach of the prohibition, than contracts and grants of private persons; that the question is not, whether such contracts or grants are made directly by law in the form of legislation, or in any other form, but whether they exist at all. The legislature may, by a law, directly make a grant; and such grant, when once made, becomes irrevocable, and cannot be constitutionally impaired. So the legislature may make a contract with individuals directly by a law, pledging the state to a performance of it; and then, when it is accepted, it is equally under the protection of the constitution. Thus, where a state authorized a sale of its public lands, and the sale was accordingly made, and conveyances given, it was held, that those conveyances could not be rescinded, or revoked by the state.1 So where a state, by a law, entered into a contract with certain Indians to exempt their lands from taxation for a valuable consideration, it was held, that the exemption could not be revoked.2 And grants of land, once voluntarily made

1 Fletcher v. Peck, 6 Cranch. 87, 135; S. C. 2 Peters's Cond. R. 208; 1 Kent's Comm. Lect. 19, p. 388.

2 New Jersey v. Wilson, 7 Cranch, 164; 8. C. 2 Peters's Cond. R. 457; 1 Kent's Comm. Lect. 19, p. 389.

by a state, by a special law, or under general laws, when once perfected, are equally as incapable of being resumed by a subsequent law, as those founded on a valuable consideration. Thus, if a state grant glebe lands, or other lands to parishes, towns, or private persons gratuitously, they constitute irrevocable executed contracts.1 And it may be laid down as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired. A grant (as has been already stated) amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert it.2

§ 1386. The cases above spoken of are cases, in which rights of property are concerned, and are, manifestly, within the scope of the prohibition. But a question,of a more nice and delicate nature, has been also litigated; and that is, how far charters, granted by a state, are contracts within the meaning of the constitution. That the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, is admitted; and it has never been so construed. It has always been understood, that the contracts spoken of in the constitution were those, which respected property, or some other object of value, and which conferred rights capable of being asserted in a court of justice.3 A charter is certainly in form and sub-

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1 Terrett v. Taylor, 9 Cranch, 52; S. C. 3 Peters's Cond. R. 259; Town of Pawlet v. Clarke, 9 Cranch, 535; S. C. 3 Peters's Cond. R. 408; 1 Kent's Comm. Lect. 19, p. 389.

2 Fletcher v. Peck, 6 Cranch 87, 135; S. C. 2 Peters's Cond. R. 308; 1 Kent's Comm. Lect. 19, p. 38.

3 Dartmouth College v. Woodward, 4 Wheat R. 518, 629.

stance a contract; it is a grant of powers, rights, and privileges; and it usually gives a capacity to take and to hold property. Where a charter creates a corporation, it emphatically confers this capacity; for it is an incident to a corporation, (unless prohibited,) to take and to hold property. A charter granted to private persons, for private purposes, is within the terms, and the reason of the prohibition. It confers rights and privileges, upon the faith of which it is accepted. It imparts obligations and duties on their part, which they are not at liberty to disregard; and it implies a contract on the part of the legislature, that the rights and privileges, so granted, shall be enjoyed. It is wholly immaterial, in such cases, whether the corporation take for their own private benefit, or for the benefit of other persons. A grant to a private trustee, for the benefit of a particular cestui que trust, is not less a contract, than if the trustee should take for his own benefit. A charter to a bank, or insurance, or turnpike company, is certainly a contract, founded in a valuable consideration. But it is not more so, than a charter incorporating persons for the erection and support of a hospital for the aged, the sick, or the infirm, which is to be supported by private contributions, or is founded upon private charity. If the state should make a grant of funds, in aid of such a corporation, it has never been supposed, that it could revoke them at its pleasure. It would have no remaining authority over the corporation, but that, which is judicial, to enforce the proper administration of the trust. Neither is a grant less a contract, though no beneficial interest accrues to the possessor. Many a purchase, whether corporate or not, may, in point of fact, be of no exchangeable value to the owners; and yet the grants confirming them

are not less within the protection of the constitution. All incorporeal hereditaments, such as immunities, dignities, offices, and franchises, are in law deemed valuable rights, and wherever they are subjects of a contract or grant, they are just as much within the reach of the constitution, as any other grants; for the constitution makes no account of the greater, or less value of any thing granted. All corporate franchises are legal estates. They are powers coupled with an interest; and the corporators have vested rights in their character as corporators.1

§ 1387. A charter, then, being a contract within the scope of the constitution, the next consideration, which has arisen upon this important subject, is, whether the principle applies to all charters, public as well as private. Corporations are divisible into two sorts, such as are strictly public, and such as are private. Within the former denomination are included all corporations, created for public purposes only, such as cities, towns, parishes, and other public bodies. Within the latter denomination all corporations are included, which do not strictly belong to the former. There is no doubt, as to public corporations, which exist only for public purposes, that the legislature may change, modify, enlarge, and restrain them; with this limitation, however, that property, held by such corporation, shall still be secured for the use of those, for whom, and at whose expense it has been acquired. The principle may be stated in a more general form. If a charter be a mere grant of political power, if it create a civil institution,

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1 Dartmouth College v. Woodward, 4 Wheat. R. 518, 629, 630, 636, 638, 644, 645, 646, 647, 653, 656, 657, 658, 697, 698, 699, 700, 701, 702.

2 Terrett v. Taylor, 9 Cranch, 52; Dartmouth College v. Woodward, 4 Wheat. R. 663, 694.

to be employed in the administration of the government, or, if the funds be public property alone, and the government alone be interested in the management of them, the legislative power over such charter is not restrained by the constitution, but remains unlimited.1 The reason is, that it is only a mode of exercising public rights and public powers, for the promotion of the general interest; and, therefore, it must, from its very nature, remain subject to the legislative will, so always that private rights are not infringed, or trenched upon.

§ 1388. But an attempt has been made to press this principle much farther, and to exempt from the constitutional prohibition all charters, which, though granted to private persons, are in reality trusts for purposes and objects, which may, in a certain sense, be deemed public and general. The first great case, in which this doctrine became the subject of judicial examination and decision, was the case of Dartmouth College. The legislature of New-Hampshire had, without the consent of the corporation, passed an act changing the organization of the original provincial charter of the college, and transferring all the rights, privileges, and franchises from the old charter trustees to new trustees, appointed under the act. The constitutionality of the act was contested, and after solemn argument, it was deliberately held by the Supreme Court, that the provincial charter was a contract within the meaning of the constitution, and that the amendatory act was utterly void, as impairing the obligation of that charter. The college was deemed, like other colleges of private foundation, to be a private eleemosynary institution,

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1 Dartmouth College v. Woodward, 4 Wheat. R. 518, 629, 630, 659, 663, 694, to 701.

endowed, by its charter, with a capacity to take property unconnected with the government. Its funds were bestowed upon the faith of the charter, and those funds consisted entirely of private donations. It is true, that the uses were in some sense public; that is, for the general benefit, and not for the mere benefit of the corporators; but this did not make the corporation a public corporation. It was a private institution for general charity. It was not distinguishable in principle from a private donation, vested in private trustees, for a public charity, or for a particular purpose of beneficence. And the state itself, if it had bestowed funds upon a charity of the same nature, could not resume those funds. In short, the charter was deemed a contract, to which the government, and the donors, and the trustees of the corporation, were all parties. It was for a valuable consideration, for the security and disposition of property, which was entrusted to the corporation upon the faith of its terms; and the trustees acquired rights under it, which could not be taken away; for they came to them clothed with trusts, which they were obliged to perform, and could not constitutionally disregard. The reasoning in the case, of which this is a very faint and imperfect outline, should receive a diligent perusal; and it is difficult to present it in an abridged form, without impairing its force, or breaking its connexion.1 The doctrineis held to be equally applicable to grants of additional rights and privileges to an existing corporation, and to the original charter, by which a corporation is first brought into existence, and established: As soon as the latter become organ-

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1 Dartmouth College v. Woodward, 4 Wheat R. 518, 624 et seq.; 1 Kent Comm. Lect 19, p. 389 to 392.

ized and in esse, the charter becomes a contract with the corporators.1

§ 1389. It has not been thought any objection to this interpretation, that the preservation of charters, and other corporate rights, might not have been primarily, or even secondarily, within the contemplation of the framers of the constitution, when this clause was introduced. It is probable, that the other great evils, already alluded to, constituted the main inducement to insert it, where the temptations were more strong, and the interest more immediate and striking, to induce a violation of contracts. But though the motive may thus have been to reach other more pressing mischiefs, the prohibition itself is made general. It is applicable to all contracts, and not confined to the forms then most known, and most divided. Although a rare or particular case may not of itself be of sufficient magnitude to induce the establishment of a constitutional rule; yet it must be governed by that rule, when established, unless some plain and strong reason for excluding it can be given. It is not sufficient to show, that it may not have been foreseen, or intentionally provided for. To exclude it, it is necessary to go farther, and show, that if the case had been suggested, the language of the convention would have been varied so, as to exclude and except it. Where a case falls within the words or a rule or prohibition, it must be held within its operation, unless there is something obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, arising from such a construction.2 No such

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1 Dartmouth College v. Woodward, 4 Wheat. g. 518, 624 et seq.; 1 Kent. Comm. Lect. 19, p. 389 to 392.

2 Dartmouth College v. Woodward, 4 Wheat. 644, 645. See also Sturgis v. Crowninshield, 4 Wheat, R. 202.

absurdity, mischief, or repugnancy, can be pretended in the present case. On the contrary, every reason of justice, convenience; and policy unite to prove the wisdom of embracing it in the prohibition. An impregnable barrier is thus thrown around all rights and franchises derived from the states, and solidity and inviolability are given to the literary, charitable, religious, and commercial institutions of the country.1

§ 1390. It has also been made a question, whether a compact between two states, is within the scope of the prohibition. And this also has been decided in the affirmative.2 The terms, compact and contract, are synonymous; and, when propositions are offered by one state, and agreed to and accepted by another, they necessarily constitute a contract between them. There is no difference, in reason or in law, to distinguish between contracts made by a state with individuals, and contracts made between states. Each ought to be equally inviolable.3 Thus, where, upon the separation of Kentucky from Virginia, it was agreed by compact between them, that all private rights and interests in lands in Kentucky, derived from the laws of Virginia, should remain valid and secure under the laws of Kentucky, and should be determined by the laws then existing in Virginia; it was held by the Supreme Court, that certain laws of Kentucky, (commonly called the occupying claimant laws,) which varied and restricted the rights and remedies of the owners of

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1 1 Kent. Comm. Lect. 19, p. 390.

2 Green v. Biddle, 8 Wheat. R. 1; 1 Kent. Comm. Lect. 19, p. 393; Sergeant on Constitution, ch. 28 [ch. 30.]

3 Green v. Biddle, 8 Wheat. R. 1, 92.

such lands, were void, because they impaired the obligation of the contract. Nothing (said the court) can be more clear upon principles of law and reason, than that a law, which denies to the owner of the land a remedy to secure the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions, tending to diminish the value and amount of the thing recovered; impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged; but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.1 But statutes and limitations, which are mere regulations of the remedy, for the purposes of general repose and quieting titles, are not supposed to impair the right; but merely to provide for the prosecution of it within a reasonable period and to deem the non-prosecution within the period an abandonment of it.2

§ 1391. Whether a state legislature has authority to pass a law declaring a marriage void, or to award a divorce, has, incidentally, been made a question, but has never yet come directly in judgment. Marriage, though it be a civil institution, is understood to constitute a solemn, obligatory contract between the parties. And it has been, arguendo, denied, that a state legislature

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1 Green v. Biddle, 8 Wheat. R. 1, 75, 76.

2 Hawkins v. Barney's Lessee, 5 Peters's Sup. R. 457; Bank of Hamilton v. DudIey's Lessee. 2 Peters's Sup. R. 492.

constitutionally possesses authority to dissolve that contract against the will, and without the default of either party. This point, however, may well be left for more exact consideration, until it becomes the very ground of the lis mota.1

§ 1392. Before quitting this subject it may be proper to remark, that as the prohibition, respecting ex post facto laws, applies only to criminal cases; and the other is confined to impairing the obligation of contracts; there are many laws of a retrospective character, which may yet be constitutionally passed by the state legislatures, however unjust, oppressive, or impolitic they may be.2 Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation, nor with the fundamental principles of the social compact.3 Still they are, with the exceptions above stated, left open to the states, according to their own constitutions of government; and become obligatory, if not prohibited by the latter. Thus, for instance, where the legislature of Connecticut, in 1795, passed a resolve, setting aside a decree of a court of probate disapproving of a will, and granted a new hearing; it was held, that the resolve, not being against any constitutional principle in that state, was valid; and that the will, which was approved upon the new hearing, was conclusive, as to the rights obtained under it.4 There is nothing in the constitution of the United States, which forbids a state legislature, from exercising

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1 Dartmouth College v. Woodward, 4 Wheat. R. 629, 695, 696.

2 See Beach v. Woodhull, 1 Peters's Cir. Ct R.; 2 Calder v. Bull, 3 Dall. R. 386; Satterlee v Mathewson, 2 Peters's Sup. R. 380; Wilkinson v. Leland, 2 Peters's Sup. R. 627, 661.

3 Patterson J. in Calder v. Bull, 3 Dall. R. 397.

4 Calder v. Bull, 3 Dull. R. 386.

judicial functions; nor from divesting rights, vested by law in an individual; provided its effect be not to impair the obligation of a contract.1 If such a law be void, it is upon principles derived from the general nature of free governments, and the necessary limitations created thereby, or from the state restrictions upon the legislative authority, and not from the prohibitions of the constitution of the United States. If a state statute should, contrary to the general principles of law, declare, that contracts founded upon an illegal or immoral consideration, or otherwise void, should nevertheless be valid, and binding between the parties; its retrospective character could not be denied; for the effect would be to create a contract between the parties, where none had previously existed. Yet it would not be reached by the constitution of the United States; for to create a contract, and to impair or destroy one, cannever be construed to mean the same thing. It may be within the same mischief, and equally unjust, and ruinous; but it does not fall within the terms of the prohibition.2 So, if a state court should decide, that the relation of landlord and tenant did not legally subsist between certain persons; and the legislature should pass a declaratory act, declaring, that it did subsist; the act, so far as the constitution of the United States is concerned, would be valid.3 So, if a state legislature should confirm a void sale, if it did not divest the settled rights of property, it would be valid.4 Nor (as has been already seen) would a state law, discharging

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1 Satterlee v. Mathewson, 2 Peters's Sup. R. 380, 413; Calder v. Bull, 3 Dull. R. 386. See Olney v. Arnold, 3 DaIl. R. 308; Wilkinson v. Leland, 2 Peters's Sup. R. 627.

2 Satterlee v. Mathewson, 2 Peters's Sup. R. 380, 412, 413.

3 Satterlee v. Mathewson, 2 Peters's Sup. R. 380, 412, 413.

4 Wilkinson v. Leland, 2 Peters's Sup. R. 627, 661.

a party from imprisonment under a judgment upon a Contract, though passed subsequently to the imprisonment, be an unconstitutional exercise of power; for it would leave the obligation of the contract undisturbed. The states still possess the rightful authority to abolish imprisonment for debt; and may apply it to present, as well as to future imprisonment.1

§ 1393. Whether, indeed, independently of the constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that since the American revolution no state government can be presumed to possess the trancendental sovereignty, to take away vested rights of property to take the property of A. and transfer it to B. by a mere legislative act.2 That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property, should be held sacred. At least, no court of justice, in this country, would be warranted in assuming, that any state legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of

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1 Mason v. Haile, 2 Peters's Sup. R. 870.

2 Fletcher v. Peel, 6 Cranch, 67, 134.

power. The people ought not to be presumed to part with rights, so vital to their security and well-being, without very strong, and positive declarations to that effect.1

§ 1394. The remaining prohibition in this clause is, that no state shall "grant any title of nobility." The reason of this prohibition is the same, as that, upon which the like prohibition to the government of the nation is founded. Indeed, it would be almost absurd to provide sedulously against such a power in the latter, if the states were still left free to exercise it. It has been emphatically said, that this is the corner-stone of a republican government; for there can be little danger, while a nobility is excluded, that the government will ever cease to be that of the people.2

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1 Wilkinson v. Leland, 2 Peters's Sup. R. 627, 657. See also Safterlee v. Mathewson, 2 Peters's Sup. R. 380, 413, 414; Fletcher v. Peck, 6 Cranch, 67, 134; Tenett v. Taylor, 9 Cranch, 52; Tout of Pawlet v.

Clark, 9 Cranch, 535. See also Sergeant on Const. ch. 28, [ch. 30.]
2 The Federalist, No. 84.

CHAPTER XXXVI.
EXECUTIVE DEPARTMENT--ORGANIZATION OF.

§ 1404. IN the progress of our examination of the constitution, we are now arrived at the second article, which contains an enumeration of the organization and powers of the executive department. What is the best constitution for the executive department, and what are the powers, with which it should be entrusted, are problems among the most important, and probably the most difficult to be satisfactorily solved, of all, which are involved in the theory of free governments.1 No man, who has ever studied the subject with profound attention, has risen from the labour without an increased and almost overwhelming sense of its intricate relations, and perplexing doubts. No man, who has ever deeply read the human history, and especially the history of republics, but has been struck with the consciousness, how little has been hitherto done to establish a safe depositary of power in any hands; and how often in the hands of one, or a few, or many, of an hereditary monarch, or an elective chief, the executive power has brought ruin upon the state, or sunk under the oppressive burthen of its own imbecility. Perhaps our own history, hitherto, does not establish, that we have wholly escaped all the dangers; and that here is not to be found, as has been the case in other nations, the vulnerable part of the republic.

§ 1405. It appears, that the subject underwent a very elaborate discussion in the convention, with much

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1 See 2 Elliot's Deb. 358; 1 Kent's Comm. Lect. 13, p. 255, 256.

diversity of opinion; and various propositions were submitted of the most opposite character. The Federalist has remarked, that there is hardly any part of the system, the arrangement of which could have been attended with greater difficulty; and none, which has been inveighed against with less candor, of criticised with less judgment.1

§ 1406. The first clause of the first section of the second article is as follows: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years; and together with the Vice-President, chosen for the same term, be chosen as follows."

§ 1407. Under the confederation there was no national executive. The whole powers of the national government were vested in a congress, consisting of a single body; and that body was authorized to appoint a committee of the states, composed of one delegate from every state, to sit in the recess, and to delegate to them such of their own powers, not requiring the consent of nine states, as nine states should consent to.2 This want of a national executive was deemed a fatal defect in the confederation.

§ 1408. In the convention, there does not seem to have been any objection to the establishment of a national executive. But upon the question, whether it should consist of a single person, the affirmative w. as carried by a vote of seven states against three.3 The term of service was at first fixed at seven years, by a vote of five states against four, one being divided. The term was afterwards altered to four years, upon the report of a

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1 The Federalist, No. 67.
2 Confederation, Art. 9, 10.
3 Journ. of Convention, 68, 89, 96, 136.

committee, and adopted by the vote of ten states against one.1

§ 1409. In considering this clause, three practical questions are naturally suggested: First, whether there should be a distinct executive department; secondly, whether it should be composed of more than one person; and, thirdly, what should be the duration of office.

§ 1410. Upon the first question, little need be said. All America have at length concurred in the propriety of establishing a distinct executive department. The principle is embraced in every state constitution; and it seems now to be assumed among us, as a fundamental maxim of government, that the legislative, executive, and judicial departments ought to be separate, and the powers of one ought not to be exercised by either of the others. The same maxim is found recognised in express terms in many of our state constitutions. It is hardly necessary to repeat, that where all these powers are united in the same hands, there is a real despotism, to the extent of their coercive exercise. Where, on the other hand, they exist together, and yet depend for their exercise upon the mere authority of recommendation, (as they did under the confederation,2) they become at once imbecile and arbitrary, subservient to

popular clamour, and incapable of steady action. The harshness of the measures in relation to paper money, and the timidity and vacillation in relation to military affairs, are examples not easily to be forgotten.

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1 Journal of Convention, 90, 136, 211, 225, 324, 332, 333; 2 Pitkin's Hist. 252.

2 See 1 Jefferson's Corresp. 63.

§ 1411. Taking it, then, for granted, that there ought to be an executive department, the next consideration is, how it ought to be organized. It may be stated in general terms, that that organization is best, which will at once secure energy in the executive, and safety to the people. The notion, however, is not uncommon, and occasionally finds ingenious advocates, that a vigorous executive is inconsistent with the genius of a republican government.1 It is difficult to find any sufficient grounds, on which to rest this notion; and those, which are usually stated, belong principally to that class of minds, which readily indulge in the belief of the general perfection, as well as perfectibility, of human nature, and deem the least possible quantity of power, with which government can subsist, to be the best. To those, who look abroad into the world, and attentively read the history of other nations, ancient and modern, far different lessons are taught with a severe truth and force. Those lessons instruct them, that energy in the executive is a leading character in the definition of a good government.2 It is essential to the protection of the community against foreign attacks.

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1 See 2 American Museum, 427. -- Milton was or this opinion; and triumphantly states, that "all ingenious and knowing men will easily agree with me, that a free commonwealth, without a single person or house of lords, is by far the best government, if it can be had." (Milton on the Ready and Easy Way to establish a Free Commonwealth.) His notion was, that the whole power of the government should centre in a house of commons. -- Locke was in favour of a concentration of the whole executive and legislative powers in a small assembly; and Hume thought the executive powers safely lodged with a hundred senators. (Hume's Essays, Vol. 1, Essay 16, p. 596.) -- Mr. Chancellor Kent has made some just reflections upon these extraordinary opinions in 1 Kent's Comm. Lect. 13, p. 264.

2 1 Kent's Comm. Lect. 13, p. 253, 254; Rawle on Const. ch. 12, p. 147, 148.

It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, and to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.1 Every man the least conversant with Roman history knows, how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable name of a dictator, as well against the intrigues of ambitious individuals, aspiring to tyranny, and the seditions of whole classes of the community, threatening the existence of the government, as against foreign enemies, menacing the destruction and conquest of the state.2 A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever may be its theory, must, in practice, be a bad government.3

§ 1412. The ingredients, which constitute energy in the executive, are unity, duration, an adequate provision for its support, and competent powers. The ingredients, which constitute safety in a republican form of government, are a due dependence on the people, and a due responsibility to the people.4

§ 1413. The most distinguished statesmen have uniformly maintained the doctrine, that there ought to be a single executive, and a numerous legislature. They have considered energy, as the most necessary qualification of the power, and this as best attained by

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1 The Federalist, No. 70; Rawle on Const. ch. 12, p. 149.

2 Ibid.

3 Ibid.

4 Ibid. 1 Kent's, Comm. Lect. 13, p. 253, 254.

reposing the power in a single hand. At the same time, they have considered with equal propriety, that a numerous legislature was best adapted to the duties of legislation, and best calculated to conciliate the confidence of the people, and to secure. their privileges and interests.1 Montesquieu has said, that. "the executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one, than by many. On the other hand, whatever depends on the legislative power is oftentimes. better regulated by many, than by a single person. But if there were no monarch, and the executive. power should be committed to a

certain number of persons, selected from the legislative body, there would be an end to liberty; by reason, that the two powers. would be united, as the same persons would sometimes possess, and would always be able to possess, a share in both."2 De Lolme, in addition to other advantages, considers the unity o{ the executive as important in a free government, because it is thus more easily restrained.3 "In those states," says he, "where the execution of the laws is entrusted to several different hands, and to each with different titles and prerogatives, such division, and such changeableness of measures, which must be the consequence of it, constantly hide the true cause of the evils of the state. Sometimes military tribunes, and at others consuls bear an absolute sway. Sometimes patricians usurp every thing; and at other times those, who are called nobles. Sometimes the people. are oppressed by de-

1 The Federalist, No. 70.

2 Montesquieu's Spirit of Laws, B. 11, ch. 6.

3 De Lolme on Const. of England, B. 2. ch. 2.

cemvirs; and at others by dictators. Tyranny in such states does not always beat down the fences, that are set around it; but it leaps over them. When men think it confined to one place, it starts up again in another. It mocks the efforts of the people, not because it is invincible, but because it is unknown. But the indivisibility of the public power in England has constantly kept the views and efforts of the people directed to one and the same object."1 He adds, in another place, "we must observe a difference between the legislative and executive powers. The latter may be confined, and even is the more easily so, when undivided. The legislature on the contrary, in order to its being restrained, should absolutely be divided."2

§ 1414. That unity is conducive to energy will scarcely be disputed. Decision, activity, secrecy, and despatch will generally characterise the proceedings of one man in a much more eminent degree, than the proceedings of a greater number; and in proportion, as the number is increased, these qualities will be diminished.3

§ 1415. This unity may be destroyed in two ways; first, by vesting the power in two or more magistrates of equal dignity; secondly, by vesting it ostensibly in one man, subject, however, in whole or in part to the control and advice of a council. Of the first, the two consuls of Rome may serve, as an example in ancient times; and in modern times, the brief and hasty

1 De Lolme on Coast. of England, B. 2, ch. 2.

2 De Lolme on Const. of England, B. 2, ch. 3. See also, The Federalist, No. 70; 1 Kent's Comm. Lect. 13, p. 253 to 255. -- The celebrated Junius (the great unknown) has pronounced De Lolme's work to be at once "deep, solid, and ingenious."

3 The Federalist, No. 70; 1 Kent's. Comm. Lect 13, p. 253, 254.

history or the three consuls off France, during its shortlived republic.1 Of the latter, several states in the Union furnish examples, as some of the colonies did before the revolution. Both these methods or destroying the unity of the executive have had their advocates. They are both liable to similar, if not to equal objections,2

§ 1416. The experience of other nations, so far as it goes, coincides with what theory would point out. The Roman history records may instances of mischiefs to the republic from dissensions between the consuls, and between the military tribunes, who were at times substituted instead of the consuls. Those dissensions would have been even more striking, as well as more frequent, if it had not been for the peculiar circumstances of that republic, which often induced the consuls to divide the administration of the government between them. And as the consuls were generally chosen from the Patrician order, which was engaged in perpetual struggles with the Plebeians for the preservation of the privileges and dignities of their own order; there was an external pressure, which compelled them to act together for mutual support and defence.3

§ 1417. But independent of any of the lights derived from history, it is obvious, that a division of the executive power between two or more persons must always tend to produce dissensions, and fluctuating councils. Whenever two or more persons are engaged

1 4 Jefferson's Corresp. 160, 161. -- Propositions were made in the convention, for an executive composed of a plurality of persons.* They came from that party in the convention, which was understood to be favourable to a continuation of tim confederation with amendments.+

2 The Federalist, No. 70.

3 Id.

*** Journal of Convention, 124**
+ Id. 123.

in any common enterprise, or pursuit, there is always danger of difference of opinion. If it be a public trust, or office, in which they are clothed with equal dignity and authority, there are peculiar dangers arising from personal emulation, or personal animosity; from superior talents on one side, encountering strong jealousies on the other; from pride of opinion on one side, and weak devotion to popular prejudices on the other; from the vanity of being the author of a plan, or resentment from some imagined slight by the approval of that of another. From these, and other causes of the like nature, the most bitter rivalries and dissensions often spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operations of those, whom they divide. The wisest measures are those often defeated, or delayed, even in the most critical moments. And what constitutes even a greater evil, the community often becomes split up into rival factions, adhering to the different persons, who compose the magistracy; and temporary animosities become thus the foundation of permanent calamities to the state.1 Indeed, the ruinous effects of rival factions in free states, struggling for power, has been the constant theme of reproach by the admirers of monarchy, and of regret by the lovers of republics. The Guelphs and the Ghibelins, the white and the black factions, have been immortalized in the history of the Italian states; and they are but an epitome of the same unvarying scenes in all other republics.2

§ 1418. From the very nature of a free government, inconveniences resulting from a division of power must

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1 The Federalist, No. 70.
2 De Lolme on Const. B. 2, ch. 1.

be submitted to, in the formation of the legislature. But it is unwise, as well as unnecessary, in the constitution of the executive. In the legislature promptitude of decision is not of great importance. It is more often an evil, than a benefit. Differences of opinion in that department may, indeed, sometimes retard salutary measures; but they often lead to more circumspection and deliberation, and to more perfection and accuracy in the laws. A resolution, once passed by a legislative body, becomes a law; and opposition to it is either illegal or impolitic. Before it becomes a law, opposition may diminish the mischiefs, or increase the good of the measure. But no favourable circumstances palliate, or atone for the disadvantages of dissension in the executive department. The evils are here pure and unmixed. They embarrass and weaken every plan, to which they relate, from the first step to the final conclusion. They constantly counteract the most important ingredients in the executive character, vigour, expedition, and certainty of operation. In peace, distraction of the executive councils is sufficiently alarming and mischievous. But in war, it prostrates all energy, and all security. It brings triumph to the enemy, and disgrace to the country.1

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1 The Federalist, No. 70. -- The learned commentator on Blackstone's Commentaries was of opinion, that an executive composed of a single delegate of each state, like the "committee of congress" under the confederation, would have been better, than a single chief magistrate for the Union. If such a scheme had prevailed, we should have had at this time an executive magistracy of twenty-four persons. See 1 Tuck. Black. Comm. App. 349, 350. Surely the experience of the country, under the confederation, must have been wholly forgotten, when this scheme approved itself to the judgment of the proposer. Mr. Jefferson has told us in an emphatic manner, that the "committee of congress immediately fell into schisms and dissensions, which became at length so inveterate, as to render all co-operation among them impracticable. They dissolved themselves,

§ 1419. Objections of a like nature apply, though in some respects with diminished force, to the scheme of an executive council, whose constitutional concurrence is rendered indispensable. An artful cabal in that council would be able to distract and enervate the whole public councils. And even without such a cabal, the mere diversity of views and opinions would almost always mark the exercise of the executive authority with a spirit of habitual feebleness and dilatoriness, or a degrading inconsistency.1 But an objection, in a republican government quite as weighty, is, that such a participation in the executive power has a direct tendency to conceal faults, and destroy responsibility. Responsibility is of two kinds, to censure, and to punishment. The first is the more important of the two, especially in an elective government. Men in public trust will more often act in such a manner, as to render them unworthy of public favour, than to render themselves liable to legal punishment. But the multiplication of voices in the business of the executive renders it difficult to fix responsibility of either kind; for it is perpetually shifted from one to. another. It often becomes impossible amidst mutual accusations to determine, upon whom the

blame ought to rest.2 A sense of mutual impropriety sometimes induces the parties to resort to plausible pretexts to disguise their misconduct; or a dread of public responsibility to cover up,

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abandoning the helm of government; and it continued without s head, until congress met, in the ensuing winter. This was then imputed to the temper of two or three individuals. But the wise ascribed it to the nature of man." 4 Jefferson's Corresp. 161.

1 The Federalist, No. 70.

2 The Federalist, No. 70; 3 Elliot's Deb. 99, 100, 103; Id. 272; 1 Kent's Comm. Lect. 13, p. 253, 254.

under the lead of some popular demagogue, their own faults and vacillations. -- Thus, a council often becomes the means, either of shifting off all effective responsibility from the chief magistrate, or of intrigues and oppositions, which destroy his power, and supplant his influence. The constant excuse, for want of decision and public spirit on his part, will be, that he has been overruled by his council; and on theirs, that he would not listen to sound advice, or resisted a cordial co-operation. In regard to the ordinary operations of government, the general result is to introduce a system of bargaining and management into the executive councils; and an equally mischievous system of corruption and intrigue in the choice and appointment of counsellors. Offices are bestowed on unworthy persons to gratify a leading member, or mutual concessions are made to cool opposition, and disarm enmity. It is but too true, that in those states, where executive councils exist, the chief magistrate either sinks into comparative insignificance, or sustains his power by arrangements, neither honourable to himself, nor salutary to the people. He is sometimes compelled to follow, when he ought to lead; and he is sometimes censured for acts, over which he has no control, and for appointments to office, which have been wrung from him by a sort of political necessity.1

§ 1420. The proper conclusion to be drawn from these considerations is, that .plurality in the executive deprives the people of the two greatest securities for the faithful exercise of delegated power. First, it removes the just restraints of public opinion; and, secondly, it diminishes the means, as well as the power, of fixing responsibility for bad measures upon the real authors.2

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1 The Federalist, No. 70.

2 The Federalist, No. 70; 1 Kent's Comm. Lect. 13, p. 253, 254; 1 Tuck. Black. Comm. App. 318, 319; 3 Elliot's Deb. 99, 100.

§ 1421. The case of the king of Great Britain is adduced, as a proof the other way; but it is a case wholly inapplicable to the circumstances of our republic. In Great Britain there is an hereditary magistrate; and it is a settled maxim in that government, that he can do no wrong; the true meaning of which is, that, for the sake of the public peace, he shall not be accountable for his administration of public affairs, and his person shall be sacred. In that kingdom it is, therefore, wise, that he should have a constitutional council, at once to advise him in regard to measures, and to become responsible for those measures. In no other way could any responsibility be brought home to the executive department. Still the king is not bound by the advice of his council. He is the absolute master of his own conduct; and the only alternative left to the ministry is, to compel him to follow their advice, or to resign the administration of the government. In the American republic the case is wholly different. The executive magistrate is chosen by, and made responsible to, the people; and, therefore, it is most fit, that he should have the exclusive management of the affairs, for which he is thus made responsible. In short, the reason for a council in Great Britain is the very reason for rejecting it in America. The object, in such case, is to secure executive energy and responsibility. In Great Britain it is secured by a council. In America it would be defeated by one.1

§ 1422. The idea of a council to the executive, which has prevailed to so great an extent in the state constitutions, has, without doubt, been derived from that

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1 The Federalist, No. 70. See Rawle on Const ch. 12, p. 147 to 150; North Amer. Review, Oct. 1827, p. 264, 265.

maxim of republican jealousy, which considers power as safer in the hands of a number of men, than of a single man. It is a misapplication of a known rule, that in the multitude of counsel there is safety. If it were even admitted, that the maxim is justly applicable to the executive magistracy, there are disadvantages on the other side, which greatly overbalance it. But in truth, all multiplication of the executive is rather dangerous, than friendly to liberty; and it is more sale to have a single object for the jealousy and watchfulness of the people, than many.1 It is in the highest degree probable, that the peculiar situation, in which the American states were placed antecedently to the

revolution, with colonial governors placed over them by the crown, and irresponsible to themselves, gave a sanction to the opinion of the value of an executive council, and of the dangers of a single magistrate, wholly disproportionate to its importance, and inconsistent with the permanent safety and dignity of an elective republic.2

§ 1423. Upon the question, whether the executive should be composed of a single person, we have already seen, that there was, at first, a division of opinion in the convention, which framed the constitution, seven stales voting in the affirmative, and three in the negative; ultimately, however, the vote was unanimous in its favour.3 But the project of an executive council was not so easily dismissed. It was renewed at different periods in various forms; and seems to have been finally, though

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1 The Federalist, No. 70; 1 Kent's Comm. Lect. 13, p. 253, 254; 3 Elliot's Deb. 99, 100.

2 Mr. Chancellor Kent has, in his Commentaries, condensed the whole pith of the argument into two paragraphs of great brevity and clearness. 1 Kent's Comm. Lect. 13, p. 253, 254. See also Rawle on Const. ch. 12, p. 147, &c. 1 Turk. Black. Comm. App. 316 to 318.

3 Journal of Convention, p. 95, 96; Id. 183.

indirectly, disposed of by the vote of eight states against three.1 The reasoning, which led to this conclusion, is understood to have been that, which has been already stated, and which is most elaborately expounded in the Federalist.2

§ 1424. The question as to the unity of the executive being disposed of, the next consideration is, as to the proper duration of his term of office. It has been already mentioned, that duration in office constitutes an essential requisite to the energy of the executive department. This has relation to two objects; first, the personal firmness of the chief magistrate in the employment of his constitutional powers; and, secondly, the stability of the system of administration, which may have been adopted under his auspices. With regard to the first, it is evident, that the longer the duration in office, the greater will be the probability of obtaining so important an advantage. A man will naturally be interested in whatever he possesses, in proportion to the firmness or precariousness of the tenure, by which he holds it. He will be less attached to what he holds by a momentary, or uncertain title, than to what he enjoys by a title durable, or certain; and of course he will be willing to risk more for the one, than for the other. This remark is not less applicable to political privilege, or honour, or trust, than to any article of ordinary property. A chief magistrate, acting under the consciousness, that in a very short time he must lay down office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity, from an independent exercise of his powers, or from those ill hu-

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1 Journ. of Convention, p. 69, 104, 265, 278, 340, 341. See also 2 Amer. Museum, 435, 534, 537.

2 The Federalist, No. 70; 3 Elliot's Deb. 100.

mours, which are apt at times to prevail in all governments. If the case should be, that he should, notwithstanding, be re-eligible, his wishes, if he should have any for office, would combine with his fears to debase his fortitude, or weaken his integrity, or enhance his irresolution.1

§ 1425. There are some, perhaps, who may be inclined to regard a servile pliancy of the executive to a prevalent faction, or opinion in the community, or in the legislature, as its best recommendation. But such notions betray a very imperfect knowledge of the true ends and objects of government. While republican principles demand, that the deliberate sense of the community should govern the conduct of those, who administer their affairs, it cannot escape observation, that transient impulses and sudden excitements, caused by artful and designing men, often lead the people astray, and require their rulers not to yield up their permanent interests to any delusions of this sort. It is a just observation, that the people commonly intend the public good. But no one, but a deceiver, will pretend, that they do not often err, as to the best means of promoting it. Indeed, beset, .as they are, by the wiles of sycophants, the snares of the ambitious and the avaricious, and the artifices of those, who possess their confidence more, than they deserve, or seek to possess it by artful appeals to their prejudices the wonder rather is, that their errors are not more numerous and more mischievous. It is the duty of their rulers to resist such bad designs at all hazards; and it has not unfrequently happened, that by such resistance they have saved the people from fatal mistakes, and, in their moments of cooler reflection, obtained their gratitude and

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1 The Federalist, No. 71.

their reverence.1 But how can resistance be expected, where the tenure of office is so short, as to make it ineffectual and insecure?

§ 1426. The same considerations apply with increased force to the legislature. If the executive department were to be subservient to the wishes of the legislature, at all times and under all circumstances, the whole objects of a partition of the powers of government would be defeated. To what purpose would it be to separate the executive and judiciary from the legislature, if both are to be so constituted, as to be at the absolute devotion of the latter? It is one thing to be subordinate to the laws; and quite a different thing to be dependent upon the legislative body. The first comports with, the last violates, the fundamental principles of good government; and, in fact, whatever may be the form of the constitution, the last unites all power in the same hands. The tendency of the legislative authority to absorb every other has been already insisted on at large in the preceding part of these Commentaries, and need not here be further illustrated. In governments purely republican it has been seen, that this tendency is almost irresistible. The representatives of the people are but too apt to imagine, that they are the people themselves; and they betray strong symptoms of impatience and even disgust at the least resistance from any other quarter. They seem to think the exercise of its proper rights by the executive, or the judiciary, to be a breach of their privileges, and an impeachment of their wisdom.2 If, therefore, the executive is

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1 The Federalist., No. 71.

2 The Federalist, No. 71; Id. No. 73; Id. No. 51. -- Mr. Jefferson says, "The executive in our governments is not the sole, it. is scarcely the principal object of my jealousy. The tyranny of the legislatures is the moat formidable dread at present, and will be for many years. That

to constitute an effective, independent branch of the government, it is indispensable to give it some permanence of duration in office, and some motive for a firm exercise of its powers.

§ 1427. The other ground, that of stability in the system of administration, is still more strikingly connected with duration in office. Few men will be found willing to commit themselves to a course of policy, whose wisdom may be perfectly clear to themselves, if they cannot be permitted to complete, what they have begun. Of what consequence will it be to form the best plans of executive administration, if they are perpetually passing into new hands, before they are matured, or may be defeated at the moment, when their reasonableness and their value cannot be understood, or realized by the public? One of the truest rewards to patriots and statesmen is the consciousness, that the objections raised against their measures will disappear upon a fair trial; and that the gratitude and affection the people will follow their labours, long after they have ceased to be actors upon the public scenes. But who will plant, when he can never reap? Who will sacrifice his present ease, and reputation, and popularity, and encounter obloquy and persecution, for systems, which he can neither mould so, as to ensure success, nor direct so, as to justify the experiment?

§ 1428. The natural result of a change of the head of the government will be a change in the course of administration, as well as a change in the subordinate persons, who are to act as ministers to the executive. A successor in office will feel little sympathy with the plans of his predecessor. To undo what has been

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of the Executive will come in its turn; but it will be at a remote period." 2 Jefferson's Corresp. 443.

done by the latter will be supposed to give proofs of his own capacity; and will recommend him to all those, who were adversaries of the past administration; and perhaps will constitute the main grounds of elevating him to office. Personal pride: party principles, and an ambition for public distinction will thus naturally prompt to an abandonment of old schemes, and combine with that love of novelty so congenial to all free states, to make every new administration the founders of new systems of government.1

§ 1429. What should be the proper duration of office is matter of more doubt and speculation. On the one hand, it may be said, that the shorter the period of office, the more security there will be against any dangerous abuse of power. The longer the period, the less will responsibility be felt, and the more personal ambition will be indulged. On the other hand, the considerations above stated prove, that a very short period is, practically speaking, equivalent to a surrender of the executive power, as a check in government, or subjects it to an intolerable vacillation and imbecility. In the convention itself much diversity of opinion existed on this subject. It was at one time proposed, that the executive should be chosen during good behaviour. But this proposition received little favour, and seems to have been abandoned without much effort.2

1 The Federalist, No 72.

2 This plan, whatever may now be thought of its value, was at the time supported by some, of the purest patriots. Mr. Hamilton, Mr. Madison, and Mr. Jay were among the number. North American Review, Oct. 1827, p. 263, 264, 266; Journal of Convention, p. 130, 131, 185; 2 Pitk. Hist. 259, note. Mr. Hamilton, (it seems) at a subsequent period of the convention, changed his opinion on account of the increased danger to the public tranquillity, incident to the election of a magistrate to this

§ 1430. Another proposition was (as has been seen) to choose the executive for seven years, which at first passed by a bare majority;1 but being coupled with a clause, "to be chosen by the national legislature," it was approved by the vote of eight states against two.2 Another clause, "to be ineligible a second time," was added by the vote of eight states against one, one being divided.3 In this form the clause stood in the first draft of the constitution, though some intermediate efforts were made to vary it.4 But it was ultimately altered upon the report of a committee so, as to change the mode of election, the term of office, and the re-eligibility, to their present form, by the vote of ten states against one.5

§ 1431. It is most probable, that these three propositions had a mutual influence upon the final vote. Those, who wished a choice to be made by the people, rather than by the national legislature, would naturally incline to a shorter period of office, than seven years. Those, who were in favour of seven years, might be willing to consent to the clause against re-eligibility, when they would resist it, if the period of office were reduced to four years.6 And those, who favoured the latter, might more readily yield the prohibitory clause, than increase the duration of office. All this, however, is but conjecture; and the most, that can be gathered

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degree of permanency. 2 Pitk. Hist. 259, 260, note. Possibly, the saran change may have occurred in the opinions of others. -- Journal of Convention. p. 130, 131. 1 Journal of Convention, p. 90.

2 Id. 92, 136, 224, 225; Id. 286, 287.

3 Id. 94, 204.

4 Journal of Convention, 190, 191 to 196, 200; Id. 286, 287, 288.

5 Id 225, 324, 330, 332, 337. See 2 Jefferson's Correspondence, p. 64, 65; 2 Pitk. Hist. 252, 253; Journal or Convention, 288, 289.

6 See 1 Jefferson's Correspondence, p. 64, 65.

from the final result, is, that opinions, strongly maintained at the beginning of the discussion, were yielded up in a spirit of compromise, or abandoned upon the weight of argument.1

§ 1432. It is observable, that the period actually fixed is intermediate between the term of office of the senate, and that of the house of representatives. In the course of one presidential term, the house is, or may be, twice recomposed; and two-thirds of the senate changed, or re-elected. So far, as executive influence can be presumed to operate upon either branch of the legislature unfavourably to the rights of the people, the latter possess, in their elective franchise, ample means of redress. On the other hand, so far, as uniformity and stability in the administration of executive duties are desirable, they are in some measure secured by the more permanent tenure of office of the senate, which will check too hasty a departure from the old system, by a change of the executive, or representative branch of the government.2

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1 3 Elliot's Debates, 99, 100; 2 Id. 358; 1 Jefferson's Correspondence, 61, 65.

2 Doctor Paley has condemned all elective monarchies, and, indeed, all elective chief magistrates. "The confession of every writer on the subject of civil government," says be, "the experience of ages, the example of Poland, and of the Papal Dominions, seem to place this amongst the few indubitable maxims, Which,the science of government admits of. A crown is too splendid a prize to be conferred upon merit. The passions, or interests of the electors, exclude all consideration of the qualities of the competitors. The same observation holds concerning the appointments to any office, which is attended with a great share of power or emolument. Nothing is gained by a popular choice worth the dissensions, tumults, and interruptions of regular industry, with which it is inseparably attended." (Paley's Moral Philosophy, B. 6, ch. 7, p. 367.) Mr. Chancellor Kent has also remarked, that it is a curious fact in European history, that on the first partition of Poland in 1773, when the partitioning powers thought it expedient to foster and confirm all the defects of its wretched government, they sagaciously demanded

§ 1433. Whether tile period of four years will answer all the purposes, for which the executive department is established, so as to give it at once energy and safety, and to preserve a due balance in the administration of the government, is a problem, which can be solved only by experience. That it will contribute far more, than a shorter period, towards these objects, and thus have a material influence upon the spirit and character of the government, may be safely affirmed.1 Between the commencement and termination of the period of office, there will be a considerable interval, at once to justify some independence of opinion and action, and some reasonable belief, that the propriety of the measures adopted during the administration may be seen, and felt by the community at large. The executive need not be intimidated in his course by the dread of an immediate loss of public confidence, without the power of regaining it before a new election; and he may, with some confidence, look forward to that esteem and respect. of his fellow-citizens, which public services usually obtain, when they are faithfully and firmly pursued with an honest devotion to the public good. If he should be re-elected, he will still more extensively possess the means of carrying into effect a wise and beneficent system of policy, foreign as well as domestic. And if he should be compelled to retire, he cannot but have the consciousness, that measures, long enough pursued to be found useful, will be persevered in; or, if abandoned, the contrast will reflect

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of the Polish Diet, that the crown should continue elective. 1 Kent. Comm. Lect. 13, p. 256. America has indulged the proud hope, that she shall avoid every danger of this sort, and escape at once from the evils of an hereditary, and of an elective monarchy. Who, that loves liberty, does not wish success to her efforts?

1 The Federalist, No. 71.

new honour upon the past administration of the government, and perhaps reinstate him in office. At all events, the period is not long enough to justify any alarms for the pubic safety.1 The danger is not, that such a limited executive will become an absolute dictator; but, that he may be overwhelmed by the combined operations of popular influence and legislative power. It may be reasonably doubted, from the limited duration of this office, whether, in point of independence and firmness, he will not be found unequal to the task, which the constitution assigns him; and if such a doubt may be indulged, that alone will be decisive against any just .jealousy of his encroachments.2 Even in England, where an hereditary monarch with vast prerogatives and patronage exists, it has been found, that the house of commons, from their immediate sympathy with the people, and their possession of the purse-strings of the nation, have been able effectually to check all his usurpations, and to diminish his influence. Nay, from small beginnings they have risen to be the great power in the state, counterpoising not only the authority of the crown, but the rank and wealth of the nobility; and gaining so solid an accession of influence, that they rather lead, than follow, the great measures of the administration.3

§ 1434. In comparing the duration of office of the president with that of the state executives, additional reasons will present themselves in favour of the former. At the time of the adoption of the constitution, the executive was chosen annually in some of the states; in others, biennially; and in others, triennially. In some

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1 1 Tuck. Black. Comm. App. 318; Rawle on Coast. ch. 31, p. 287 to 290.

2 The Federalist, No. 71.

3 The Federalist, No. 71.

of the states, Which have been subsequently admitted into the Union, the executive is chosen annually;in others, biennially; in others, triennially; and in others, quadriennially. So that there is a great diversity of opinion exhibited on the subject, not only in the early, but in the later state constitutions in the Union.1 Now, it may be affirmed, that if, considering the nature of executive duties in the state governments, a period of office of two, or three, or even four years, has not been found either dangerous or inconvenient, there are very strong reasons, why the duration of office of the president of the United States should be at least equal to the longest of these periods. The nature of the duties to be performed by the president, both at home and abroad, are so various and complicated, as not only to require great talents, and great wisdom to perform them in any manner suitable to their importance and difficulty; but also long experience in office to acquire, what may be deemed the habits of administration, and a steadiness, as well as comprehensiveness, of view of all the bearings of measures. The executive duties in the states are few, and confined to a narrow range. Those of the president embrace all the ordinary and extraordinary arrangements of peace and war, of diplomacy and negotiation, of finance, of naval and military operations, and of the execution of the laws through almost infinite ramifications of details, and in places at vast distances from each other.2 He is

compelled constantly to take into view the whole circuit of the Union; and to master many of the local interests and other circumstances, which may require new adaptations of measures to meet

1 4 Elliot's Debates, App. 557; Dr. Leiber's Encyclopedia Americana, Art., Constitutions; The Federalist, No. 39.

2 The Federalist, No. 72.

the public exigences. Considerable time must necessarily elapse before the requisite knowledge for the proper discharge of all the functions of his office can be obtained; and, after it is obtained, time must be allowed to enable him to act upon that knowledge so, as to give vigour and healthiness to the operations of the government. A short term of office would scarcely suffice, either for suitable knowledge, or suitable action. And to say the least, four years employed in the executive functions of the Union would not enable any man to become more familiar with them, than half that period with those of a single state.1 In short, the same general considerations, which require and justify a prolongation of the period of service of the members of the national legislature beyond that of the members of the state legislatures, apply with full force to the executive department. There have, nevertheless, at different periods of the government, been found able and ingenious minds, who have contended for an annual election of the president, or some shorter period, than four years.2 **§ 1435.** Hitherto our experience has demonstrated, that the period has not been found practically so long, as to create danger to the people, or so short, as to take away a reasonable independence and energy from the executive. Still it cannot be disguised, that sufficient

1 1 Kent. Comm. Lect. 13, p. 262.

2 Mr. Senator Hillhouse, in April, 1808, proposed an annual election, among other amendments to the constitution; and defended the proposition in a very elaborate speech. The, amendment, however, found no support. See Hillhouse's Speech, l2th April, 1808, printed at New Haven, by O. Steele & Co. The learned editor of Blackstone's Commentaries manifestly thought a more frequent election, than once in four years, desirable. 1 Tuck. Black. Comm. App. 328, 329.

time has scarcely yet elapsed to enable us to pronounce a decisive opinion upon the subject; since the executive has generally acted witha majority of the nation; and in critical times has been sustained by the force of that majority in strong measures, and in times of more tranquillity, by the general moderation of the policy of his administration. **§ 1436.** Another question, connected with the duration of office of the president, was much agitated in the convention, and has often since been a topic of serious discussion; and that is, whether he should be re-eligible to office. In support of the opinion, that the president ought to be ineligible after one period of office, it was urged, that the return of public officers into the mass of the common people, where they would feel the tone, which they had given to the administration of the laws, was the best security the public could have for their good behaviour. It would operate as a check upon the restlessness of ambition, and at the same time promote the independence of the executive. It would prevent him from a cringing subserviency to procure a re-election; or to a resort to corrupt intrigues for the maintenance of his power.1 And it was even added by some, whose imaginations were continually haunted by terrors of all sorts from the existence of any powers in the national government, that the re-eligibility of the executive would furnish an inducement to foreign governments to interfere in our elections, and would thus inflict upon us all the evils, which had desolated, and betrayed Poland.2

1 3 Elliot's Debates, 99, Rawle on Const. ch. 31, p. 283; The Federalist, No. 72.

2 See 2 Elliot's Debates, 357; Rawle on Const. ch. 31, p. 283.

§ 1437. In opposition to these suggestions it was stated, that one ill effect of the exclusion would be a diminution of the inducements to good behaviour. There are few men, who would not feel much less zeal in the discharge of a duty, when they were conscious, that the advantage of the station, with which it is connected, must be relinquished at a determinate period, than when they were permitted to entertain a hope of obtaining by their merit a continuance of it. A desire of reward is one of the strongest incentives of human conduct; and the best security for the fidelity of mankind is to make interest coincide with duty. Even the love of fame, the ruling passion of the noblest minds, will scarcely prompt a man to undertake extensive and arduous enterprises, requiring considerable time to mature and perfect, if they may be taken from his management before their accomplishment, or be liable to failure in the hands of a successor. The most, under such circumstances, which can be expected of the generality of mankind, is the negative merit of not doing harm, instead of the positive merit of doing good.1 Another ill effect of the exclusion

would be the temptation to sordid views, to peculation, to the corrupt gratification of favourites, and in some instances to usurpation. A selfish or avaricious executive might, under such circumstances, be disposed to make the most he could for himself, and his friends, and partisans, during his brief continuance in office, and to introduce a system of official patronage and emoluments, at war with the public interests, but well adapted to his own. If he were vain and ambitious, as well as avaricious and selfish, the transient possession of his honours would

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1 The Federalist, No. 72; 3 Elliot's Deb. 99; Id. 358.

depress the former passions, and give new impulses to the latter. He would dread the loss or gain more, than the loss of fame; since the power must drop from his hands too soon to ensure any substantial addition to his reputation.1 On the other hand, his very ambition, as well as his avarice, might tempt him to usurpation; since the chance or impeachment would scarcely be worthy of thought; and the present power or serving friends might easily surround him with advocates for every stretch of authority, which would flatter his vanity, or administer to their necessities.

§ 1438. Another ill effect of the exclusion would be depriving the community of the advantage or the experience, gained by an able chief magistrate in the exercise of office. Experience is the parent of wisdom. And it would seem almost absurd to say, that it ought systematically to be excluded from the executive office. It would be equivalent to banishing merit from the public councils, because it had been tried. What could be more strange, than to declare, at the moment, when wisdom was acquired, that the possessor of it should no longer be enabled to use it for the very purposes, for which it was acquired?2

§ 1439. Another ill effect o.f the exclusion would be, that it might banish men from the station in certain emergencies, in which their services might be eminently useful, and indeed almost indispensable lot the safety of their country. There is no nation, which has not at some period or other in its history felt an absolute necessity of the services of particular men in particular stations; and perhaps it is not too much to say, as vital to the preservation or its political exist-

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1 The Federalist, No. 72; 2 Elliot's Debates 358.

2 The Federalist, No. 72; 3 Elliot's Debates, 99, 100.

ence. In a time of war, or other pressing calamity, the very confidence of a nation in the tried integrity and ability of a single man may of itself ensure a triumph. Is it wise to substitute in such cases inexperience. for experience, and to set afloat public opinion, and change the settled course of administration?1 One should suppose, that it would be sufficient to possess the right to change a bad magistrate, without making the singular merit of a good one the very ground of excluding him from office.

§ 1440. Another ground against the exclusion was founded upon our own experience under the state governments of the utility and safety of the re-eligibility of the executive. In some of the states the executive is re-eligible; in others he is not. But no person has been able to point out any circumstance in the administration of the state governments unfavourable to a re-election of the chief magistrate, where the right has constitutionally existed. If there had been any practical evil, it must have been seen and felt. And the common practice of continuing the executive in office in some of these states, and of displacing in others, demonstrates, that the people are not sensible of any abuse, and use their power with a firm and unembarrassed freedom at the elections.

§ 1441. It was added, that the advantages proposed by the exclusion, (1.) greater independence in the executive, (2.) greater security to the people, were not well founded. The former could not be attained in any moderate degree, unless the exclusion was made perpetual. And, if it were, there might be many motives to induce the executive to sacrifice his indepen-

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1 The Federalist, No. 72; 2 Elliot's Debates, 99, 100.

dence to friends, to partisans, to selfish objects, and private gain, to the fear of enemies, and the desire to stand well with majorities. As to the latter supposed advantage, the exclusion would operate no check upon a man of irregular ambition, or corrupt principles, and against such men alone could the exclusion be important. In truth, such men would easily find means to cover up their usurpations and dishonesty under fair pretensions, and mean subserviency to popular prejudices. They would easily delude the people into a belief, that their acts were constitutional, because they were in harmony with the public wishes, or held out some specious, but false projects for the public good.

§ 1449. Most of this reasoning would apply, though with diminished force, to the exclusion for a limited period, or until after the lapse of an intermediate election to the office. And it would have equally diminished advantages, with

respect both to personal independence, and public security. In short, the exclusion, whether. perpetual or temporary, would have nearly the same effects; and these effects would be generally pernicious, rather than salutary.1 Re-eligibility naturally connects itself to a certain extent with duration of office. The latter is necessary to give the officer himself the inclination and the resolution to act his part well, and the community time and leisure to observe the tendency of his measures, and thence to form an experimental estimate of his merits. The former is necessary to enable the people, when they see reason to approve of his conduct, to continue him in the station, in order to prolong the utility of his virtues and

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1 The Federalist, No. 72; Rawle on the Const. ch. 31, p. 288, 289.

talents, and to secure to the government the advantage of permanence in a wise system of administration.1

§ 1443. Stiff it must be confessed, that where the duration is for a considerable length of time, the right of re-election becomes less important, and perhaps less safe to the public. A president chosen for ten years might be made ineligible with far less impropriety, than one chosen for four years. And a president chosen for twenty years ought not to be again eligible, upon the plain ground, that by such a term of office his responsibility would be greatly diminished, and his means of influence and patronage immensely increased, so as to check in a great measure the just expression of public opinion, and the free exercise of the elective franchise. Whether an intermediate period, say of eight years, or of seven years, as proposed in the convention, might not be beneficially combined with subsequent ineligibility, is a point, upon which great statesmen have not been agreed; and must be left to the wisdom of future legislators to weigh anti decide.2 The

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1 The Federalist, No. 72.

2 Mr. Jefferson appears to have entertained the opinion strongly, that the chief magistrate ought to be ineligible after one term of office. "Reason and experience tell us," says he, "that the chief magistrate will always be re-elected, if he may be re-elected. He is then an officer for life. This once observed, it becomes of so much consequence to certain nations to have a friend or a foe at the head of our affairs, that they will interfere with money and with arms, &c. The election of a president of America some years hence will he much more interesting to certain nations of Europe, than ever the election of a king of Poland was." (Letter to Mr. Madison in 1787, 2 Jeffer. Cor. 274, 275.) He added in the same letter: "The power of removing every fourth year by the vote of the people is a power, which they will not exercise; and if they were disposed to exercise it, they would not be permitted."* How little has this reasoning accorded with the fact!! In the memoir written by him towards the close of his life, he says: "My wish was, that the president

*** See also 2 Jefferson's Corresp. 291, 439, 440, 443.**

inconvenience of such frequently recurring elections of the chief magistrate, by generating factions, combining intrigues, and agitating the public mind, seems not hitherto to have attracted as much attention, as it deserves. One of two evils may possibly occur from this source; either a constant state of excitement, which will prevent the fair operation of the measures of an administration; or a growing indifference to the election, both on the part of candidates and the people, which will surrender it practically into the hands of the selfish, the office-seekers, and the unprincipled devotees of power. It has been justly remarked by Mr. Chancellor Kent, that the election of a supreme executive magistrate for a whole nation affects so many interests, addresses itself so strongly to popular passions, and holds out such powerful temptations to ambition, that it necessarily becomes a strong trial to public virtue, and even hazardous to the public tranquillity.1

§ 1444. The remaining part of the clause respects the Vice-President. If such an officer was to be created, it is plain, that the duration of his office should be co-extensive with that of the president. Indeed, as we shall immediately see, the scheme of the government necessarily embraced it; for when it was decided, that two persons were to be voted for, as president, it was decided, that he, who had the greatest number of

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should be elected for seven years, and be ineligible afterwards. This term I thought sufficient to enable him, with the concurrence of the legislature, to carry through and establish any system of improvement he should propose for the general good. But. the practice adopted, I think, is better, allowing his continuance for eight years, with a liability to be dropped at half way of the term, making that a period of probation." 1 Jefferson's Corresp. 61, 65. See also 1 Tucker's Black. Comm. App. 328, 329.

1 1 Kent's Comm. Lect. 13, p. 257.

votes of the electors, after the person chosen as president, should be vice-president. The principal question, therefore, was, whether such an officer ought to be created. It has been already stated, that the original scheme of the government did not provide for such an officer. By that scheme, the president was to be chosen by the national legislature.1 When afterwards an election by electors, chosen directly or indirectly by the people, was proposed by a select committee, the choice of a vice-president constituted a part of the .proposition; and it was finally adopted by the vote of ten states against one.2

§ 1445. The appointment of a vice-president was objected to, as unnecessary and dangerous. As president of the senate, he would be entrusted with a power to control the proceedings of that body; and as he must come from some one of the states, that state would have a double vote in the body. Besides, it was said, that if the president should die, or be removed, the vice-president might,' by his influence, prevent the election of a president. But, at all events, he was a superfluous officer, having few duties to perform, and those might properly devolve upon some other established officer of the government.3

§ 1446. The reasons in favour of the appointment were, in part, founded upon the same ground as the objections. It was seen, that a presiding officer must be chosen for the senate, where all the states were equally represented, and where an extreme jealousy might naturally be presumed to exist of the preponder-

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1 Journal of Convention, 68, 92, 136, 224.

2 Journal of Convention, 323, 324, 333, 337.

3 See 2 Elliot's Deb. 359, 361; The Federalist, No. 68.

ating influence of any one state. If a member of the senate were appointed, either the state would be deprived of one vote, or would enjoy a double vote in case of an equality of votes, or there Would be a tie, and no decision. Each of these alternatives was equally undesirable, and might lay the foundation of great practical inconveniences. An officer, therefore, chosen by the whole Union, would be a more suitable person to preside, and give a casting vote, since he would be more free, than any member of the senate, from local attachments, and local interests; and being the representative of the Union; would naturally be induced to consult the interests of all the states.1 Having only a casting vote, his influence could only operate exactly, when most beneficial; that is, to procure a decision. A still more important consideration is the necessity of providing some suitable person to perform the executive functions, when the president is unable to perform them, or is removed from office. Every reason, which recommends the mode of election of the president, prescribed by the constitution, with a view either to dignity, independence, or personal qualifications for office, applies with equal force to the appointment of his substitute. He is to perform the same duties, and to possess the same rights; and it seems, if not indispensable, at least peculiarly proper, that the choice of the person, who should succeed to the executive functions, should belong to the people at large, rather than to a select body chosen for another purpose. If (as was suggested) the president of the senate, chosen by that body, might have been designated, as the constitutional substitute; it is

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1 3 Elliot's Deb. 37, 38, 51, 52; The Federalist, No. 68.

by no means certain, that he would either possess, so high qualifications, or enjoy so much public confidence, or feel so much responsibility for his conduct, as a vicepresident selected directly by and from the people. The president of the senate would generally be selected from other motives, and with reference to other qualifications, than what ordinarily belonged to the executive department. His political opinions might be in marked contrast with those of a majority of the nation; and while he might possess a just influence in the senate, as a presiding officer, he might be deemed wholly unfit for the various duties of the chief executive magistrate. In addition to these considerations, there was no novelty in the appointment of such an officer for similar purposes in some of the state governments;1 and it therefore came recommended by experience, as a safe and useful arrangement, to guard the people against the inconveniences of an interregnum in the government, or a devolution of power upon an officer, who was not their choice, and might not possess their confidence.

§ 1447. The next clause embraces the mode of election of the President and Vice-President; and although it has been repealed by an amendment of the constitution, (as will be hereafter shown,) yet it still deserves consideration, as a part of the original scheme, and more especially, as very grave doubts have been entertained, whether the substitute is not inferior in wisdom and convenience.

§ 1448. The clause is as follows: "Each state shall appoint in such manner, as the legislature thereof may direct, a number of electors, equal to the

1 The Federalist, No. 68.

whole number of senators and representatives, to which the state may be entitled in the congress. But no senator, or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." "The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of tim government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one, who have such majority and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of tim electors shall be the vice-president. But if there should remain two or more, who have equal votes,

the senate shall choose from them by ballot the vicepresident."

§ 1449. It has been already remarked, that originally in the convention the choice of the president was, by a vote of eight states against two, given to the national legislature.1 This mode of appointment, however, does not seem to have been satisfactory; for a short time afterwards, upon a reconsideration of the subject, it was voted, by six states against three, one being divided, that the president should be chosen by electors appointed for that purpose; and by eight states against two, that the electors should be chosen by the legislatures of the states.2 Upon a subsequent discussion, by the vote of seven states against four, the choice was restored to the national legislature.3 Towards the close of the convention the subject was referred to a committee, who reported a scheme, in many respects, as it now stands. The clause, as to the mode of choice by electors, was carried, by the vote of nine states against two; that respecting the time, and place, and manner of voting of the electors, by ten states against one; that respecting the choice by the house of representatives, in case no choice was made by the people, by ten states against one.4

§ 1450. One motive, which induced a change of the choice of the president from the national legislature, unquestionably was, to have the sense of the people

1 Journal of Convention, 68, 92, 136, 224, 225; Id. 286, 287.

2 Journal of Convention, 190, 191.

3 Id. 200. See Id. 286, 287.

4 Journal of Convention, 324, 333, 334, 335, 336, 337.-- The committee of the convention reported in favour of a choice by the senate, in case there was none by the people. Journal of Convention, 325.

operate in the choice of the person, to whom so important a trust was confided. This would be accomplished much more perfectly by committing the right of choice to persons, selected for that sole. purpose at the particular conjuncture, instead of persons, selected for the general purposes of legislation.1 Another motive was, to escape from those intrigues and cabals, which would be promoted in the legislative body by artful and designing men, long before the period of the choice, with a view to accomplish their own selfish purposes.2 The very circumstance, that the body entrusted with the power, was chosen long before the presidential election, and for other general functions, would facilitate every plan to corrupt, or manage them. It would be in the power of an ambitious candidate, by holding out the rewards of office, or other sources of patronage and honour, silently; but irresistibly to influence a majority of votes; and, thus, by his own bold and unprincipled conduct, to secure a choice, to the exclusion of the highest, and purest, and most enlightened men in the country. Besides; the very circumstance of the possession of the elective power would mingle itself with all the ordinary measures of legislation. Compromises and bargains would be made, and laws passed, to gratify particular members, or conciliate particular interests; and thus a disastrous influence would be shed over the whole policy of the government. The president would, in fact, become the mere tool of the dominant party in congress; and would, before he occupied the seat, be bound down to an entire subserviency to their views.3 No measure would be adopted, which

1 The Federalist, No. 68.

2 2 Wilson's Law Lect. 187.

3 Rawle on the Constitution, ch. 5, p. 58.

was not, in some degree, connected with the presidential election; and no presidential election made, but what would depend upon artificial combinations, and a degrading favouritism.1 There would be ample room for the same course of intrigues, which has made memorable the choice of a king in the Polish diet, of a chief in the Venetian senate, and of a pope in the sacred college of the Vatican.

§ 1451. Assuming that the choice ought not to be confided to the national legislature, there remained various other modes, by which it might be effected; by the people directly; by the state legislatures; or by electors, chosen by the one, or the other. The latter mode was deemed most advisable; and the reasoning, by which it was supported, was to the following effect. The immediate election should be made by men, the most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to a judicious combination of all the inducements, which ought to govern their choice. A small number of persons, selected by their fellow citizens from the general mass for this special object, would be most likely to possess the information, and discernment, and independence, essential for the proper discharge of the duty.2 It is also highly important to afford as little opportunity, as possible, to tumult and disorder. These evils are not unlikely to occur in the election of a chief magistrate directly by the people, considering the strong excitements and interests, which such an occasion may naturally be presumed to produce. The choice of a number of persons, to

1 See 1 Kent's Comm. Lect. 13, p. 261, 262.

2 The Federalist, No. 68.

form an intermediate body of electors, would be far less apt to convulse the community with any extraordinary or violent movements, than the choice of one, who was himself the final object of the public wishes. And as the electors chosen in each state are to assemble, and vote in the state, in which they are chosen, this detached and divided situation would expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all convened at one time in one place.1 The same circumstances would naturally lessen the dangers of cabal, intrigue, and corruption, especially, if congress should, as they undoubtedly would, prescribe the same day for the choice of the electors, and for giving their votes throughout the United States. The scheme, indeed, presents every reasonable guard against these fatal evils to republican governments. The appointment of the president is not made to depend upon any pre-existing body of men, who might be tampered with beforehand to prostitute their votes; but is delegated to persons chosen by the immediate act of the people, for that sole and temporary purpose. All those persons, who, from their situation, might be suspected of-too great a devotion to the president in office, such as senators, and representatives, and other persons holding offices of trust or profit under the United States, are excluded from eligibility to the trust. Thus, without corrupting the body of the people, the immediate agents in the election may be fairly presumed to enter upon their duty free from any sinister bias. Their transitory existence, and dispersed situation would present formidable obstacles to any corrupt combinations; and

1 The Federalist, No. 68; 1 Kent's Comm. Lect. 13, p. 261, 262.

time, as well as means, would be wanting to accomplish, by bribery or intrigue of any considerable number, a betrayal of their duty.1 The president, too, who should be thus appointed, would be far more independent, than if chosen by a legislative body, to whom he might be expected to make correspondent sacrifices, to gratify their wishes, or reward their services.2 And on the other hand, being chosen by the voice of the people, his .gratitude would take the natural direction, and sedulously guard their rights.3

1 The Federalist, No. 68, l Tuck. Black. Comm. App. 326, 327;

2 Wilson's Law Lect. 187, 188, 189. 2 Id.

3 In addition to these grounds, it has been suggested, that a still greater and more insuperable difficulty against a choice directly by the people, as a single community, was, that such a measure would be an entire consolidation of the government of the country, and an annihilation of the state sovereignties, so far as concerned the organization of the executive department of the Union. This was not to be permitted, or endured; and it would, besides, have destroyed the balance of the Union, and reduced the

weight of the slave-holding states to a degree, which they would have deemed altogether inadmissible. 1 Kent's Comm. Lect. 13, p. 261. It is not perceived, how either of these results could have taken place, unless upon some plan, (which was never proposed,) which should disregard altogether the existence of the states, and take away all representation of the slave population. The choice might have been directly by the people without any such course. And in point of fact, such an objection, as that suggested by Mr. Chancellor Kent, to a choice by the people, does not seem to have occurred to the authors of the Federalist. If the choice had been directly by the people, each state having as many votes for president, as it would be entitled to electors, the result would have been exactly, as it now is. If each state had been entitled to one vote, only, then the state sovereignties would have been completely represented by the people of each state upon an equality. If the choice had been by the people in districts, according to the ratio of representation, then the president would have been chosen by a majority of the people in a majority of the representative districts. There would be no more a consolidation, than there now is in the house of representatives. In neither view could there be any injurious inequality bearing on the Southern states.

§ 1452. The other parts of the scheme are no less entitled to commendation. The number of electors is equal to the number of senators and representatives of each state; thus giving to each state as virtual a representation in the electoral colleges, as that, which it enjoys in congress. The votes, when given, are to be transmitted to the seat of the national government, and there opened and counted in the presence of both houses. The person, having a majority of the whole number of votes, is to be president. But, if no one of the candidates has such a majority, then the house of representatives, the popular branch of the government, is to elect from the five highest on the list the person, whom they may deem best qualified for the office, each state having one vote in the choice. The person, who has the next highest number of votes after the choice of president, is to be vice-president. But, if two or more shall have equal votes, the senate are to choose the vice-president. Thus, the ultimate functions are to be shared alternately by the senate and representatives in the organization of the executive department.1

§ 1453. "This process of election," adds the Federalist, with a somewhat elevated tone of satisfaction, "affords a moral certainty, that the office of president will seldom fall to the lot of a man, who is not in an eminent degree endowed with the requisite qualifica-

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1 Mr. Chancellor Kent has summed up the general arguments in favour of an election by electors with great felicity. 1 Kent's Comm. Lect. 13, p. 261, 262. And the subject of the organization of the executive department is also explained, with much clearness and force, by the learned editor of Blackstone's Commentaries, and by Mr. Rawle in his valuable labours. 1 Tucker's Black. Comm. App. 325 to 328; Rawle on Constitution, ch. 5, p. 51 to 55; 2 Wilson's Law Lectures, 186 to 189.

tions. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honours of a single state. But it will require other talents, and a different kind of merit to establish him in the esteem, and confidence of the whole Union, or of so considerable a portion of it, as will be necessary to make him a successful candidate for the distinguished office of president of the United States. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters preeminent for ability and virtue. And this will be thought no inconsiderable recommendation of the constitution by those, who are able to estimate the share, which the executive in every government must necessarily have in its good or ill administration."1

§ 1454. The mode of election of the president thus provided for has not wholly escaped censure, though the objections have been less numerous, than those brought against many other parts of the constitution, touching that department of the government.2

§ 1455. One objection was, that he is not chosen directly by the people, so as to secure a proper dependence upon them. And in support of this objection it has been urged, that he will in fact owe his appointment to the state governments; for it will become the policy of the states, which cannot directly elect a president, to prevent his election by the people, and thus to throw the choice into the house of representatives, where it will be decided by the votes of states.3 Again, it was urged, that, this very mode of choice by states in the house of representatives is most unjust

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1 The Federalist, No. 68.

2 See The Federalist, No. 68; 2 Elliot's Debates, 360 to 363.

3 2 Elliot's Debates, 360, 361.

and unequal. Why, it has been said, should Delaware, with her single representative, possess the same vote with Virginia, with ten times that number?1 Besides; this mode of choice by the house of representatives will give rise to the worst intrigues; and if ever the arts of corruption shall prevail in the choice of a president, they will prevail by first throwing the choice into the house of representatives, and then assailing the virtue, and independence of members holding the state vote, by all those motives of honour and reward, which can so easily be applied by a bold and ambitious candidate.2

§ 1456. The answer to these objections has been already in a great measure anticipated in the preceding pages. But it was added, that the devolution of the choice upon the house of representatives was inevitable, if there should be no choice by the people; and it could not be denied, that it was a more appropriate body for this purpose, than the senate, seeing, that the latter were chosen by the state legislatures, and the former by the people. Besides; the connexion of the senate with the executive department might naturally produce a strong influence in favour of the existing executive, in opposition to any rival candidate.3 The mode of voting by states, if the choice came to the house of representatives, was but a just compensation to the smaller states for their loss in the primary election. When the people vote for the president, it is manifest, that the large states enjoy a decided advantage over the small states; and thus their interests may be neglected or sacrificed. To compensate them for this in the eventual election by the house of represen-

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1 1 Tucker's Black. Comm. App. 327.

2 1 Tucker's Black. Comm..App. 327, 328.

3 1 Tucker's Black. Comm. App. 327, 328.

tatives, a correspondent advantage is given to the small states. It was in fact a compromise.1 There is no injustice in this; and if the people do not elect a president, there is a greater chance of electing one in this mode, than there would be by a mere representative vote according to numbers; as the same divisions would probably exist in the popular branch, as in their respective states.2

§ 1457. It has been observed with much point, that in no respect have the enlarged and liberal views of the framers of the constitution, and the expectations of the public, when it was adopted, been so completely frustrated, as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges.3 It is notorious, that the electors are now chosen wholly with reference to particular candidates, and are silently pledged to vote for them. Nay, upon some occasions the electors publicly pledge themselves to vote for a particular person; and thus, in effect, the whole foundation of the system, so elaborately constructed, is subverted.4 The candidates for the presidency are selected and announced in each state long before the election; and an ardent canvass is maintained in the newspapers, in party meetings, and in the state legislatures, to secure votes for the favourite candidate, and to defeat his opponents. Nay, the state legislatures often become the nominating body, acting in their official capacities, and recommending by solemn resolves their own candidate to the other states.5 So, that nothing is left to the electors after their choice,

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1 2 Elliot's Debates, 364.

2 Rawle on Constitution, ch. 5, p. 54.

3 Rawle on Constitution, ch. 5, p. 57, 58.

4 Ibid.

5 Ibid. A practice, which has been censured by some persons, as still more alarming, is the nomination of the president by members of

but to register votes, which are already pledged; and an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.

§ 1458. The principal difficulty, which has been felt in the mode of election, is the constant tendency, from the number of candidates, to bring the choice into the house of representatives. This has already occurred twice in the progress of the government; and in the future there is every probability of a far more frequent occurrence. This was early foreseen; and, even in one of the state conventions, a most distinguished statesman, and one of the framers of the constitution, admitted, that it would probably be found impracticable to elect a president by the immediate suffrages of the people; and that in so large a country many persons would probably be voted for, and that the lowest of the five highest on the list might not have an inconsiderable number of votes.1 It cannot escape the discernment of any attentive observer, that if the house of representatives is often to choose a president, the choice

will, or at least may, be influenced by many motives, independent of his merits and qualifications. There is danger, that intrigue and cabal may mix in the rivalries and strife.2 And the discords, if not the corruptions, generated by the occasion, will probably long outlive the immediate choice, and scatter their pestilential influences over all the great interests of the country. One fearful crisis was passed in the choice

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congress at political meetings at Washington; thus, in the mild form of recommendation introducing their votes into the election with all their official influence. Rawle on Const. ch. 5, p. 58.

1 Mr. Madison, 2 Elliot's Debates, 364.

2 1 Tucker's Black. Comm. App. 327; 1 Kent's Comm. Lect. 13, p. 261.

of Mr. Jefferson over his competitor, Mr. Burr, in 1801, which threatened a dissolution of the government, and put the issue upon the tried patriotism of one or two individuals, who yielded from a sense of duty their preference of the candidate, generally supported by their friends.2

§ 1459. Struck with these difficulties, it has been a favourite opinion of many distinguished statesmen, especially of late years, that the choice ought to be directly by the people in representative districts, a measure, which, it has been supposed, would at once facilitate a choice by the people in the first instance, and interpose an insuperable barrier to any general corruption or intrigue in the election. Hitherto this plan has not possessed extensive public favour. Its merits are proper for discussion elsewhere, and do not belong to these Commentaries.

§ 1460. The issue of the contest of 1801 gave rise

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1 1 Kent's Comm. Lect. 13, p. 262.

2 Allusion is here especially made to the late Mr. Bayard, who held the vote of Delaware, and who, by his final vote in favour of Mr. Jefferson, decided the election. It was remarked at the time, that in the election of Mr. Jefferson, in 1801, the votes of two or three states were held by persons, who soon afterwards received office from him. The circumstance is spoken of in positive terms by Mr. Bayard, in his celebrated Speech on the Judiciary, in 1802.* Mr. Bayard did not make it matter of accusation against Mr. Jefferson, as founded in corrupt bargaining. Nor has any such charge been subsequently made. The fact is here stated merely to show, how peculiarly delicate the exercise of such functions necessarily is; and how difficult it may be, even for the most exalted and pure executive, to escape suspicion or reproach, when he is not chosen directly by the people. Similar suggestions will scarcely ever fail of being made, whenever a distinguished representative obtains office after an election of president, to which he has contributed. The learned editor of Blackstone's Commentaries has spoken with exceeding zeal of the dangers arising from the intrigues and cabals of an election by the house of representatives. 1 Tucker's Black. Comm. App. 327.

*** Debates On the Judiciary, printed by Whitney & Co. Albany, 1802, p. 416, 419.**

to an amendment of the constitution in several respects, materially changing the mode of election of president. In the first place it provides, that the ballots of the electors shall be separately given for president and vicepresident, instead of one ballot for two persons, as president; that the vice-president (like the president) shall he chosen by a majority of the whole number of electors appointed; that the number of candidates, out of whom the selection of president is to be made by the house of representatives, shall be three, instead of five; that the senate shall choose the vice-president from the two highest numbers on the list; and that, if no choice is made of president before the fourth of March following, the vice-president shall act as president.

§ 1461. The amendment was proposed in October, 1803, and was ratified before September, 1804,1 and is in the following terms.

"The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted. for as president, and of all persons voted for as vicepresident, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of government of the United States; directed to the president of the senate; -- the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates,

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1 Journal of Convention, Supp. 484, 488.

and the votes shall then be counted; the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member, or members, from twothirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vicepresident shall act as president, as in the case of the death or other constitutional disability of the president."

"The person, having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority o! the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice."

"But no person, constitutionally ineligible to the office of president, shall be eligible to that of vicepresident of the United States."

§ 1462. This amendment has alternately been the subject of praise and blame, and experience alone can

decide, whether the changes proposed by it are in all respects for the better, or the worse.1 In some respects it is a substantial improvement. In the first place, under the original mode, the senate was restrained from acting, until the house of representatives had made their selection, which, if parties ran high, might be considerably delayed. By the amendment the senate may proceed to a choice of the vice-president, immediately on ascertaining the returns of the votes.2 In the next place, under the original mode, if no choice should be made of a president by the house of representatives until after the expiration of the term of the preceding officer, there would be no person to perform the functions of the office, and an interregnum would ensue, and a total suspension of the powers of government.3 By the amendment, the new vice-president would in such case act as president. By the original mode, the senate are to elect the vice-president by ballot; by the amendment, the mode of choice is left open, so that it may be viva voce. Whether this be an improvement, or not, may be doubted.

§ 1463. On the other hand, the amendment has certainly greatly diminished the dignity and importance of the office of vice-president. Though the duties remain the same, he is no longer a competitor for the presidency, and selected, as possessing equal merit, talents, and qualifications, with the other candidate. As every state was originally compelled to vote for two candidates (one of whom did not belong to the state)

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1 1 Kent's Comm. Lect. 13, p. 262; Rawle on Const. ch. 5, p. 54, 55.

2 1 Rawle on Const. ch. 5, p. 54; 1 Kent's Comm. Lect. 13, p. 260.

3 Mr. Rawle is of opinion, that the old vice-president would, under the old mode, act as president in case of a non-election of president. I cannot find in the constitution any authority for such a position. Rawle on Const. ch. 5, p. 54. See also Act of Congress, 1st March, 1792, ch. 8.

for the same office, a choice was fairly given to all other states to select between them; thus excluding the absolute predominance of any local interest, or local partiality.

§ 1464. In the original plan, as well as in the amendment, no provision is made for the discussion or decision of any questions, which may arise, as to the regularity and authenticity of the returns of the electoral votes, or the right of the persons, who gave the votes, or the manner, or circumstances, in which they ought to be counted. It seems to have been taken for granted, that no question could ever arise on the subject; and that nothing more was necessary, than to open the certificates, which were produced, in the presence of both houses, and to count the names and numbers, as returned. Yet it is easily to be conceived, that very delicate and interesting inquiries may occur, fit to be debated and decided by some deliberative body.1 In fact, a question did occur upon the counting of the votes for the presidency in 1821 upon the re-election of Mr. Monroe, whether the votes of the state of Missouri could be counted; but as the count would make no difference in the choice, and the declaration was made of his re-election, the senate immediately withdrew; and the jurisdiction, as well as the course of proceeding in a case of real controversy, was left in a most embarrassing situation.

§ 1465. Another defect in the constitution is, that no provision was originally, or is now made, for a case, where there is an equality of votes by the electors for more persons, than the constitutional number, from which the house of representatives is to make the election. The language of the original text is, that

1 See 1 Kent's Comm. Lect. 13. p. 258, 259.

the house shall elect "from the five highest on the list." Suppose there were six candidates, three of whom had an equal number; who are to be preferred? The amendment is, that the house shall elect "from the persons having the highest numbers, not exceeding three." Suppose there should be four candidates, two of whom should have an equality of votes; who are to be preferred? Such a case is quite within the range of probability; and may hereafter occasion very serious dissensions. One object in lessening the number of the persons to be balloted for from five to three, doubtless was, to take away the chance of any person few votes from being chosen president having very against the general sense of the nation.1 Yet it is obvious now, that a person having but a very small number of electoral votes, might, under the present plan, be chosen president, if the other votes were divided between two eminent rival candidates; the friends of each of whom might prefer any other to such rival candidate. Nay, their very hostility to each other might combine them in a common struggle to throw the final choice upon the third candidate, whom they might hope to control, or fear to disoblige.

§ 1466. It is observable, that the language of the constitution is, that "each state shall appoint in such manner, as the legislature thereof may direct," the number of electors, to which the state is entitled. Under this authority the appointment of electors has been variously provided for by the state legislatures. In some states the legislature have directly chosen the electors by themselves; in others they have been chosen by the people by a general ticket throughout the whole state; and in others by the people in electoral

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1 2 Elliot's Debates, 362, 363.

districts, fixed by the legislature, a certain number of electors being apportioned to each district.1 No question has ever arisen, as to the constitutionality of either mode, except that of a direct choice by the legislature. But this, though often doubted by able and ingenious minds,2 has been firmly established in practice, ever since the adoption of the constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it.3 At present, in nearly all the states, the electors are chosen either by the people by a general ticket, or by the state. legislature. The choice in districts has been gradually abandoned; and is now persevered in, but by two states.4 The inequality of this mode of choice, unless it should become general throughout the Union, is so obvious, that it is rather matter of surprise, that it should not long since have been wholly abandoned. In case of any party divisions in a state, it may neutralize its whole vote, while all the other states give an unbroken electoral vote. On this account, and for the sake of uniformity, it has been thought desirable by many statesmen to have the constitution amended so, as to provide for an uniform mode of choice by the people.

§ 1467. The remaining part of the clause, which precludes any senator, representative, or person holding an office of trust or profit under the United States, from being an elector, has been already alluded to, and. requires little comment. The object is, to prevent persons holding public stations under the government of the United States, from any direct influence in the

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1 1 Tuck. Black. Comm. App. 326.

2 See 3 Elliot's Debates, 100, 101.

3 See 2 Wilson's Law Lect. 187.

4 See Rawle on Const. ch. 5, p. 55.

choice of a president. In respect to persons holding office, it is reasonable to suppose, that their partialities would all be in favour of the re-election of the actual incumbent, and they might have strong inducements to exert their official influence in the electoral college. In respect to senators and representatives, there is this additional reason for excluding them; that they would be already committed by their vote in the electoral college; and thus, if there should be no election by the people, they could not bring to the final vote either the impartiality, or the independence, which the theory of the constitution contemplates.

§ 1468. The next clause is, "The congress may "determine the time of choosing the electors, and the day, on which they shall give their votes, which day shall be the same throughout the United States."

§ 1469. The propriety of this power would seem to be almost self-evident. Every reason of public policy and convenience seems in favour of a fixed time of giving the electoral votes, and that it should be the same throughout the Union. Such a measure is calculated to repress political intrigues and speculations, by rendering a combination among the electoral colleges, as to their votes, if not utterly impracticable, at least very difficult; and thus secures the people against those ready expedients, which corruption never fails to employ to accomplish its designs.1 The

arts of ambition are thus in some degree checked, and the independence of the electors against external influence in some degree secured. This power, however, did not escape objection in the general, or the state conventions, though the objection was not extensively insisted on.2

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1 3 Elliot's Debates, 100, 101.

2 Journal of Convention, 325, 331, 333, 335; 3 Elliot's Deb. 100, 101.

§ 1470. In pursuance of the authority given by this clause, congress, in 1792, passed an act declaring, that the electors shall be appointed in each state within thirty-four days, preceding the first Wednesday in December in ever; fourth year, succeeding the last election of president, according to the apportionment of representatives and senators then existing, The electors chosen are required to meet and give their votes on the said first Wednesday of December, at such place in each state, as shall be directed by the legislature thereof. They are then to make and sign three certificates of all the votes by them given, and to seal up the same, certifying on each, that a list of the votes of such state for president and vice-president is contained therein, and shall appoint a person to take charge of, and deliver, one of the same certificates to the president of the senate at the seat of government, before the first Wednesday of January then next ensuing, another of the certificates is robe forwarded forthwith by the post-office to the president of the senate at the seat of government, and the third is to be delivered to the judge of the district, in which the electors assembled.1 Other auxiliary provisions are made by the same act for the due transmission and preservation of the electoral votes, and authenticating the appointment of the electors. The president's term of office is also declared to commence on the fourth day of March next succeeding the day, on which the votes of the electors shall be given.2

§ 1471. The next clause respects the qualifications of the president of the United States. "No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shaft be eligible to the office of president.

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1 Act of 1st March, 1792, ch. 8

2 Ibid.

Neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

§ 1472. Considering the nature of the duties, the extent of the information, and the solid wisdom and experience required in the executive department, no one can reasonably doubt the propriety of some qualification of age. That, which has been selected, is the middle age of life, by which period the character and talents of individuals are generally known, and fully developed; and opportunities have usually been afforded for public service, and for experience in the public councils. The faculties of the mind, if they have not then attained to their highest maturity, are in full vigour, and hastening towards their ripest state. The judgment, acting upon large materials, has, by that time, attained a solid cast; and the principles, which form the character, and the integrity, which gives lustre to the virtues of life, must then, if ever, have acquired public confidence and approbation.1

§ 1473. It is indispensable, too, that the president should be a natural born citizen of the United States; or a citizen at the adoption of the constitution, and for fourteen years before his election. This permission of a naturalized citizen to become president is an exception from the great fundamental policy of all governments, to exclude foreign influence from their executive councils and duties. It was doubtless introduced (for it has now become by lapse of time merely nominal, and will soon become wholly extinct) out of respect to those distinguished revolutionary patriots, who were born in a foreign land, and yet had entitled themselves

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1 See 1 Kent's Comm. Lect. 13, p. 273.

to high honours in their adopted country.1 A positive exclusion of them from the office would have been unjust to their merits, and painful to their sensibilities. But the general propriety of the exclusion of foreigners, in common cases, will scarcely be doubted by any sound statesman. It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe. Germany, Poland, and even the pontificate of Rome, are sad, but instructive examples of the enduring mischiefs arising from this source.2 A residence of fourteen years in the United States is also made an indispensable requisite for every candidate; so, that the people may have a full opportunity to know his character and merits, and

that he may have mingled in the duties, and felt the interests, and understood the principles, and nourished the attachments, belonging to every citizen in a republican government.3 By "residence," in the constitution, is to be understood, not an absolute inhabitancy within the United States during the whole period; but such an inhabitancy, as includes a permanent domicil in the United States. No one has supposed, that a temporary absence abroad on public business, and especially on an embassy to a foreign nation, would interrupt the residence of a citizen, so as to disqualify him for office.4 If the word were to be construed with such strictness, then a mere journey through any foreign

1 Journ. of Convention, 267, 325, 361.

2 1 Kent's Comm. Lect. 13, p. 255; 1 Tuck. Black. Comm. App. 323.

3 Ibid.

4 Rawle on Const. ch. 31, p. 287.

adjacent territory for health, or for pleasure, or a commorancy there for a single day, would amount to a disqualification. Under such a construction a military or civil officer, who should have been in Canada during the late war on public business, would have lost his eligibility. The true sense of residence in the constitution is fixed domicil, or being out of the United States, and settled abroad for the purpose of general inhabitancy, animo manendi, and not for a mere temporary and fugitive purpose, in transitu.

§ 1474. The next clause is, "In case of the removal of the president from office, or his death, resignation, or inability to discharge the duties of the said office, the same shall devolve on the vice-president. And the congress may by law provide for the case of removal, death, resignation, or inability of the president and vice-president, declaring what officer shall then act as president; and such officer shall act accordingly, until the disability be removed, or a president shall be elected."

§ 1475. The original scheme of the constitution did not embrace (as has been already stated) the appointment of any vice-president, and in case of the death, resignation, or disability of the president, the president of the senate was to perform the duties of his office.1 The appointment of. a vice-president was carried by a vote of ten states to one.2 Congress, in pursuance of the power here given, have provided, that in case of the removal, death, resignation, or inability of the president and vice-president, the president of the senate pro tempore, and in case there shall be no president, then the speaker of the house of representatives for the

1 Journal of Convention, p. 225, 226.

2 Id. 324, 333, 337.

time being shall act as president, until the disability be removed, or a president shall be elected.1

§ 1476. No provision seems to be made, or at least directly made, for the case of the non-election of any president and vice-president at the period prescribed by the constitution. The case of a vacancy by removal, death, or resignation, is expressly provided for; but not of a vacancy by the expiration of the official term of office. A learned commentator has thought, that such a case is not likely to happen, until the people of the United States shall be weary of the constitution and government, and shall adopt this method of putting a period to both, a mode of dissolution, which seems, from its peaceable character, to recommend itself to his mind, as fit for such a crisis.2 But no absolute dissolution of the government would constitutionally take place by such a non-election. The only effect would be, a suspension of the powers of the executive part of the government, and incidentally of the legislative powers, until a new election to the presidency should take place at the next constitutional period, an evil of very great magnitude, but not equal to a positive extinguishment of the constitution. But the event of a non-election may arise, without any intention on the part of the people to dissolve the government. Suppose there should

1 Act of 1st March, 1792, ch. 8, § 9. -- If the office should devolve on the speaker, after the congress, for which the last speaker was chosen, had expired, and before the next meeting of congress, it might be a question, who is to serve, and whether the speaker of the house of representatives, then extinct, could be deemed the person intended. 1 Kent's Comm. Lect. 13, p. 260, 261. In order to provide for the exigency of a vacancy in the office of president during the recess of congress, it ha. become usual for the vice-president, a few days before the termination of each session of congress, to retire from the chair of the senate, to enable that body to elect a president pro tempore to be ready to act in any ease of emergency. Rawle on Const. ch. 5, p. 57.

2 1 Tuck. Black. Comm. App. 320.

be three candidates for the presidency, and two for the vice-presidency, each of whom should receive, as nearly as possible, the same number of votes; which party, under such circumstances, is bound to yield up its own preference? May not each feel equally and conscientiously the duty to support to the end of the contest its own favorite candidate in the house of representatives? Take another case. Suppose two persons should receive a majority of all the votes for the presidency, and both die before the time of taking office, or even before the votes are ascertained by congress. There is nothing incredible in the supposition, that such an event may occur. It is not nearly as improbable, as the occurrence of the death of three persons, who had held the office of president, on the anniversary of our independence, and two of these in the same year. In each of these' cases there would be a vacancy in the office of president and vice-president by mere efflux of time; and it may admit of doubt, whether the language of the constitution reaches them. If the vice-president should succeed to the office of president, he will continue in it until the regular expiration of the period, for which the president was chosen; for there is no provision for the choice of a new president, except at the regular period, when there is a vice-president in office; and none for the choice of a vice-president, except when a president also is to be chosen.1

§ 1477. Congress, however, have undertaken to provide for every case of a vacancy both of the offices of president and vice-president; and have declared, that. in such an event there shall immediately be a new election made in the manner prescribed by the act.2

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1 See Rawle on Const. ch. 5, p. 56.

2 Act of 1st March, 1792, ch. 8, § 11.

How far such an exercise of power is constitutional has never yet been solemnly presented for decision. The point was hinted at in some of the debates, when the constitution was adopted; and it was then thought to be susceptible of some doubt.1 Every sincere friend of the constitution will naturally feel desirous of upholding the power, as far as he constitutionally may.2 But it would be more satisfactory, to provide for the case by some suitable amendment, which should clear away every doubt, and thus prevent a crisis dangerous to our future peace, if not to the existence of the government.

§ 1478. What shall be the proper proof of the resignation of the president, or vice-president, or of their refusal to accept the office, is left open by the constitution. But congress, with great wisdom and forecast, have provided, that it shall be by some instrument in writing, declaring the same, subscribed by the party, and delivered into the office of the secretary of state.3

§ 1479. The next clause is, "The president shall, at stated times, receive for his services a compensation, which shall neither be increased, nor diminished during the period, for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

§ 1480. It is obvious, that without due attention to the proper support of the president, the separation

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1 2 Elliot's Debates, 359, 360.

2 In the revised draft of the constitution, the clause stood: "And such officer shall act accordingly, until the disability be removed, or the period for choosing another president arrive;" and the latter words were then altered, so as to read, "until a president shall be elected." Journ. of Convention, 361, 382.

3 Act of 1st March, 1792, ch. 8, § 11.

of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over his salary and emolument, would soon render him obsequious to their will. A control over a man's living is in most cases a control over his actions. To act upon any other view of the subject would be to disregard the voice of experience, and the operation of the invariable principles, which regulate human conduct. There are, indeed, men, who could neither be distressed, nor won into a sacrifice of their duty. But this stern virtue is the growth of few soils; and it will be found, that the general lesson of human life is, that men obey their interests; that they may be driven by poverty into base compliances, or tempted by largesses to a desertion of duty.1 Nor have there been wanting examples in our own country of the intimidation, or seduction of the executive by the terrors, or allurements of the pecuniary arrangements of the legislative body.2 The wisdom of this clause can scarcely be too highly commended. The legislature, on the appointment of a president, is once for all to declare, what shall be the compensation for his services during the time, for which he shall have been elected. This done, they will have no power to alter it, either by increase or diminution, till a new period of service by a new election commences. They can neither weaken his fortitude by operating upon his necessities, nor corrupt his integrity by appealing to his

avarice. Neither the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument. He can, of course, have

1 The Federalist, No.73; 1 Kent's Comm. Lect. 13, p. 263.
2 The Federalist, No. 73; 1 Kent's Comm. Lect. 13, p. 263; 1 Tuck. Black. Comm. App. 323, 324.

no pecuniary inducement to renounce, or desert, the independence intended for him by the constitution.1 The salary of the first president was fixed by congress at the sum of twenty-five thousand dollars per annum, and of the vice-president, at five thousand dollars.2 And to prevent any difficulty, as to future presidents, congress, by a permanent act, a few years afterwards established the same compensation for all future presidents and vice-presidents.3 So that, unless some great changes should intervene, the independence of the executive is permanently secured by an adequate maintenance; and it can scarcely be diminished, unless some future executive shall basely betray his duty to his successor.

§ 1481. The next clause is, "Before he enters on the execution of his office, he shall take the following oath or affirmation: I do solemnly swear, (or affirm,) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

§ 1489. There is little need of commentary upon this clause. No man can well doubt the propriety of placing a president of the United States under the most solemn obligations to preserve, protect, and defend the constitution. It is a suitable pledge of his fidelity and responsibility to his country; and creates upon his conscience a deep sense of duty, by an appeal at once in the presence of God and man to the most sacred and solemn sanctions, which can operate upon the human mind.4

1 The Federalist, No. 73.
2 Act of 24th September, 1789, ch. 19.
3 Act of 18th February, 1793, ch. 9.
4 See Journal of Convention, 225, 296, 361, 383.

CHAPTER XXXVII.
EXECUTIVE --POWERS AND DUTIES.

§ 1483. Having thus considered the manner, in which the executive department is organized, the next inquiry is, as to the powers, with which it is entrusted. These, and the.corresponding duties, are enumerated in the second and third sections of the second article of the constitution.

§ 1484. The first clause of the second section is, "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.1 He may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices. And he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

§ 1485. The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it.2 Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish

1 See Journal of Convention, 225, 295, 362, 383.
2 1 Kent's Comm. Lect. 13, p. 264; 3 Elliot's Deb. 103.

the exercise of power by a single hand.1 Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. Timidity, indecision, obstinacy, and pride of opinion, must mingle in all such councils, and infuse a torpor and sluggishness, destructive of all military operations. Indeed, there would seem to be little reason to enforce the propriety of giving this power to the executive department, (whatever may be its actual organization,) since it is in exact coincidence with the provisions of our state constitutions; and therefore seems to be universally deemed safe, if not vital to the system.

§ 1486. Yet the clause did not wholly escape animadversion in the state conventions. The propriety of admitting the president to be commander-in-chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person without any restraint, as he might make a bad use of it. The consent of both houses of congress ought, therefore, to be required, before he should take the actual command.2 The answer then given was, that though the president might, there was no necessity, that he should, take the command in person; and there was no probability, that he would do so, except in extraordinary emergencies, and when he was possessed

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1 The Federalist, No 74; 3 Elliot's Debates, 103.

2 2 Elliot's Debates, 365. See also 3 Elliot's Debates, 108.

of superior military talents.1 But if his assuming the actual command depended upon the assent of congress, what was to be done, when an invasion, or insurrection took place during the recess of congress? Besides; the very power of restraint might be so employed, as to cripple the executive department, when filled by a man of extraordinary military genius. The power of the president, too, might well be deemed safe; since he could not, of himself, declare war, raise armies, or call forth the militia, or appropriate money for the purpose; for these powers all belonged to congress.2 in Great Britain, the king is not only commander-in-chief of the army, and navy, and militia, but he can declare war; and, in time of war, can raise. armies and navies, and call forth the militia of his own mere will.3 So, that (to use the words of Mr. Justice Blackstone) the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the undoubted right of his majesty; and both houses or either house of parliament cannot, nor ought to pretend to the same.4 The only power of check by parliament is, the refusal of supplies; and this is found to be abundantly sufficient to protect the nation against any war against the sense of the nation, or any serious abuse of the power in modern times.5

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1 2 Elliot's Debates, 366.

2 3 Elliot's Debates, 103.

3 3 Elliot's Debates, 103; 1 Black. Comm. 262, 408 to 421.

4 1 Black. Comm. 262, 263.

5 During the war with Great Britain in 1812, it was questioned, whether the president could delegate his right to command the militia, by authorizing another officer to command them, when they were called into the public service. (8 Mass, Reports, 548, 550.) If he cannot, this extraordinary result would follow, that if different detachment, of militia

§ 1487. The next provision is, as to the power of the president, to require the opinions in writing of the heads of the executive departments. It has been remarked, that this is a mere redundancy, and the right would result from the very nature of the office.1 Still, it is not without use, as it imposes a more strict responsibility, and recognises a public duty of high importance and value in critical times. It has, in the progress of the government, been repeatedly acted, upon; but by no president with more wisdom and propriety, than by President Washington.2

§ 1488. The next power is, "to grant reprieves and pardons." It has been said by the marquis Beccaria, that the power of pardon does not exist under a perfect administration of the laws; and that the admission of the power is a tacit acknowledgment of the infirmi-

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were called out, he could not, except in person, command any of them; and if they were to act together, no officer could be appointed to command them in his absence. In the Pennsylvania insurrection, in 1794, President Washington called out the militia of the adjacent states of New Jersey, Maryland, and Virginia, as well as of Pennsylvania, and all the troops, so called out, acted under the orders of the governor of Virginia, on whom the president conferred the chief command during his absence. Rawle on the Const. ch. 20, p. 193. It was a practical affirmation of the authority, and was not contested. See also 5 Marshall's Life of Washington, ch. 8, p. 580, 584, 588, 589.

1 The Federalist, No. 74. See Journal of Convention, 225, 326, 342.

2 Mr. Jefferson has informed us, that in Washington's administration, for measures of importance, or difficulty. a consultation was held with the heads of the departments, either assembled, or by taking their opinions separately in conversation, or in writing. In his own administration, he followed the practice of assembling the heads of departments, as a cabinet council. But he has added, that he thinks the course of

requiring the separate opinion in writing of each bead of a department is most strictly in the spirit of the constitution; for the other does, in fact, transform the executive into a directory. 4 Jefferson's Corresp. 143, 144.

ty of the course of justice.1 But if this be a defect at all, it arises from the infirmity of human nature generally; and in this view, is no more objectionable, than any other power of government; for every such power, in some sort, arises from human infirmity. But if it be meant, that it is an imperfection in human legislation to admit the power of pardon in any case, the proposition may well be denied, and some proof, at least, be required of its sober reality. The common argument is, that where punishments are mild, they ought to be certain; and that the clemency of the chief magistrate is a tacit disapprobation of the laws. But surely no man in his senses will contend, that any system of laws can provide for every possible shade of guilt, a proportionate degree of punishment. The most, that ever has been, and ever can be done, is to provide for the punishment of crimes by some general rules, and within some general limitations. The total exclusion of all power of pardon would necessarily introduce a very dangerous power in judges and juries, of following the spirit, rather than the letter of the laws; or, out of humanity, of suffering real offenders wholly to escape punishment; or else, it must be holden, (what no man will seriously avow,) that the situation and circumstances of the offender, though they alter not the essence of the offence, ought to make no distinction in the punishment.2 There are not only various gradations of guilt in the commission of the same crime, which are not susceptible of any previous enumeration and definition; but the proofs must, in many cases, be imperfect in their own nature, not only as to the actual commission of the

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1 Beccaria, ch. 46; l Kent. Comm. Leek 13, p. 265; 4 Black. Comm. 307; 2 Wilson's Law Lect. 193 to 198.
2 4 Black. Comm. 397.

Offence, but also, as to the aggravating or mitigating circumstances. In many cases, convictions must be founded upon presumptions and probabilities. Would it not be at once unjust and unreasonable to exclude all means of mitigating punishment, when subsequent inquiries should demonstrate, that the accusation was wholly unfounded, or the crime greatly diminished in point or atrocity and aggravation, from what the evidence at the trial seemed to establish? A power to pardon seems, indeed, indispensable under the most correct administration of the law by human tribunals; since, otherwise, men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and courts.1 Besides; the law maybe broken, and yet the offender be placed in such circumstances, that he will stand, in a great measure, and perhaps wholly, excused in moral and general justice, though not in the strictness of the law. What then is to be done? Is he to be acquitted against the law; or convicted, and to suffer punishment infinitely beyond his deserts? If an arbitrary power is to be given to meet such cases, where can it be so properly lodged, as in the executive department?2

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1 1 Kent's Comm. Lect. 13, p. 265.
2 Mr. Chancellor Kent has placed the general reasoning in a just light. "Were it possible," says he "in every instance, to maintain a just proportion between the crime and the penalty, and were the rules of testimony and the mode of trial so perfect, as to preclude mistake, or injustice, there would be some colour for the admission of this (Beccaria's) plausible theory. But even in that case policy would sometimes require a remission of a punishment, strictly due for a crime certainly ascertained. The very notion of mercy implies the accuracy of the claims of justice."* What should we say of a government, which purported to act upon mere human justice, excluding all opera-

*** Kent's Comm. Lect. 13, p. 265.**

§ 1489. Mr. Justice Blackstone says, that "in democracies, this power of pardon can never subsist; for, there, nothing higher is acknowledged, than the magistrate, who administers the laws; and it would be impolitic for the power of judging, and of pardoning to center in one and the same person. This (as the president Montesquieu, observes)1 would oblige him very often to contradict himself, to make and unmake his decisions. It would tend to confound all ideas of right among the mass of the people, as they would find it difficult to tell, whether a prisoner was discharged by his innocence, or obtained a pardon through favour."2 And hence, he deduces the superiority of a monarchical government; because in monarchies, the king acts in a superior sphere; and may, therefore, safely be trusted with the power of pardon, and it becomes a source of personal loyalty and affection.3

§ 1490. But, surely, this reasoning is extremely forced and artificial. In the first place, there is more difficulty or absurdity in a democracy, than in a monarchy, in such cases, if the power of judging and pardoning be in the same

lands; as if tile monarch be at once the judge, and the person, who pardons. And Montesquieu's reasoning is in fact addressed to this very case of a monarch, who is at once the judge, and dispenser of pardons.4 In the next place, there is no inconsistency in a democracy any more, than in a monarchy, in entrusting one magistrate with a power to try

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tions of mercy in all cases? An inexorable government would scarcely be more praiseworthy, than a despotism. It would be intolerable and unchristian. 1 Montesq. Spirit of Laws, B. 6, ch. 5.
2 4 Black. Comm. 397, 398.
3 Ibid.
4 Montesq. B. 6, ch. 5.

the cause, and another with a power to pardon. The one power is not incidental to, but in contrast with the other. Nor, if both powers were lodged in the same magistrate, would there be any danger of their being necessarily confounded; for they may be required to be acted upon separately, and at different times, so as to be known as distinct prerogatives. But, in point of fact, no such reasoning has the slightest application to the American governments, or, indeed, to any others, where there is a separation of the general departments of government, legislative, judicial, and executive, and the powers of each are administered by distinct persons. What difficulty is there in the people delegating the judicial power to one body of magistrates, and the power of pardon to another, in a republic any more, than there is in the king's delegating the judicial power to magistrates, and reserving the pardoning power to himself, in a monarchy?1 In truth, the learned author, in his extreme desire to recommend a kingly form of government, seems on this, as on many other occasions, to have been misled into the most loose and inconclusive statements. There is not a single state in the Union, in which there is not by its constitution a power of pardon lodged in some one department of government, distinct from the judicial.2 And the power of remitting penalties is in some cases, even in England, entrusted to judicial officers.3

§ 1491. So far from the power of pardon being in-

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1 Mr. Rawle's Remarks upon this subject are peculiarly valuable, from their accuracy, philosophical spirit, and clearness of statement. Rawle on Const. ch. 17, p. 174 to 177.
2 1 Tucker's Black. Comm. App. 331; 2 Wilson's Law Lect. 193 to 200.
3 Bacon's Abridg. Court of Exchequer, B.

compatible with the fundamental principles or a republic, it may be boldly asserted to be peculiarly appropriate, and safe in all free states; because the power can there be guarded by a just responsibility for its exercise.1 Little room will be left for favouritism, personal caprice, or personal resentment. If the power should ever be abused, it would be far less likely to occur in opposition, than in obedience to the will of the people. The danger is not, that in republics the victims of the law will too often escape punishment by a pardon; but that the power will not be sufficiently exerted in cases, where public feeling accompanies the prosecution, and assigns the ultimate doom to persons, who have been convicted upon slender testimony, or popular suspicions.

§ 1492. The power to pardon, then, being a fit one to be entrusted to all governments, humanity and sound policy dictate, that this benign prerogative should be, as little as possible, lettered, or embarrassed. The criminal code of every country partakes so much of necessary severity, that, without an easy access to exceptions in favour of unfortunate guilt, justice would assume an aspect too sanguinary and cruel. The only question is, in what department of the government it can be most safely lodged; and that must principally refer to the executive, or legislative department. The reasoning in favour of vesting it in the executive department may be thus stated. A sense of responsibility is always strongest in proportion, as it is undivided. A single person would, therefore, be most ready to attend to the force of those motives, which

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1 Kent's Comm. Lect. 13, p. 266.

might plead for a mitigation of the rigour of the law; and the least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The consciousness, that the life, or happiness of an offender was exclusively within his discretion, would inspire scrupulousness and caution; and the dread of being accused of weakness, or connivance, would beget circumspection of a different sort. On the other hand, as men generally derive confidence from numbers, a large assembly might naturally encourage each other in acts of obduracy, as no one would feel much apprehension of public censure.1 A public body, too, ordinarily engaged in other duties,

would be little apt to sift cases of this sort thoroughly to the bottom, and would be disposed to yield to the solicitations, or be guided by the prejudices of a few; and thus shelter their own acts of yielding too much, or too little, under the common apology of ignorance, or confidence. A single magistrate would be compelled to search, and act upon his own responsibility; and therefore would be at once a more enlightened dispenser of mercy, and a more firm administrator of public justice.

§ 1493. There are probably few persons now, who would not consider the power of pardon in ordinary cases, as best deposited with the president. But the expediency of vesting it in.him in any cases, and especially in cases of treason, was doubted at the time of adopting the constitution; and it was then urged, that it ought at least in cases of treason to be vested in one, or both branches of the legislature.2 That there are strong reasons, which may be assigned in favour of vesting the power in congress in cases of treason, need

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1 The Federalist, No. 74. See 2 Wilson's Law Lect. 198 to 200.

2 2 Elliot's Debates, 366; The Federalist, No. 74.

not be denied. As treason is a crime levelled at the immediate existence of society, when the laws have once ascertained the guilt of the offender, there would seem to be a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature.1 But there are strong reasons also against it. Even in such cases a single magistrate, of prudence and sound sense, would be better fitted, than a numerous assembly, in such delicate conjunctures, to weigh the motives for and against the remission of the punishment, and to ascertain all the facts without undue influence. The responsibility would be more felt, and more direct. Treason, too, is a crime, that will often be connected with seditions, embracing a large portion of a particular community; and might under such circumstances, and especially where parties were nearly poised, find friends and favourites, as well as enemies and opponents, in the councils of the nation.2 So, that the chance of an impartial judgment might be less probable in such bodies, than in a single person at the head of the nation.

§ 1494. A still more satisfactory reason is, that the legislature is not always in session; and that their proceedings, must be necessarily slow, and are generally not completed, until after long delays. The inexpediency of deferring the execution of any criminal sentence, until a long and indefinite time after a conviction, is felt in all communities. It destroys one of the best effects of punishment, that, which arises from a prompt and certain administration of justice following close upon the offence. If the legislature is invested with

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1 The Federalist, No. 74.

2 The Federalist, No. 74; Rawle on Const. ch. 17, p. 178.

the authority to pardon, it is obviously indispensable, that no sentence can be properly executed, at least in capital cases, until they have had time to act. And a mere postponement of the subject from session to session would be naturally sought by all those, who favoured the convict, and yet doubted the success of his application. In many cases delay would be equivalent to a pardon, as to its influence upon public opinion, either in weakening the detestation of the crime, or encouraging the commission of it. But the principal argument for reposing the power of pardon in the executive magistrate in cases of treason is, that in seasons of insurrection, or rebellion, there are critical moments, when a well-timed offer of pardon to the insurgents, or rebels, may restore the tranquillity of the Commonwealth; and if these are suffered to pass unimproved, it may be impossible afterwards to interpose with the same success. The dilatory process of convening the. legislature, or one of the branches, for the purpose of sanctioning such a measure, would frequently be the loss of the golden opportunity. The loss of a week, of a day, or even of an hour may sometimes prove fatal. If a discretionary power were confided to the president to act in such emergencies, it would greatly diminish the importance of the restriction. And it would generally be impolitic to hold out, either by the constitution or by law, a prospect of impunity by confiding the exercise of the power to the executive in special eases; since it might be construed into an argument of timidity or weakness, and thus have a tendency to embolden guilt.1 In point of fact, the power has always been found safe in the hands of the state executives in trea-

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1 The Federalist, No. 74; 3 Elliot's Debates, 105, 106, 107.

son, as well as in other cases; and there can be no practical reason, why it should not be equally safe with the executive of the Union.1

§ 1495. There is an exception to the power of pardon, that it shall not extend to cases of impeachment, which takes from the president every temptation to abuse it in cases of political and official offences by persons in the public service. The power of impeachment will generally be applied to persons holding high offices under the government; and it is of great consequence, that the president should not have the power of preventing a thorough investigation of their conduct, or of securing them against the disgrace of a public conviction by impeachment, if they should deserve it. The constitution has, therefore, wisely interposed this check upon his power, so that he cannot, by any corrupt coalition with favourites, or dependents in high offices, screen them from punishment.2

§ 1496. In England (from which this exception was probably borrowed) no pardon can be pleaded in bar of an impeachment. But the king may, after conviction upon an impeachment, pardon the offender. His prerogative, therefore, cannot prevent the disgrace of a conviction; but it may avert its effects, and restore the offender to his credit.3 The president possesses .no such power in any case of impeachment; and, as the

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judgment upon a conviction extends no farther, than to a removal from office, and disqualification to hold office, there is not the same reason for its exercise after con- 1 The Federalist, No. 64; 3 Elliot's Debates, 105, 106; 1 Tucker's Black. Comm. App. 331.

2 1 Kent's Comm. Lect. 13, p. 266.

3 1 Tucker's Black. Comm. App. 331, 332; 4 Black. Comm. 399, 400. See also Rawle on Const. ch. 17, p. 176; ch. 31, p. 293, 294.

viction, as there is in England; since (as we have seen) the judgment there, so that it does not exceed what is allowed by law, lies wholly in the breast of the house of lords, as to its nature and extent, and may, in many cases, not only reach the life, but the whole fortune of the offender.

§ 1497. It would seem to result from the principle, on which the power of each branch of the legislature to punish for contempts is founded, that the executive authority cannot interpose between them and the offender. The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all their duties. If they can be overawed by force, or corrupted by largesses, or interrupted in their proceedings by violence, without the means of self-protection, it is obvious, that they willsoon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good will and pleasure for the exercise of their own powers. Thus, in effect, the rights of the people entrusted to them would be placed in perpetual jeopardy. The constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and to make it effectual the former is excluded by implication.1

§ 1498. Subject to these exceptions, (and perhaps there may be others of a like nature standing on special grounds,) the power of pardon is general and unqualified, reaching from the highest to the lowest offences. The power of remission of fines, penalties, and forfeitures is

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1 Rawle on Constitution, ch. 17, p. 177.

also included in it; and may in the last resort be exercised by the executive, although it is in many cases by our laws confided to the treasury department.1 No law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases.2

§ 1499. The next clause is: "He (the president) shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur. And he shall nominate, and, by and with the advice and consent of.the senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments."

§ 1500. The first power, "to make treaties," was not in the original draft of the constitution; but was afterwards reported by a committee; and after some ineffectual attempts to amend, it was adopted, in substance, as it now stands, except, that in the report the advice and consent of two thirds of the senators was not required to a treaty of peace. This exception was struck out by a vote of eight states against three. The principal struggle was, to require two thirds of the

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1 Act of 3d of March, 1797, ch. 67; Act of 11th of Feb. 1800, ch. 6.

2 Instances of the exercise of this power by the president, in remitting fines and penalties in cases, not

within the scope of the laws giving authority to the treasury department, have repeatedly occurred; and their obligatory force has never been questioned.

whole number of members of the senate, instead of two thirds of those present.1

§ 1501. Under the confederation congress possessed the sole and exclusive power of "entering into treaties and alliances, provided, that no treaty of commerce shall be made, whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people were subjected to; or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." But no treaty or alliance could be entered into, unless by the assent of nine of the states.2 These limitations upon the power were found very inconvenient in practice; and indeed, in conjunction with other defects, contributed to the prostration, and utter imbecility of the confederation.3

§ 1502. The power "to make treaties" is by the constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succours; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes, which the policy or interests of independent sovereigns may dictate in their intercourse with each other.4 But though the power is thus general and unrestricted, it is not to be so construed, as to destroy the fundamental laws of the state. A power given by the constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be con-

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1 Journal of Convention, p. 225, 316, 339, 341, 342, 343, 362; The Federalist, No. 75.

2 Confederation, Art. 9.

3 The Federalist, No. 42.

4 See 5 Marshall's Life of Washington, ch. 8, p. 659 to 659.

strued, therefore, in subordination to it; and cannot supersede, or interfere with any other of its fundamental provisions.1 Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would destroy, what it was designed merely to fulfil, the will of the people. Whether there are any other restrictions; necessarily growing out of the structure of the government, will remain to be considered, whenever the exigency shall arise.2

§ 1503. The power of making treaties is indispensable to the due exercise of national sovereignty, and very important, especially as it relates to war, peace, and commerce. That it should belong to the national government would seem to be irresistibly established by every argument deduced from experience, from public policy, and a close survey of the objects of government. It is difficult to circumscribe the power within any definite limits, applicable to all times and exigencies, without impairing its efficacy, or defeating its purposes. The constitution has, therefore, made it general and unqualified. This very circumstance, however, renders it highly important, that it should be delegated in such

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1 See Woodeson's Elem. of Jurisp. p. 51.

2 See l Tuck. Black. Comm. App. 332, 333; Rawle on Const. ch. 7, p. 63 to 76; 2 Elliot's Deb. 368, 369 to 379; Journal of Convention, p. 342; 4 Jefferson's Corresp. 2, 3. -- Mr. Jefferson seems at one time to have thought, that the constitution only meant to authorize time president and senate to carry into effect, by way of treaty, any power they might constitutionally exercise. At the same time, he admits, that he was sensible of the weak points of this position. 4 Jefferson's Corresp. 498. What are such powers given to the president and senate? Could they make appointments by treaty?

a mode, and with such precautions, as will afford the highest security, that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.1 With such views, the question was naturally presented in the convention, to what body shall it be delegated? It might be delegated to congress generally, as it was under the confederation, exclusive of the president, or in conjunction with him. It might be delegated to either branch of the legislature, exclusive of, or in conjunction with him. Or it might be exclusively delegated to the president.

§ 1504. In the formation of treaties, secrecy and immediate despatch are generally requisite, and sometimes absolutely indispensable. Intelligence may often be obtained, and measures matured in secrecy, which could never be done, unless in the faith and confidence of profound secrecy. No man at all acquainted with diplomacy, but must

have felt, that the success of negotiations as often depends upon their being unknown by the public, as upon their justice or their policy. Men will assume responsibility in private, and communicate information, and express opinions, which they would feel the greatest repugnance publicly to avow; and measures may be defeated by the intrigues and management of foreign powers, if they suspect them to be in progress, and understand their precise nature and extent. In this view the executive department is a far better depositary of the power, than congress would be. The delays incident to a large assembly; the differences of opinion; the time consumed in debate; and the utter impossibility of secrecy, all combine to render them unfitted for the purposes of diplomacy. And our

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1 The Federalist, No. 64.

own experience during the confederation abundantly demonstrated all the evils, which the theory would lead us to expect.1 Besides; there are tides in national affairs, as well as in the affairs of private life. To discern and profit by them is the part of true political wisdom; and the loss of a week, or even of a day, may sometimes change the whole aspect of affairs, and render negotiations wholly nugatory, or indecisive. The loss of a battle, the death of a prince, the removal of a minister, the pressure or removal of fiscal embarrassments at the moment, and other circumstances, may change the whole posture of affairs, and ensure success, or defeat the best concerted project.2 The executive, having a constant eye upon foreign affairs, can promptly meet, and even anticipate such emergencies, and avail himself of all the advantages accruing from them; while a large assembly would be coldly deliberating on the chances of success, and the policy of opening negotiations. It is manifest, then, that congress would not be a suitable depositary of the power.

§ 1505. The same difficulties would occur from confiding it exclusively to either branch of congress. Each is too numerous for prompt and immediate action, and secrecy. The matters in negotiations, which usually require these qualities in the highest degree, are the preparatory and auxiliary measures; and which are to be seized upon, as it were, in an instant. The president could easily arrange them. But the house, or the senate, if in session, could not act, until after great delays; and in the recess could not act all. To have entrusted the power to either would have been to relinquish the benefits of the constitutional agency of the

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1 The Federalist, No. 64.

2 Id. No. 64.

president in the conduct of foreign negotiations. It is true, that the branch so entrusted might have the option to employ the president in that capacity; but they would also have the option of refraining from it; and it cannot be disguised, that pique, or cabal, or.personal or political hostility, might induce them to keep their pursuits at a distance from his inspection and participation. Nor could it be expected, that the president, as a mere ministerial agent of such branch, would enjoy. the confidence and respect of foreign powers to the same extent, as he would, as the constitutional representative of the nation itself; and his interposition would of course have less efficacy and weight.1

§ 1506. On the other hand, considering the delicacy and extent of the power, it is too much to expect, that a free people would confide to a single magistrate, however respectable, the sole authority to act conclusively, as well as exclusively, upon the subject of treaties. In England, the power to make treaties is exclusively vested in the crown.2 But however proper it may be in a monarchy, there is no American statesman, but must feel, that such a prerogative in an American president would be inexpedient and dangerous.3 It would be inconsistent with that wholesome jealousy, which all republics ought to cherish of all depositaries of power; and which, experience teaches us, is the best security against the abuse of it.4 The check, which acts upon the mind from the consideration, that what is done is but preliminary, and requires the assent of other independent minds to give it a legal conclusiveness, is a restraint, which awakens caution, and compels to deliberation.

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1 The Federalist, No. 75.

2 1 Black. Comm. 957; The Federalist, No. 69.

3 The Federalist, No. 75.

4 Id. No. 75.

§ 1507. The plan of the constitution is happily adapted to attain all just objects in relation to foreign negotiations. While it confides the power to the executive department, it guards it from serious abuse by placing it under the ultimate superintendence of a select body of high character and high responsibility. It is indeed clear to a

demonstration, that this joint possession of the power affords a greater security for its just exercise, than the separate possession of it by either.1 The president is the immediate author and finisher of all treaties; and all the advantages, which can be derived from talents, information; integrity, and deliberate investigation on the one hand, and from secrecy and despatch on the other, are thus combined in the system.2 But no treaty, so formed, becomes binding upon the country, unless it receives the deliberate assent of two thirds of the senate. In that body all the states are equally represented; and, from the nature of the appointment and duration of the office, it may fairly be presumed at all times to contain a very large portion of talents, experience, political wisdom, and sincere patriotism, a spirit of liberality, and a deep devotion to all the substantial interests of the country. The constitutional check of requiring two thirds to confirm a treaty is, of itself, a sufficient guaranty against any wanton sacrifice of private rights, or any betrayal of public privileges. To suppose otherwise would be to suppose, that a representative republican government was a mere phantom; that the state legislatures were incapable, or unwilling to choose senators possessing due qualifications; and that the people would voluntarily confide power to those, who were ready to promote

1 The Federalist, No. 75.

2 Id. No. 64.

their ruin, and endanger, or destroy their liberties. Without supposing a case of utter indifference, or utter corruption in the people, it would be impossible, that the senate should be so constituted at any time, as that the honour and interests of the country would not be safe in their hands. When such an indifference, or corruption shall have arrived, it will be in vain to prescribe any remedy; for the constitution will have crumbled into ruins, or have become a mere shadow, about which it would be absurd to disquiet ourselves.1

§ 1508. Although the propriety of this delegation of the power seems, upon sound reasoning, to be incontestible; yet few parts of the constitution were assailed with more vehemence.2 One ground of objection was, the trite topic of an intermixture of the executive and legislative powers; some contending, that the president ought alone to possess the prerogative of making treaties; and others, that it ought to be exclusively deposited in the senate. Another objection was, the smallness of the number of the persons, to whom the power was confided; some being of opinion, that the house of representatives ought to be associated in its exercise; and others, that two thirds of all the members of the senate, and not two thirds of all the members present, should be required to ratify a treaty.3

§ 1509. In relation to the objection. that the power ought to have been confided exclusively to the president, it may be suggested in addition to the preceding remarks, that, however safe it may be in governments, where the executive magistrate is an hereditary monarch, to commit to him the entire power of making

1 The Federalist, No. 64.

2 See 2 Elliot's Debates, 367 to 379.

3 The Federalist, No. 75.

treaties, it would be utterly unsafe and improper to entrust that power to an executive magistrate chosen for four years. It has been remarked, and is unquestionably true, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of corruption by foreign powers, so as to surrender any important rights or interests. But a man, raised from a private station to the rank of chief magistrate for a short period, having but a slender or moderate fortune, and no very deep Stake in the society, might sometimes be under temptations to sacrifice duty to interest, which it would require great virtue to withstand. If ambitious, he might be tempted to seek his own aggrandizement by the aid of a foreign power, and use the field of negotiations for this purpose. If avaricious, he might make his treachery to his constituents a vendible article at an enormous price. Although such occurrences are not ordinarily to be expected; yet the history of human conduct does not warrant that exalted opinion of human nature, which would make it wise in a nation to commit its most delicate interests and momentous concerns to the unrestrained disposal of a single magistrate.1 It is far more wise to interpose checks upon the actual exercise.of the power, than remedies to redress, or punish an abuse of it.

§ 1510. The impropriety of delegating the power exclusively to the senate has been already sufficiently considered. And, in addition to what has been already urged against the participation of the house of representatives in it, it may be remarked, that the house of representatives is for other reasons far less fit, than 'the

1 The Federalist, No. 75.

senate, to be the exclusive depositary of the power, or to hold it in conjunction with the executive. In the first place, it is a popular assembly, chosen immediately from the people, and representing, in a good measure, their feelings and local interests; and it will on this account be more likely to be swayed by such feelings and interests, than the senate, chosen by the states through the voice of the state legislatures. In the next place, the house of representatives are chosen for two years only; and the internal composition of the body is constantly changing so, as to admit of less certainty in their opinions, and their measures, than would naturally belong to a body of longer duration. In the next place, the house of representatives is far more numerous, than the senate, and will be constantly increasing in numbers so, that it will be more slow in its movements, and more fluctuating in its councils. In the next place, the senate will naturally be composed of persons of more experience, weight of character, and talents, than the members of the house. Accurate knowledge of foreign politics, a steady and systematic adherence to the same views, nice and uniform sensibility to national character, as well as secrecy, decision, and despatch, are required for a due execution of the power to make treaties. And, if these are not utterly incompatible with the genius of a numerous and variable body, it must be admitted, that they will be more rarely found there, than in a more select body, having a longer duration in office, and representing, not the interests of private constituents alone, but the sovereignty of states.

§ 1511. Besides; the very habits of business, and the uniformity and regularity of system, acquired by a long possession of office, are of great concern in all

cases of this sort. The senators from the longer duration of their office will have great opportunities of extending their political information, and of rendering their experience more and more beneficial to their country. The members are slowly changed; so, that the body will at all times, from its very organization, comprehend a large majority of persons, who have been engaged for a considerable time in public duties, and foreign affairs. If, in addition to all these reasons, it is considered, that in the senate all the states are equally represented, and in the house very unequally, there can be no reasonable doubt, that the senate is in all respects a more competent, and more suitable depositary of the power, than the house, either with, or without the co-operation of the executive. And most of the reasoning applies with equal force to any participation by the house in the treaty-making functions. It would add an unwieldly machinery to all foreign operations; and retard, if not wholly prevent, the beneficial purposes of the power.1 Yet such a scheme has not been without warm advocates. And it has been thought an anomaly, that, while the power to make war was confided to both branches of congress, the power to make peace was within the reach of one, with the co-operation of the president.2

§ 1512. But there will be found no inconsistency, or inconvenience in this diversity of power. Considering the vast expenditures and calamities, with which war is attended, there is certainly the strongest ground for

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1 The Federalist, No. 64, 75. -- In the convention a proposition was made to add the house to the senate, in advising and consenting to treaties. But it was rejected by the vote of ten states against one. Journ. of Convention, 339, 340.

2 1 Tuck. Black. Comm. App. 338, 339.

confiding it to the collected wisdom of the national councils. It requires one party only to declare war; but it requires the co-operation and consent of both belligerents to make peace. No negotiations are necessary in the former case; in the latter, they are indispensable. Every reason, therefore, for entrusting the treaty-making power to the president and senate in common negotiations, applies a fortiori to a treaty of peace. Indeed, peace is so important to the welfare of a republic, and so suited to all its truest interests, as well as to its liberties, that it can scarcely be made too facile. While, on the other hand, war is at all times so great an evil, that it can scarcely be made too difficult. The power to make peace can never be unsafe for the nation in the hands of the president and two thirds of the senate. The power to prevent it, may not be without hazard in the hands of the house of representatives, who may be too much under the control of popular excitement, or legislative rivalry, to act at all times with the same degree of impartiality and caution. In the convention, a proposition to except treaties of peace from the treaty-making power was, at one time, inserted, but was afterwards deliberately abandoned.1

§ 1513. In regard to the objection, that the arrangement is a violation of the fundamental rule, that the legislative and executive departments ought to be kept separate; it might be sufficient to advert to the considerations stated in another place, which show, that the true sense of the rule does not require a total separation.2 But, in truth, the nature of the power of making treaties indicates a peculiar propriety in the Union of the executive and the senate in the exercise of it.

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1 Journ. of Convention, 226, 395, 326, 341, 342.

2 See Vol. II. § 524, et seq.

Though some Writers on government place this power in the class of executive authorities; yet, it is an arbitrary classification; and, if attention is given to its operation, it will be found to partake mere of the legislative, than of the executive character. The essence of legislation is to prescribe law, or regulations for society; while the execution of those laws and regulations, and the employment of the common strength, either for that purpose, or for the common defence, seem to comprize all the functions of the executive magistrate. The power of making treaties is plainly neither the one, nor the other. It relates, neither to the execution of subsisting laws, nor to the enactment of new ones; and still less does it relate to the exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law with us; but, as to the foreign sovereigns, have only the obligation of good faith. Treaties are not rules prescribed by thesovereign to his subjects; but agreements between sovereign and sovereign. The treaty-making power, therefore, seems to form a distinct department, and to belong, properly, neither to the legislature, nor the executive, though it may be said to partake of qualities common to each. The president, from his unity, promptitude, and facility of action, is peculiarly well adapted to carry on the initiative processes; while the senate, representing all the states, and engaged in legislating for the interests of the whole country, is equally well fitted to be entrusted with the power of ultimate ratification.1

§ 1514. The other objection, which would require a concurrence of two thirds of all the members of the

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1 The Federalist, No. 75.

senate, and not merely of two thirds of all present, is not better founded.1 All provisions, which require more, than a majority of any body to its resolutions, have (as has been already intimated) a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration ought never to be lost sight of; and very strong reasons ought to exist to justify any departure from the ordinary rule, that the majority ought to govern. The constitution has, on this point, gone as far in the endeavour to secure the advantage of numbers in the formation of treaties, as can be reconciled either with the activity of the public councils, or with a reasonable regard to the sense of the major part of the community. If two thirds of the whole number of members had been required, it would, in many cases, from a non-attendance of a part, amount in practice to a necessity almost of unanimity. 'The history of every political establishment, in which such a principle has prevailed, is a history of impotence, perplexity, and disorder. Proofs of this position may be easily adduced from the examples of the Roman tribuneship, the Polish diet, and the states general of the Netherlands, and even from our own experience under the confederation.2 Under the latter instrument the concurrence of nine states was necessary, not only to making treaties, but to many other acts of a less important character; and measures were often defeated by the non-attendance of members, sometimes by design, and sometimes by accident.3 It is hardly possible, that a treaty could be ratified by surprise, or tak-

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1 2 Elliot's Debates, 367 to 379.

2 The Federalist, No. 75; Id. No. 22.

3 Ibid. and 1 Elliot's Debates, 44, 45.

ing advantage of the accidental absence of a few members; and certainly the motive to punctuality in attendance will be greatly increased by making such ratification to depend upon the numbers present.1

§ 1515. The Federalist has taken notice of the difference between the treaty-making power in England, and that in America in the following terms: "The president is to have power, with the advice and consent of the senate, to make treaties, provided two thirds of the members present concur. The king of Great Britain is the sole and absolute representative of the nation, in all foreign transactions. He can, of his own accord, make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority, in this respect, is not conclusive; and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification of parliament. But, I believe, this doctrine was never heard of, till it was broached upon the present occasion. Every jurist of that kingdom, and every other man acquainted with its constitution, knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity. and perfection, independ-

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1 The Federalist, No. 75, 22; 2 Elliot's Debates, 368. -- In the convention a proposition to require the assent of two thirds of all the members of the senate was rejected by the vote of eight states against three. Another to require, that no treaty shall be made, unless two thirds of the whole number of senators were present, was also rejected by the vote of six states against five. Another, to require a majority of all the members of the senate to make a treaty, was also rejected by the vote of six states against five. Another, to require, that all the members should be summoned, and have time to attend, shared a like fate, by the vote of eight states against three. Journal of Convention, 343, 344.

ent of any other sanction. The parliament, it is true, is sometimes seen employing itself in altering the existing laws, to conform them to the stipulations in a new treaty; and this may have, possibly, given birth to the imagination, that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause; from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect, therefore, there is no comparison between the. intended power of the president, and the actual power of the British sovereign. The one can perform alone, what the other can only do with the concurrence of a branch of the legislature. It must be admitted, that, in this instance, the power of the federal executive would exceed that of any state executive. But this arises naturally from the exclusive possession, by the Union, of that part of the sovereign power, which relates to treaties. If the confederacy were to be dissolved, it would become a question, whether the executives of the several states were not solely invested with that delicate and important prerogative."1

§ 1516. Upon the whole it is difficult to perceive, how the treaty-making power could have been better deposited, with a view to its safety and efficiency. Yet it was declaimed against with uncommon energy, as dangerous to the commonwealth, and subversive of

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1 See also the opinion of Iredell J. in Ware v. Hylton, 3 Dall. 272 to 276.

public liberty.1 Time has demonstrated the fallacy of such prophecies; and has confirmed the belief of the friends of the constitution, that it would be, not only safe, but full of wisdom and sound policy. Perhaps no stronger illustration, than this, can be found, of the facility of suggesting ingenious objections to any system, calculated to create public alarm, and to wound public confidence, which, at the same time, are unfounded in human experience, or in just reasoning.

§ 1517. Some doubts appear to have been entertained in the early stages of the government, as to the correct exposition of the constitution in regard to the agency of the senate in the formation of treaties. The question was, whether the agency of the senate was admissible previous to the negotiation, so as to advise on the instructions to be given to the ministers; or was limited to the exercise of the power of advice and consent, after the treaty was formed; or whether the president possessed an option to adopt one mode, or the other, as his judgment might direct.2 The practical exposition assumed on the first occasion, which seems to have occurred in President Washington's administration, was, that the option belonged to the executive to adopt either mode, and the senate might advise before, as well as after, the formation of a treaty.3 Since that period, the senate have been rarely, if ever, consulted, until after a treaty has been completed, and laid before them for ratification.4 When so laid before the senate, that body is in the habit of deliberating upon it, as, indeed, it does on all executive business, in secret,

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1 2 Elliot's Debates, 367 to 379.

2 5 Marshall's Life of Washington, ch. 2, p. 223.

3 Executive Journal, 11th August, 1790, p. 60, 61.

4 Rawle on Const. ch. 7, p. 63.

and with closed doors. The senate may wholly reject the treaty, or advise and consent to a ratification of part of the articles, rejecting others, or recommend additional or explanatory articles. In the event of a partial ratification, the treaty does not become the law of the land, until the president and the foreign sovereign have each assented to the modifications proposed by the senate.1 But, although the president may ask the advice and consent of the senate to a treaty, he is not absolutely bound by it; for he may, after it is given,

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1 Rawle on Const. ch. 7, p. 63, 64. -- Before the ratification of treaties, it is common for the senate to require, and. for the president to lay before them, all the official documents respecting the negotiations,

to assist their judgment. But the house of representatives have no constitutional right to insist on the production of them; and it is matter of discretion with the president, whether to comply, or not, with the demand of the house, which is but in the nature of a request. In the case of the British Treaty of 1794, President Washington refused to lay the papers before the house of representatives, when requested by them so to do. See his Massager 24th of March, 1796; 1 Tuck. Black. Comm. App. 334; 5 Marshall's Life of Washington, ch. 8, p. 654; 4 Jefferson's Corresp. 464, 465; Rawle on Const. ch. 16, p. 171.

In the early part of President Washington's administration, he occasionally met the senate in person, to confer with them on the executive business confided to them by the constitution. But this practice was found very inconvenient, and was soon abandoned. In June, 1853, the senate appointed a committee to hold a conference with President Madison, respecting his nomination of a minister to Sweden, then before them for ratification. Bat he declined it, considering, that it was incompatible with the due relations between the executive, and other departments of the government* It is believed,that the practice has been ever since abandoned.

Mr. Jefferson and the cabinet, (with tile exception of Mr. Hamilton,) in President Washington's administration, seem to have been of opinion, that neither branch of the legislature had a right to call upon the heads of departments, except through calls on the president for information or papers. (4 Jefferson's 'Corresp. 463, 461, 465.) The practice has, however, of late years, settled down in favour of making direct calls on the heads of the departments. Rawle on Const. ch. 16, p. 171, 172.

*** Sergeant on Const. ch. 31, (2d edition,) p. 371; 5 Niles's Register, 213 290: Id. 276, 340; 2 Executive Journal, 354, 381, 382. See also 2 Executive Journal, 353, 354, 388, 383.**

still constitutionally refuse to ratify it. Such an occurrence will probably be rare, because the president will scarcely incline to lay a treaty before the senate, which he is not disposed to ratify.1

§ 1518. The next part of the clause respects appointments to office. The president is to nominate, and by and with the advice and consent of the senate, to appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and other officers, whose appointments are not otherwise provided for.

§ 1519. Under the confederation, an exclusive power was given to congress of "sending and receiving ambassadors."2 The term "ambassador," strictly construed, (as would seem to be required by the second article of that instrument,) comprehends the highest grade only of public ministers;3 and excludes those grades, which the United States would be most likely to prefer, whenever foreign embassies may be necessary. But under no latitude of construction could the term, "ambassadors," comprehend consuls. Yet it was found necessary by congress to employ the inferior grades of ministers, and to send and receive consuls. It is true, that the mutual appointment of consuls might have been provided for by treaty; and where no treaty existed, congress might perhaps have had the authority under the ninth article of the confederation, which conferred a general authority to appoint officers managing the general affairs of the United States. But the adrnis-

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1 Rawle on the Constitution, ch. 20, p. 194, 195; 4 Jefferson's Correspondence, 317, 318.

2 Article 9.

3 An enumeration of the various grades and powers or foreign ministers property belongs to a treatise on public law. The learned reader, however, will find ample information in the treatises of Grotius, Vattel, Martens, and Wiequefort.

sion of foreign consuls into the United States, when not stipulated for by treaty, was no where provided for.1 The whole subject was full of embarrassment and constitutional doubts; and the provision in the constitution, extending the appointment to other public ministers and consuls, as well as to ambassadors, is a decided improvement upon the confederation.

§ 1520. In the first draft of the constitution, the power was given to the president to appoint officers in all cases, not otherwise provided for by the constitution; and the advice and consent of the senate was not required.2 But in the same draft, the power to appoint ambassadors and judges of the Supreme Court was given. to the senate.3 The advice and consent of the senate, and the appointment by the president of ambassadors, and ministers, consuls, and judges of the Supreme Court, was afterwards reported by a committee, as an amendment, and was unanimously adopted.4

§ 1521. The mode of appointment to office, pointed out by the constitution, seems entitled to peculiar commendation. There are several ways, in which in ordinary cases the power may be vested. It may be confided to congress; or to one branch of the legislature; or to the executive alone; or to the executive in concurrence with any

selected branch. The exercise of it by the people at large will readily be admitted by all considerate statesmen, to be impracticable, and therefore need not be examined. The suggestions, already made upon the treaty-making power, and the inconveniences of vesting it in congress, apply with great force to that of vesting the power of appointment. to office in the

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1 The Federalist, No. 49.
2 Journ. of Convention, p. 225.
3 Id. 223.
4 Id. 325, 326, 340, 362.

same body. It would enable candidates for office to introduce all sorts of cabals, intrigues, and coalitions into congress; and not only distract their attention from their proper legislative duties; but probably in a very high degree influence all legislative measures. A new source of division and corruption would thus be infused into the public councils, stimulated by private interests, and pressed by personal solicitations. What would be to be done, in case the senate and house should disagree in an appointment? Are they to vote in convention, or as distinct bodies? There would be practical difficulties attending both courses; and experience has not justified the belief, that either would conduce either to good appointments, or to due responsibility.1

§ 1522. The same reasoning would apply to vesting the power exclusively in either branch of the legislature. It would make the patronage of the government subservient to private interests, and bring into suspicion the motives and conduct of members of the appointing body. There would be great danger, that the elections at the polls might be materially influenced by this power, to confer, or to withhold favours of this sort.2

§ 1523. Those, who are accustomed to profound reflection upon the human character and human experience, will readily adopt the opinion, that one man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to particular offices, than any body of men of equal, or even of superior discernment.3 His sole and undivided responsibility will naturally beget a livelier sense of duty, and a more ex-

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1 See The Federalist, No. 76, 77.
2 Ibid.
3 The Federalist, No. 76; 2 Wilson's Law Lect. 191, 199.

act regard to reputation. He will inquire with more earnestness, and decide with more impartiality. He will have fewer personal attachments to gratify, than a body of men; and will be less liable to be misled by his private friendships and affections; or, at all events, his conduct will be more open to scrutiny, and less liable to be misunderstood. If he ventures upon a system of favoritism, he will not escape censure, and can scarcely avoid public detection and disgrace. But in a public body appointments will be materially influenced by party attachments and dislikes; by private animosities, and antipathies, and partialities; and will be generally founded in compromises, having little to do with the merit of candidates, and much to do with the selfish interests of individuals and cabals. They will be too much governed by local, or sectional, or party arrangements.1 A president, chosen from the nation at large, may well be presumed to possess high intelligence, integrity, and sense of character. He will be compelled to consult public opinion in the most important appointments; and must be interested to vindicate the propriety of his appointments by selections from those, whose qualifications are unquestioned, and unquestionable. If he should act otherwise, and surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favour. Nothing, no, not even the whole influence of party, could long screen him from the just indignation of the people. Though slow, the ultimate award of popular opinion would stamp upon his conduct its merited infamy. No president, however weak, or credulous, (if such a per-

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1 The Federalist, No. 76.

son could ever under any conjuncture of circumstances obtain the office,) would fail to perceive, or to act upon admonitions of this sort. At all events, he would be less likely to disregard them, than a large body of men, who would share the responsibility, and encourage each other in the division of the patronage of the government.

§ 1594. But, though these general considerations might easily reconcile us to the choice of vesting the power of appointment exclusively in the president, in preference to the senate, or house of representatives alone; the patronage of the government, and the appointments to office are too important to the public weifare, not to induce great hesitation in vesting them exclusively in the president. The power may be abused; and, assuredly, it will be

abused, except in the hands of an executive of great firmness, independence, integrity, and public spirit. It should never be forgotten, that in a republican government offices are established, and are to be filled, not to gratify private interests and private attachments; not as a means of corrupt influence, or individual profit; not for cringing favourites, or court sycophants; but for purposes of the highest public good; to give dignity, strength, purity, and energy to the administration of the laws. It would not, therefore, be a wise course to omit any precaution, which, at the same time, that it should give to the president a power over the appointments of those, who are in conjunction with himself to execute the laws, should also interpose a salutary check upon its abuse, acting by way of preventive, as well as of remedy.

§ 1525. Happily, this difficult task has been achieved by the constitution. The president is to nominate, and thereby has the sole power to select for office; but his

nomination cannot confer office, unless approved by a majority of the senate. His responsibility and theirs is thus complete, and distinct. He can never be compelled to yield to their appointment of a man unfit for office; and, on the other hand, they may withhold their advice and consent from any candidate, who in their judgment does not possess due qualifications for office. Thus, no serious abuse of the power can take place without the co-operation of two co-ordinate branches, of the government, acting in distinct spheres; and, if there should be any improper concession on either side, it is obvious, that from the structure and changes, incident to each department, the evil cannot long endure, and will be remedied, as it should be, by the elective franchise. The consciousness of this check will make the president more circumspect, and deliberate in his nominations for office. He will feel, that, in case of a disagreement of opinion with the senate, his principal vindication must depend upon the unexceptionable character of his nomination. And in case of a rejection, the most, that can be said, is, that he had not his first choice. He will still have a wide range of selection; and his responsibility to present another candidate, entirely qualified for the office, will be complete and unquestionable.

§ 1526. Nor is it to be expected, that the senate will ordinarily fail of ratifying the appointment of a suitable person for the office. Independent of the desire, which such a body may naturally be presumed to feel, of having offices suitably filled, (when they cannot make the appointment themselves,) there will be a responsibility to public opinion for a rejection, which will overcome all common private wishes. Cases, indeed, may be imagined, in which the senate

from party motives, from a spirit of opposition, and even from motives of a more private nature, may reject a nomination absolutely unexceptionable. But such occurrences will be rare. The more common error, (if there shall be any) will be too great a facility to yield to the executive wishes, as a means of personal, or popular favour. A president will rarely want means, if he shall choose to use them, to induce some members of such a body to aid his nominations; since a correspondent influence may be fairly presumed to exist, to gratify such persons in other recommendations for office, and thus to make them indirectly the dispensers of local patronage. It will be, principally, with regard to high officers, such as ambassadors, judges, heads of departments, and other appointments of great public importance, that the senate will interpose to prevent an unsuitable choice. Their own dignity, and sense of character, their duty to their country, and their very title to office will be materially dependent upon a firm discharge of their duty on such occasions.1

§ 1527. Perhaps the duties of the president, in the discharge of this most delicate and important duty of his office, were never better summed up, than in the following language of a distinguished commentator.2 "A proper selection and appointment of subordinate officers is one of the strongest marks of a powerful mind. It is a duty of the president to acquire, as far

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1 The Federalist, No. 76, 77; 1 Kent's Comm. Lect. 13, p. 269; Rawle on Const. ch. 14, p. 162, &c.; 1 Tucker's Black. Comm. App. 340 to 343. -- The whole reasoning of the Federalist, on this subject, is equally striking for its sound practical sense and its candour. I have freely used it in the foregoing summary. The Federalist, No. 76.

2 Rawle on Const. ch. 14, p. 164.

as possible, an intimate knowledge of the capacities and characters of his fellow citizens; to disregard the importunities of friends; the hints or menaces of enemies; the bias of party, and the hope of popularity. The latter is sometimes the refuge of feeble-minded men; but its gleam is transient, if it is obtained by a dereliction of honest duty and sound discretion. Popular favour is best secured by carefully ascertaining, and strictly pursuing the true interests of the people. The president himself is elected on the supposition, that he is the most capable citizen to

understand, and promote those interests; and in every appointment he ought to consider himself as executing a public trust of the same nature. Neither should the fear of giving offence to the public, or pain to the individual, deter him from the immediate exercise of his power of removal, on proof of incapacity, or infidelity in the subordinate officer. The public, uninformed of the necessity, may be surprised, and at first dissatisfied; but public approbation ultimately accompanies the fearless and upright discharge of duty."

§ 1528. It was objected by some persons, at the time of the adoption of the constitution, that this union of the executive with the senate in appointments would give the president an undue influence over the senate. This argument is manifestly untenable, since it supposes, that an undue influence over the senate is to be acquired by the power of the latter to restrain him. Even, if the argument were well founded, the influence of the president over the senate would be still more increased, by giving him the exclusive power of appointment; for then he would be wholly beyond restraint. The opposite ground was assumed by other persons, who thought the influence of the

senate over the president would by this means become dangerous, if not irresistible.1 There is more plausibility in this suggestion; but it proceeds upon unsatisfactory reasoning. It is certain, that the senate cannot, by their refusal to confirm the nominations of the president, prevent him from the proper discharge of his duty. The most, that can be suggested, is, that they may induce him to yield to their favourites, instead of his own, by resisting his nominations. But if this should happen in a few rare instances, it is obvious, that his means of influence would ordinarily form a counter check. The power, which can originate the disposal of honours and emoluments, is more likely to attract, than to be attracted by the power, which can merely obstruct their course.2 But in truth, in every system of government there are possible dangers, and real difficulties; and to provide for the suppression of all influence of one department, in regard to another, would be as visionary, as to provide, that human passions and feelings should never influence public measures. The most, that can be done, is to provide checks, and public responsibility. The plan of the constitution

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1 A practical question of some importance arose soon after the constitution was adopted, in regard to the appointment of foreign ministers; whether tim power of the senate over the appointment gave that body a right to inquire into the policy of making any such appointment, or instituting any mission; or whether their power was confined to the consideration of the mere fitness of the person nominated for the office. If the former were the true interpretation of the senatorial authority, then they would have a right to inquire into the motives, which should induce the president to create such a diplomatic mission. It was after debate decided by a small majority of the senate, in 1792, that they had no right to enter upon the consideration of the policy, or fitness of the mission. 5 Marshall's Life of Washington, ch. 5, p. 370, note. But the senate have on several occasions since that time decided the other way; and particularly in regard to missions to Russia and Turkey.

2 The Federalist, No. 77.

seems as nearly perfect for this purpose, as any one can be; and indeed it has been less censured, than any other important delegation of power in that instrument.1

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1 Whether the senate should have a negative on presidential appointments, was a question, upon which the members of the convention were much divided. Mr. John Adams (afterwards president) was opposed to it; and a friendly correspondence took place between him and Mr. Roger Sherman, of Connecticut. (one of the framers of the constitution,) upon the subject. I extract from Mr. Pitkin's valuable History of the United States, the substance of the arguments urged on each side, as they present a general view of the reasoning, which had influence in the convention.

"To some general observations of Mr. Sherman in favour of this power in the senate, Mr. Adams made the following objections.

"'The negative of the senate upon appointments,' he said 'is liable to the following objections.

"'1. It takes away, or at least it lessens the responsibility of the executive -- our constitution obliges me to say, that it lessens the responsibility of the president. The blame of an hasty, injudicious, weak, or wicked appointment, is shared so much between him and the senate, that his part of it will be too small. Who can censure him, without censuring the senate, and the legislatures who appoint them? all their friends will be interested to vindicate the president, in order to screen them from censure; besides, if an impeachment is brought before them against an officer, are they not interested to acquit him, lest some part of the odium of his guilt should fall upon them, who advised to his appointment?

"'2. It turns the minds and attention of the people to the senate, a branch of the legislature, in executive matters; it interests another branch of the legislature in the management of the executive; it divides the people between the executive sad the senate: whereas all the people ought to be united to watch the executive, to oppose its encroachments, and resist its ambition. Senators and representatives, and their constituents--in short, the aristocratical and democratical divisions of society, ought to be united, on all occasions, to oppose the executive or the monarchical branch, when it attempts to overleap its limits. But how can this union be effected, when the aristocratical branch has pledged its reputation to the executive by consenting to an appointment?

"'3. It has a natural tendency, to excite ambition in the senate. An active. ardent spirit, in that house, who is rich, and able, has a great reputation and influence, will be solicited by candidates for office; not to introduce the idea of bribery, because, though it certainly would force itself in, in other countries, and will probably here, when we

§ 1529. The other part of the clause, while it leaves to the president the appointment to all offices, not otherwise provided for, enables congress to vest the

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grow populous and rich, yet it is not yet, I hope, to be dreaded. But ambition must come in, already. A senator of great influence will be naturally ambitious, and desirous of increasing his influence. Will he not be under a temptation to use his influence with the president, as well as his brother senators, to appoint persons to office in the several states, who will exert themselves in elections to get out his enemies or opposers, both in senate and house of representatives, and to get in his friends, perhaps his instruments? Suppose a senator, to aim at the treasury office, for himself, his brother, father, or son. Suppose him to aim at the president's chair, or vice-president's, at the next election -- or at the office of war, foreign or domestic affairs, will he not naturally be tempted to make use of his whole patronage, his whole influence, in advising to appointments, both with president and senators, to get such persons nominated, as will exert themselves in elections of president, vice-president, senators, and house of representatives, to increase his interests, and promote his views? In this point of view, I am very apprehensive, that this defect in our constitution will have an unhappy tendency to introduce corruption of the grossest kinds, both of ambition and avarice, into all our elections. And this will be the worst of poisons to our constitution; it will not only destroy the present form of government, but render it almost impossible to substitute in its place any free government, even a better limited monarchy, or any other, than a despotism, or a simple monarchy.

"'4. To avoid the evil under the last head, it will be in danger of dividing the continent into two or three nations, a case that presents no prospect but of perpetual war.

"' 5. This negative on appointments is in danger of involving the senate in reproach, obloquy, censure, and suspicion, without doing any good. Will the senate use their negative or not? -- if not, why should they have it? -- many will censure them for not using it -- many will ridicule them, call them servile, &c., if they do use it. The very first instance of it will expose the senators to the resentment, not only of the disappointed candidate and all his friends, but of the president and all his friends; and those will be most of the officers of government, through the nation.

"'6. We shall very soon have parties formed -- a court and country party -- and these parties will have names given them; one party in the house of representatives will support the president and his measures and ministers -- the other will oppose them -- a similar party will be in the senate -- these parties will struggle with all their art, perhaps with intrigue, perhaps with corruption at every election to increase their own

appointment of such inferior officers, as they may think proper, in the president, in the courts of law, or in the heads of departments. The propriety of this dis-

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friends, and diminish their opposers. Suppose such parties formed in the senate, and then consider what factions, divisions, we shall have there, upon every nomination.

"' 7. The senate have not time. You are of opinion, "that the concurrence of the senate in the appointment to office will strengthen the bands of the executive, and secure the confidence of the people, much better than a select council, and will be less expensive," but in every one of these ideas, I have the misfortune to differ from you. It will weaken the hands of the executive, by lessening the obligation,

gratitude, and attachment of the candidate to the president, by dividing his attachment between the executive and legislature, which are natural enemies.

"'Officers of government, instead of having a single eye, and undivided attachment to the executive branch, as they ought to have, consistent with law and the constitution, will be constantly tempted to be factious with their factious patrons in the senate. The president's own officers, in a thousand instances, will oppose his just and constitutional exertions, and screen themselves under the wings of their patrons and party in the legislature. Nor will it secure the confidence of the people; the people will have more confidence in the executive, in executive matters, than in the senate. The people will be constantly jealous of factious schemes in the senators to unduly influence the executive, and of corrupt bargains between the senate and executive, to serve each other's private views. The people will also be jealous, that the influence of the senate will be employed to conceal, connive, and defend guilt in executive officers, instead of being a guard and watch upon them, and a terror to them -- a council selected by the president himself, at his pleasure, from among the senators, representatives, and nation at large, would be purely responsible -- in that case, the senate, as a body, would not be compromised. The senate would be a terror to privy councillors -- its honor would never be pledged to support any measure or instrument of the executive, beyond justice, law, and the constitution. Nor would a privy, council be more expensive. The whole senate must now deliberate on every appointment, and, if they ever find time for it, you will find that a great deal of time will be required and consumed in thin service. Then the president might have a constant executive council; now he has none.

"'I said, under the seventh head, that the senate would not have time. You will find, that the whole business of this. government will be infinitely delayed, by this negative of the senate on treaties and appointments. Indian treaties and consular conventions have been

cretionary power in congress, to some extent, cannot well be questioned. If any discretion should be allowed, its limits could hardly admit of being exactly defined;

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already waiting for months, and the senate have not been able to find a moment of time to attend to them; and this evil must constantly increase, so that the senate must be constantly sitting, and must be paid as long as they sit.

"'But I have tired your patience. Is there any truth or importance in these broken hints and crude surmises, or hot? To me they appear well founded, and very important.'

"To these remarks Mr. Sherman replied, that he esteemed 'the provision made for appointments to office to be a matter of very great importance, on which the liberties and safety of the people depended, nearly as much as on legislation. If that was vested in the president alone, he might render himself despotic. It was a saying of one of the kings of England, "that while the king could appoint the bishops and judges, he might have what religion and laws he pleased." To give that observation its full effect, they most hold their offices during his pleasure; by such appointments, without control, a power might be gradually established, that would be more formidable than a standing army.

"'It appears to me, that the senate is the most important branch in the government, for the aid and support of the executive, for securing the rights of the individual states, the government of the United States, and the liberties of the people. The executive is not to execute its own will, but the will of the legislature declared by the laws, and the senate, being a branch of the legislature, will be disposed to accomplish that end, and advise to such appointments, as will be most likely to effect it; from their knowledge of the people in the several states, they can give the best information who are qualified for office. And they will, as you justly observe, in some degree lessen his responsibility; yet, will he not have as much remaining as he can well support? and may not their advice enable him to make such judicious appointments, as to render responsibility less necessary? no person can deserve censure, when he acts honestly according to his best discretion.

"'The senators, being chosen by the legislatures of the states, and depending on them for re-election, will naturally be watchful to prevent any infringement of the rights of the states. And the government of the United States being federal, and instituted by a number of sovereign states for the better security of their rights, and advancement of their interests, they may be considered as so many pillars to support it, and by the exercise of the state governments, peace and good order may be preserved in the places most remote from the seat of the federal government, as well as at the centre.

and it might fairly be left to congress to act according to the lights of experience. It is difficult to foresee, or to provide for all the combinations of circumstances,

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"'I believe this will be a better balance to secure the government, than three independent negatives would be.

"'I think you admit, in your Defence of the Governments of the United States, that even one branch might serve in .a diplomatic government, like that of the Union; but I think the constitution is much improved by the addition of another branch, and those of the executive and judiciary. This seems to be an improvement on federal government, beyond what has been made by any other states. I can see nothing in the constitution, that will tend to its dissolution, except the article for making amendments.

"'That the evils, that you suggest, may happen in consequence of the power vested in the senate, to aid the executive, appears to me to be but barely possible. The senators, from the provision made for their appointment, will commonly be some of the most respectable citizens in the states, for wisdom and probity, and superior to faction, intrigue, or low artifice to obtain appointments for themselves, or their friends, and any attempts of that kind would destroy their reputation with a free and enlightened people, and so frustrate the end they would have in view. Their being candidates for re-election will probably be one of the most powerful motives (next to that of their virtue) to fidelity in office, and by that means alone would they hope for success. "He that walketh uprightly, walketh surely," is the saying of a divinely inspired writer--they will naturally have the confidence of the people, as they will be chosen by their immediate representatives, as well as from their characters, as men of wisdom and integrity. And I see not why all the branches of government should not harmonize in promoting the great end of their institution. the good and happiness of the people.

"'The senators and representatives being eligible from the citizens at large, and wealth not being a requisite qualification for either, they will be persons nearly equal, as to wealth and other qualifications, so that there seems not to be any principle tending to aristocracy; which, if I understand the term, is a government by nobles, independent of the people, which cannot take place with us, in either respect, without a total subversion of the constitution. I believe the more this provision of the constitution is attended to, and experienced, the more the wisdom and utility of it will appear. As senators cannot hold any other office themselves. they will not be influenced, in their advice to the president, by interested motives. But it is said, they may have friends and kindred to provide for; it is true they may, but when we consider their character and situation, will they not be diffident of nominating a friend, or relative, who may wish for an office, and be well qualified for it, lest it

which might vary the right to appoint in such cases. In one age the appointment might be most proper in the president; and in another age, in a department.

§ 1530. In the practical course of the government, there does not seem to have been any exact line drawn, who are, and who are not, to be deemed inferior officers in the sense of the constitution, whose appointment does not necessarily require the concurrence of the senate.1 In many cases of appointments, congress have required the concurrence of the senate, where, perhaps, it might not be easy to say, that it was required by the constitution. The power of congress has been exerted

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should be suspected to proceed from partiality? And will not their fellow members have a degree of the same reluctance, lest it should be thought they acted from friendship to a member of their body? so that their friends and connexions would stand a worse chance, in proportion to their real merit, than strangers. But if the president was left to select a council for himself, though he may be supposed to be actuated by the best motives -- yet he would be surrounded by flatterers, who would assume the character of friends and patriots, though they had no attachment to the public good, no regard to the laws of their country, but influenced wholly by self-interest, would wish to extend the power of the executive, in order to increase their own; they would often advise him to dispense with laws, that should thwart their schemes, and in excuse plead, that it was done from necessity to promote the public good -- they will use their own influence; induce the president to use his, to get laws repealed, or the constitution altered, to extend his powers and prerogatives, under pretext of advancing the public good, and gradually render the government a despotism. This seems to be according to the course of human affairs, and what may be expected from the nature of things. I think, that members of the legislature would be most likely duly to execute the laws, both in the executive and judiciary departments."*

1 Rawle on Const. ch. 14, p. 163, 164; 1 Lloyd's Debates. 480 to 600; 2 Lloyd's Debates, 1 to 12; Sergeant on Const. ch. 29, (ch. 31.) -- Whether the beads of departments are inferior officers in the sense of the constitution, was much discussed, in the debate on the organization of the department of foreign affairs, in 1789: The result of the debate seems to have been, that they were not 1 Lloyd's Debates, 480 to 600; 2 Lloyd's Debates, 1 to 12; Sergeant on Const. ch. 29, (ch. 31.)

*** 2 Pitkin's Hist. p. 285 to 291.**

to a great extent, under this clause, in favour of the executive department. The president is by law invested, either solely, or with the senate, with the appointment of all military and naval officers, and of the most important civil officers, and especially of those connected with the administration of justice, the collection of the revenue, and the supplies and expenditures of the nation. The courts of the Union possess the narrow prerogative of appointing their own clerk, and reporter, without any farther patronage. The heads of department are, in like manner, generally entitled to the appointment of the clerks in their respective offices. But the great anomaly in the system is the enormous patronage of the postmaster general, who is invested with the sole, and exclusive authority to appoint, and remove all deputy post-masters; and whose power and influence have thus, by slow degrees, accumulated, until it is, perhaps, not too much to say, that it rivals, if it does not exceed, in value and extent, that of the president himself. How long a power so vast, and so accumulating, shall remain without any check on the part of any other branch of the government, is a question for statesmen, and not for jurists. But it cannot be disguised, that it will be idle to impose constitutional restraints upon high executive appointments, if this power, which pervades every village of the republic, and exerts an irresistible, though silent, influence in the direct shape of office, or in the no less inviting form of lucrative contracts, is suffered to remain with. out scrutiny or rebuke. It furnishes no argument against the interposition of a check, which shall require the advice and consent of the senate to appointments, that the power has not hitherto been abused. In its own nature, the post-office establishment is susceptible of

abuse to such an alarming degree; the whole correspondence of the country is so completely submitted to the fidelity and integrity of the agents, who conduct it; and the means of making it subservient to mere state policy are so abundant, that the only surprise is, that it has not already awakened the public jealousy, and been placed under more effectual control. It may be said, Without the slightest disparagement of any officer, who has presided over it, that if ever the people are to be corrupted, or their liberties are to be prostrated, this establishment will furnish the most facile means,. and be the earliest employed to accomplish such a purpose.1

§ 1531. It is observable, that the constitution makes no mention of any power of removal by the executive of any officers whatsoever. As, however, the tenure of office of no officers, except those in the judicial department, is, by the constitution, provided to be during good behaviour, it follows by irresistible inference, that all others must hold their offices during pleasure, unless congress shall have given some other duration to their office.2 As far as congress constitutionally possess the power to regulate, and delegate the appointment of "inferior officers," so far they may prescribe the term of office, the manner in which, and the persons by whom, the removal, as well as the appointment to office, shall be made.3 But two questions naturally occur upon this subject. The first is, to whom, in the absence

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1 It is truly surprising, that, while the learned commentator on Blackstone hag been so feelingly alive to all other exertions of national power and patronage, this source of patronage should not have drawn from him a single remark, except of commendation. 1 Tuck. Black. Comm. App. 264, 341, 342.

2 1 Lloyd's Debates, 511, 512.

3 See Marbury v. Madison, 1 Cranch, 137, 155.

of all such legislation, does the power of removal belong; to the appointing power, or to the executive; to the president and senate, who have concurred in the appointment, or to the president alone? The next is, if the power of removal belongs to the executive, in regard to any appointments confided by the constitution to him; whether congress can give any duration of office in such cases, not subject to the exercise of this power of removal?1 Hitherto the latter has remained a merely speculative question, as all our legis-

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1 Another question occurred upon carrying into effect the act of congress of 1821, for reducing the military establishment. President Monroe, on that occasion, contended, that he had a right, in filling the original vacancies in the artillery, and in the newly created office of adjutant general, to place in them any officer belonging to the whole military establishment, whether of the staff, or of the line. "In filling

original vacancies," said he, "that is, offices newly created, it is my opinion, that congress have no right, under the constitution, to impose any restraint, by law, on the power granted to the president, so as to prevent his making a free election for these offices from the whole body of his fellow citizens." -- "If the law imposed such a restraint, it would be void." -- "If the right of the president. to fill these original vacancies, by the selection of officers from any branch of the whole military establishment, was denied, he would be compelled to place in them officers of the same grade, whose corps had been reduced, and they with them. The effect, therefore, of the law, as to those appointments, would be to legislate into office, men, who had been already legislated ,at of office, taking from the president all agency in their appointment." -- (Message, 12th April, 1822; 1 Executive Journal, 286.) The senate wholly disagreed to this doctrine, contending, that, as congress possessed the power to make rules and regulations for the land and naval forces, they had a right to make any, which they thought would promote the public service. This power had been exercised from the foundation of the government, in respect to the army and navy. Congress have a right to fix the rule, as to promotions and appointments. Every promotion is a new appointment, and is submitted to the senate for confirmation. Congress, in all reductions of the army, have fixed the rules of reduction, and no executive had hitherto denied their rightful power so to do, or hesitated to execute such rules, as had been prescribed. Sergeant on Const. ch. 29, (ch. 31.)

lation, giving a limited duration to office, recognises the executive power of removal, as in full force.1

§1539. The other is a vastly important practical question; and, in an early stage of the government, underwent a most elaborate discussion.2 The language of the constitution is, that the president "shall nominate, and, by and with the advice and consent of the senate, appoint," &c. The power to nominate does not naturally, or necessarily include the power to remove; and if the power to appoint does include it, then the latterbelongs conjointly to the executive and the senate. In short, under such circumstances, the removal takes place in virtue of the new appointment, by mere operation of law. It results, and is not separable, from the appointment itself.

§ 1533. This was the doctrine maintained with great earnestness by the Federalist;3 and it had a most material tendency to quiet the just alarms of the overwhelming influence, and arbitrary exercise of this prerogative of the executive, which might prove fatal to the personal independence, and freedom of opinion of public officers, as well as to the public liberties of. the country. Indeed, it is utterly impossible not to feel, that, if this unlimited power of removal does exist, it may be made, in the hands of a bold and designing

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1 In the debate.in 1789 upon the bill for organizing the department for foreign affairs, (the department of state,) the very question was discussed; and the fired vote seems to have expressed the sense of the legislature. that the power of removal by the executive could not be abridged by the legislature; st least, not in cases, where the power to appoint was not subject to legislative delegation. See 5 Marshall's Life of Washington, ch. 3. p. 196 to 200; 1 Lloyd's Debates, 851 to 366; Id. 450, 480 to 600; 2 Lloyd's Debates, 1 to 12.

2 1 Lloyd's Debates, 351, 366, 450, 480 to 600; 2 Lloyd's Debates, 1 to 12; 5 Marshall's Life of Washington, ch. 3, p. 196 to 200.

3 The Federalist, No. 77.

man, of high ambition, and feeble principles, an instrument of the worst oppression, and most vindictive vengeance. Even in monarchies, while the councils of state are subject to perpetual fluctuations and changes, the ordinary officers of the government are permitted to remain in the silent possession of their offices, undisturbed by the policy, or the passions of the favourites of the court. But in a republic, where freedom of opinion and action are guaranteed by the very first principles of the government, if a successful party may first elevate their candidate to office, and then make him the instrument of their resentments, or their mercenary bargains; if men may be made spies upon the actions of their neighbours, to displace them from office; or if fawning sycophants upon the popular leader of the day may gain his patronage, to the exclusion of worthier and abler men, it is most manifest, that elections will be corrupted at their very source; and those, who seek office, will have every motive to delude, and deceive the people. It was not, therefore, without reason, that, in the animated discussions already alluded to, it was urged, that the power of removal was incident to the power of appointment. That it would be a most unjustifiable construction of the constitution, and of its implied powers, to hold otherwise. That such a prerogative in the executive was in its own nature monarchical and arbitrary; and eminently dangerous to the best interests, as well as the liberties, of the country. It would convert all the officers of the country into the mere tools and creatures of the president. A dependence, so servile on one individual, would deter men of high and honourable minds from

engaging in the public service. And if, contrary to expectation, such men should be brought into office, they would be reduced

to the necessity of sacrificing every principle of independence to the will of the chief magistrate, or of exposing themselves to the disgrace of being removed from office, and that too at a time, when it might no longer be in their power to engage in other pursuits.1

§ 1534. The Federalist, while denying the existence of the power, admits by the clearest implication the full force of the argument, thus addressed to such a state of executive prerogative. Its language is: "The consent of that body (the senate) would be necessary to displace, as well as to appoint. A change of the chief magistrate, therefore, could not occasion so violent, or so general a revolution in the officers of the government, as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change in favour of a person, more agreeable to him, by the apprehension, that a discountenance of the senate might frustrate the attempt, and bring some degree of discredit upon himself. Those, who can best estimate the value of a steady administration, will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which, from the greater permanency of its own composition, will, in all probability, be less subject to inconstancy, than any other member of the government."2 No man can fail to perceive the entire safety of the power of removal if it must thus be exercised in conjunction with the senate.

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1 5 Marshall's Life of Washington, ch. 3, p. 198; 1 Lloyd's Debates, 351, 366, 450, 480 to 600.

2 The Federalist, No. 77.

§ 1535. On the other hand, those, who after the adoption of the constitution held the doctrine, (for before that period it never appears to have been avowed by any of its friends, although it was urged by its opponents, as a reason for rejecting it,) that the power of removal belonged to the president, argued, that it resulted from the nature of the power, and the convenience, and even necessity of its exercise. It was clearly in its nature a part of the executive power, and was indispensable for a due execution of the laws, and a regular administration of the public affairs. What would become of the public interests, if during the recess of the senate the president could not remove an unfaithful public officer? If he could not displace a corrupt ambassador, or head of department, or other officer engaged in the finances, or expenditures of the government? If the executive, to prevent a non-execution of the laws, or a non-performance of his own proper functions, had a right to suspend an unworthy officer from office, this power was in no respect distinguishable from a power of removal. In fact, it is an exercise, though in a more moderated form, of the same power. Besides; it was argued, that the danger, that a president would remove good men from office was wholly imaginary. It was not by the splendour attached to the character of a particular president like Washington, that such an opinion was to be maintained. It was founded on the structure of the office. The man, in whose favour a majority of the people of the United States would unite, to elect him to such an office, had every probability at least in favour of his principles. He must be presumed to possess integrity, independence, and high talents. It would be impossible, that he should abuse the patronage of the government, or his power of removal, to the

base purposes of gratifying a party, or of ministering to his own resentments, or of displacing upright and excellent officers for a moro difference of opinion. The public odium, which would inevitably attach to such conduct, would be a perfect security against it. And, in truth, removals made from such motives, or with a view to bestow the offices upon dependents, or favourites, would be an impeachable offence.1 One of the most distinguished framers of the constitution 2 on that occasion after having expressed his opinion decidedly in favour of the existence of the power of removal in the executive, added: "In the first place he will be impeachable by this house before the senate for such an act of mal-administration; for I contend, that the wanton removal of meritorious officers would subject him to impeachment, and removal from his high trust."3

§ 1536. After a most animated discussion, the vote finally taken in the house of representatives was affirmative of the power ofremoval in the president, without any co-operation of the senate, by the vote of thirtyfour members against twenty.4 In the senate the clause in the bill, affirming the power, was carried by the casting vote of the vice-president.5

§ 1537. That the final decision of this question so made was greatly influenced by the exalted character of the president, then in office, was asserted at the time, and has always been believed. Yet the doctrine

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1 1 Lloyd's Debates, 351, 366, 450, 480 to 600; 2 Lloyd's Debates, 1 to 12; 4 Elliot's Debates, 141 to 207; 5 Marsh. Life of Washington, ch. 3, p. 196 to 200.

2 Mr. Madison, 1 Lloyd's Debates, 503.

3 Ibid.

4 5 Marsh. Life of Washington, ch. 3, p. 199; I Lloyd's Debates, 599; 2 Lloyd's Debates, 19.

5 Senate Journal, July 18, 1789, p. 42.

was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in this decision; and it constitutes, perhaps, the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of congress, which has not been.questioned on many other occasions.1 Even the most jealous advocates of state rights seem to have slumbered over this vast reach of authority; and have left it untouched, as the neutral ground of controversy, in which they desired to reap no harvest, and from which they retired without leaving any protestations of title or contest.2 Nor is this general acquiescence and silence without a satisfactory explanation. Until a very recent period, the power had been exercised in few cases, and generally in such, as led to their own vindication. During the administration of President Washington few removals were made, and none without cause; few were made in that of the first President Adams. In that of President Jefferson the circle was greatly enlarged; but yet it was kept within narrow bounds, and with an express disclaimer of the right to remove for differences of opinion, or otherwise, than for some clear public good. In the administrations of the subsequent presidents, Madison, Monroe, and J.Q. Adams, a general moderation and forbearance were exercised with the approbation of the country, and without disturbing the harmony of the system. Since the induction into office of President Jackson,

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1 1 Kent's Comm. Lect. 14, p. 289, 290.

2 Mr. Tucker in his Commentaries on Blackstone scarcely alludes to it. (See 1 Tucker's Black. Comm. App. 341.) On the other hand, Mr. Chancellor Kent has spoken on it with becoming freedom and pertinence of remark. 1 Kent's Comm. Lect. 14, p. 289, 290.

an opposite course has been pursued, and a system of removals and new appointments to office has been pursued so extensively, that it has reached a very large proportion of all the offices of honour and profit in the civil departments of the country. This is matter of fact; and beyond the statement of the fact1 it is not the intention of the Commentator to proceed. This extraordinary change of system has awakened general attention, and brought back the whole controversy, with regard to the executive power of removal, to a severe scrutiny. Many of the most eminent statesmen in the country have expressed a deliberate opinion, that it is utterly indefensible, and that the only sound interpretation of the constitution is that avowed upon its adoption; that is to say, that the power of removal belongs to the appointing power.

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1 In proof of this statement, lest it should be questioned, it is proper to say, that a list of removals (confessedly imperfect) between the 4th of March, 1829, when President Jackson came into office, and the 4th of March, 1830, has been published, by which it appears, that, during that period, there were removed, eight persons in the diplomatic corps; thirtysix in the executive departments; and in the other civil departments including consuls, marshals, district attorneys, collectors, and other officers of the customs, registers and receivers, one hundred and ninetynine persons. These officers include a very large proportion of all the most lucrative offices under the national government. Besides these, there were removals in the post-office department, during the same period, of four hundred and ninety-one persons. (See Mr. Post-Master General Barry's Report of 24th of March, 1830.) This statement will be found in the National Intelligence of the 27th of Sept, 1832, with the names of the parties (except post-masters;) and I am not aware, that it has ever been denied to be correct. It is impossible for me to vouch for its entire accuracy. It is not probable, that, from the first organization of the government, in 1789, down to 1829, the aggregate of all the removals made amounted to one third of this number. In President Washington's administration of eight years, only nine removals took place. See Mr. Clayton's Speech in the Senate, on the 4th of March 1830.

§ 1538. Whether the predictions of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized, must be left to the sober judgment of the community, and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the

power of removal, (which the reader must decide for himself,) it will be difficult, and perhaps impracticable, after forty years experience, to recall the practice to the correct theory. But at all events, it will be a consolation to those, who love the Union, and honour a devotion to the patriotic discharge of duty, that in regard to "inferior officers," (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government,) the remedy for any permanent abuse is still within the power of congress, by the simple expedient of requiring the consent of the senate to removals in such cases.

§ 1539. Another point of great practical importance is, when the appointment of any officer is to be deemed complete. It will be seen in a succeeding clause, that the president is to "commission all the officers of the United States." In regard to officers, who are removable at the will of the executive, the. point is unimportant, since they may be displaced, and their commission arrested at any moment. But if the officer is not so removable, the time, when the appointment is complete, becomes of very deep interest.

§ 1540. This subject was very elaborately discussed in the celebrated case of Marbury v. Madison.1 Marbury had been appointed a justice of the peace of the

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1 1 Cranch's R. 137; S. C. 1 Peters's Cond. R. 270.

District of Columbia for five years, according to an act of congress, by President Adams, by and with the consent of the senate. His commission had been signed by the president, and was sealed, and deposited in the department of state at the time of Mr. Jefferson's accession to the presidency; and was afterwards withheld from him by the direction of the latter. An act of congress had directed the secretary of state to keep the seal of the United States; and to make out, and record, and affix the seal to all civil commissions to officers of the United States, to be appointed by the president, after he should have signed the same. Upon the fullest deliberation, the court were of opinion, that, when a commission has been signed by the president, the appointment is final and complete. The officer appointed has, then, conferred on him legal rights, which cannot be resumed. Until that, the discretion of the president may be exercised by him, as to the appointment; but, from that moment, it is irrevocable. His power over the office is then terminated in all cases, where by law the officer is not removable by him. The right tothe office is then in the person appointed, and he has the absolute, unconditional power of accepting, or rejecting it. Neither a delivery of the commission, nor an actual acceptance of the office, is indispensable to make the appointment perfect.

§ 1541. The reasoning, upon which this doctrine is founded, cannot be better elucidated, than by using the very language of the opinion, in which it is promulgated. After quoting the words of the constitution, and laws above referred to, it proceeds as follows:

§ 1542. "These are the clauses of the constitution and laws of the United States, which affect this part of

the case. They seem to contemplate three distinct operations: (l.) The nomination. This is the sole act of the president, and is completely voluntary. (2.) The appointment. This is also the act of the president; and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. (3.) The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. 'He shall,' says that instrument, 'commission all the officers of the United States.' The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress 'to vest, by law, the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments;' thus contemplating cases, where the law may direct the president to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused. Although that clause of the constitution, which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise, than by himself; yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to

an office, and the commission of an officer, who has been appointed, remains the same, as if in practice the president had commissioned officers appointed by an authority, other than his own. It follows, too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and, if he was not removable at the will of the president, would either give him a right to his commission, or enable him to perform the duties without it. These

observations are premised solely for the purpose of rendering more intelligible those, which apply more directly to the particular case under consideration.

§ 1543. "This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise, than by proving the existence of a commission. Still the commission is not necessarily the appointment; though conclusive evidence of it. But at what stage does it amount to this conclusive evidence? The answer to this question seems an obvious one. The appointment, being the sole act of the president, must be completely evidenced, when it is shown, that he has done every thing to be performed by him. Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still, it would be made, when the last act to be done by the president was performed, or at farthest, when the commission was complete. The last act to be done by the president, is the signature of the commission.

He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. Some point of time must be taken, when the power of the executive over .an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, 'and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the president:' 'Provided, that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States; nor to any other instrument or act, without the special warrant of the president therefor.' The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument, which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed, till the commission

all the weight, which it appears possible to give them, is signed, because the signature, which gives force and effect to the commission, is conclusive evidence, that the appointment is made. The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding, which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act, which the law enjoins on a particular officer for a particular purpose. If it should be supposed, that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment; still, when the seal is affixed, the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All, that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the cooperation of others. After searching anxiously for the principles, on which a contrary opinion may be supported, none have been found, which appear of sufficient force to maintain the opposite doctrine. Such, as the imagination of the court could suggest, have been very deliberately examined, and after allowing them

they do not shake the opinion, which has been formed.

§ 1544. "In considering this question, it has been conjectured, that the commission may have been assimilated to a deed, to the validity of which delivery is essential. This idea is founded on the supposition, that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But, for the purpose of examining this objection fairly, let it be conceded, that the principle claimed for its support is established. The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary, that the livery should be made personally to the grantee of the office. It never is so made. The law would

seem to contemplate, that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission, after it shall have been signed by the president. If, then, the act of livery be necessary to give validity to the commission, is has been delivered, when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party. But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions the sign manual of the president, and the seal of the United States, are those solemnities. This objection, therefore, does not touch the case.

§ 1545. "It has also occurred, as possible, and barely possible, that the transmission of the commission, and

the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment, which must precede it, and which is the mere act of the president. If the executive required, that every person, appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer, to whom that duty is assigned, and may be accelerated, or retarded by circumstances, which canhave no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed, or not, as the letter enclosing the commission should happen to get into the post-office, and reach him in safety, or to miscarry.

§ 1546. "It may have some tendency to elucidate this point, to inquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume, it could not be doubted, but that a copy from the record of the office of the secretary of state would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not he necessary to prove, that the original had been transmitted, and afterwards lost. The copy would be complete evidence, that the

original had existed, and that the appointment had been made; but, not that the original had been transmitted. If, indeed, it should appear, that the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed, which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed. In the ease of commissions, the law orders the secretary of state to record them. When, therefore, they are signed and sealed, the order for their being recorded is given; and whether inserted in the book, or not, they are in law recorded. A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record erase therefrom a commission, which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law? Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

§ 1547. "If the transmission of a commission be not considered, as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept. But neither the one, nor the other, is capable of rendering the appointment a nonentity. That this is the understanding of the govern-

ment is apparent from the whole tenor of its conduct. A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission, or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person, who has declined to accept, and not in the place of the person, who had been previously in office, and had created the original vacancy. It is, therefore, decidedly the opinion of the court, that, when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state. Where an officer is removable at the will of the executive, the circumstance, which completes his appointment, is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights, which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made. But having once made the

appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it. Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law, creating the office, gave the officer a right to hold for five years, independent of the executive; the appointment was not revocable but vested in the officer legal rights, which

are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right."1

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1 See also Rawle on the Constitution, ch. 14, p. 166; Sergeant on Constitution, ch. 29, [ch. 31.] -- The reasoning of thin opinion would seem to be, in a judicial view, absolutely irresistible; and, as such, received at the time a very general approbation from the profession. It was, however, totally disregarded by President Jefferson, who, on this, as on other occasions, placed his right of construing the constitution and laws, as wholly above, and independent of judicial decision. In his correspondence, he repeatedly alluded to this subject, and endeavoured to vindicate his conduct. In one of his letters he says, "In the case of Marbury and Madison, the federal judges declared, that commissions, signed and sealed by the president, were valid, although not delivered. I deemed delivery essential to complete a deed, which, as long as it remains in the hands of the party, is, as yet, no deed; it is in posse only, but not in esse; and I withheld the delivery of the commission. They cannot issue a mandamus to the president, or legislature, or to any of their officers."* It is true, that the constitution does not authorize the Supreme Court to issue a mandamus in the exercise of original jurisdiction, as was the case in Marbury v. Madison; and it was so decided by the Supreme Court. But the Act of Congress of 1789, ch. 20, § 13, had actually conferred the very power on the Supreme Court., by providing, that the Supreme Court shall have power "to issue writs of mandamus, &c. to any courts appointed, or persons holding office under the authority of the United States." So, that the Supreme Court, in declining jurisdiction, in effect declared, that the act of congress was, in this respect, unconstitutional. But no lawyer could doubt, that congress might confer the power on any other court; and the Supreme Court itself might issue a mandamus in the exercise of its appellate jurisdiction. But the whole argument of President Jefferson proceeds on an assumption, which is not proved. He says, delivery is essential to a deed. But, assuming this to be correct in all cases, it does not establish, that a commission is essential to every appointment, or that a commission must, by the constitution, be by a deed; or that an appointment to office is not complete, before the commission is sealed, or delivered. The question is not, whether a deed at the common law is perfect without a delivery; but whether an appointment under the constitution is perfect without a delivery of a commission. If a delivery were necessary, when the president had signed the commission, and delivered it to the secretary to be sealed and recorded, such delivery would be

*** 4 Jefferson's Corresp. 317; Id. 75; Id. 372, 373.**

§ 1548. Another question, growing out of appointments, is, at what time the appointee is to be deemed in office, whether from the time of his acceptance of the office, or his complying with the preliminary requisitions, (such, as taking the oath of office, giving bond for the faithful discharge of his duties, &c.) orhis actual entry upon the duties of his office. This question may become of great practical importance in eases of removals from office, and also in cases, where by law officers are appointed for a limited term. It frequently happens, that no formal removal from office is made by the president, except by nominating another person to the senate, in place of the person removed, and without any notice to him. In such a case, is the actual incumbent in office de facto removed immediately upon the nomination of a new officer? If so, then all his subsequent acts in the office are void, though he may have no notice of the nomination, and may, from the delay to give such notice, go on for a month to perform its functions. Is the removal to be deemed complete only, when the nomination has been confirmed? Or, when notice is actually given to the incumbent? Or, when the. appointee has accepted the

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sufficient, for it is the final act required to be done by the president. But, in point of fact, the seat is not the seal of the president, but of the United States. The commission, sealed by the president, is not his deed; and it does not take effect, as his deed. It is merely a verification of his act by the highest evidence. The doctrine, then, of deeds of private persons, at the common law, is inapplicable. It is painful to observe in President Jefferson's writings, the constant insinuations against public men and public bodies, who differ from his own opinions or measures, of being governed by improper or unworthy motives, or

mere party spirit. The very letters here cited (4 Jefferson's Corresp. 75, 317, 372) afford illustrations, not to be mistaken; and certainly diminish the value, which might otherwise be attributed to his criticisms.

office?1 Hitherto this point does not seem to have received any judicial decision, and therefore must be treated as open to controversy. If the decision should be, that in such cases the nomination without notice creates a removal de facto, as well as de jure, it is obvious, that the public, as well as private individuals, may become sufferers by unintentional and innocent violations of law. A collector, for instance, may receive duties, may grant clearances to vessels, and may perform other functions of the office for months after such a nomination, without the slightest suspicion of any want of legal authority. Upon one occasion it was said by the Supreme Court, that "when a person appointed to any office (under the United States) refuses to accept that office, the successor is nominated in the place of the person, who has declined to accept, and not in the place of the person, who had been previously in office, and had created the original vacancy."2 From this remark, it would seem to be the opinion of the court, that the office is completely filled in every case of vacancy, as soon as the appointment is complete; independently of the acceptance of the appointee. If so, it would seem to follow, that the removal must, at all events, be complete, as soon as a new appointment is made.3

§ 1549. The next clause of the constitution is, "The president shall have power to fill up all vacancies, that may happen during the recess of the senate, by grant-

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1 See Johnson v. United States, 5 Mason's R. 425, 438, 439.

2 Marbury v. Madison, 1 Cranch's R. 137; S.C. 1 Peters's Cond. R. 270.

3 See Johnson v. United States, 5 Mason's R. 425, 438, 439; United States v. Kirkpatrick, 4 Wheat. R. 733, 734.

ing commissions, which shall expire at the end of their next session."

§ 1550. This clause was not in the first draft of the constitution; but was afterwards inserted by an amendment, apparently without objection.1 One of the most extraordinary instances of a perverse intention to misrepresent, and thereby to render odious the constitution, was in the objection, solemnly urged against this clause, that it authorized the president to fill vacancies in the senate itself, occurring during the recess;2 a power; which, in another clause of the constitution, was expressly confided to the state executive. It is wholly unnecessary, however, now to dwell upon this preposterous suggestion, since it does. not admit of a doubt, that the power given to the president is applicable solely to appointments to offices under the United States, provided for by the constitution and laws of the Union. It is only another proof of the gross exaggerations, and. unfounded alarms; which were constantly resorted to for the purpose of defeating a system, which could scarcely fail of general approbation, if it was fairly understood.3

§ 1551. The propriety of this grant is so obvious, that it can require no elucidation. There was but one of two courses to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject. The former course would have been at once burthensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security.

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1 Journal of Convention, 225, 341.

2 The Federalist, No. 67.

3 Id. No. 67,

§ 1552. The appointments so made, by the very language of the constitution, expire at the next session of the senate; and the commissions given by him have the same duration. When the senate is assembled, if the president nominates the same officer to the office, this is to all intents and purposes a new nomination to office; and, if approved by the senate, the appointment is a new appointment, and not a mere continuation of the old appointment. So that, if a bond for fidelity in office has been given under the first appointment and commission, it does not apply to any acts done under the new appointment and commission.1

§ 1553. The language of the clause is, that the president shall have power to fill up vacancies, that may happen during the recess of the senate. In 1813, President Madison appointed and commissioned ministers to negotiate the treaty of peace of Ghent during the recess of the senate; and a question was made, whether he had a constitutional authority so to do, there being no vacancy of any existing office; but this being the creation of a new office. The senate, at their next session, are said to have entered a protest against such an exercise of power by the executive.

On a subsequent occasion, (April 20, 1822,) the senate seem distinctly to have held, that the president could not create the office of minister, and make appointments to such an office during the recess, without the consent of the senate. By "vacancies" they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word "happen" had relation to some casualty, not provided for by law. If the senate are in session, when offices are created by law, which have not as yet been filled, and

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1 United States v. Kirkpatrick, 9 Wheat. R. 720, 733, 734, 735.

nominations are not then made to them by the president, he cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate. In many instances, where offices are created by law, special power is on this very account given to the president to fill them during the recess; and it was then said, that in no other instances had the president filled such vacant offices without the special authority of law.1

§ 1554. The next section of the second article is, "He (the president) shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures, as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them, and, in case of a disagreement between them, with respect to the time of adjournment, he may adjourn them to such time, as he shall think proper. He shall receive ambassadors, and other public ministers. He shall take care, that the laws be faithfully executed; and shall commission all the officers of the United States."

§ 1555. The first part, relative to the president's giving information and recommending measures to congress, is so consonant with the structure of the executive departments of the colonial, and state governments, with the usages and practice of other free governments, with the general convenience of congress, and with a due share of responsibility on the part of the executive, that it may well be presumed to be above all real objection. From the nature and duties of the executive department, he must possess more extensive sources of

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1 Sergeant on Const. ch. 29, (ch. 31); 2 Executive Journal, p. 415, 500; 3 Executive Journal, 297.

information, as well in regard to domestic as foreign affairs, than can belong to congress. The true workings of the laws; the defects in the nature or arrangements of the general systems of trade, finance, and justice; and the military, naval, and civil establishments of the Union, are more readily seen, and more constantly under the view of the executive, than they can possibly be of any other department. There is great wisdom, therefore, in not merely allowing, but in requiring, the president to lay before congress all facts and information, which may assist their deliberations; and in enabling him at once to point out the evil, and to suggest the remedy. He is thus justly made responsible, not merely for a due administration of the existing systems, but for due diligence and examination into the means of improving them.1

§ 1556. The power to convene congress on extraordinary occasions is indispensable to the proper operations, and even safety of the government. Occasions may occur in the recess of congress, requiring the government to take vigorous measures to repel foreign aggres-

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1 See 1 Tuck. Black. Comm. App. 343, 344, 345; The Federalist, No. 78; Rawle on Const. ch. 16, p. 175. -- The practice in the time of President Washington, and President John Adams was, for the president, at the opening of each session of congress to meet both Houses in person, and deliver a speech to them, containing his views on public affairs, and his recommendations of measures. On other occasions he simply addressed written messages to them, or either of them, according to the nature of the message. To the speeches thus made a written answer was given by each house; and thus an opportunity was afforded by the opponents of the administration to review its whole policy in a single debate on the answer. That practice was discontinued by President Jefferson, who addressed all his communications to congress by written messages; and to these no answers were returned.* The practice thus introduced by him has been ever since exclusively pursued by all succeeding presidents, whether for the better has been gravely doubted by some of our most distinguished statesmen.

*** Rawle on Const. ch. 16, p. 171, 172, 173.**

sions, depredations, and direct hostilities; to provide adequate means to mitigate, or overcome unexpected calamities; to suppress insurrections; and to provide for innumerable other important exigencies, arising out of the intercourse and revolutions among nations.1

§ 1557. The power to adjourn congress in cases of disagreement is equally indispensable; since it is the only peaceable way of terminating a controversy, which can lead to nothing but distraction in the public councils.2

§ 1558. On the other hand, the duty imposed upon him to take care, that the laws be faithfully executed, follows out the strong injunctions of his oath of office, that he will "preserve, protect, and defend the constitution." The great object of the executive department is to accomplish this purpose; and without it, be the form of government whatever it may, it will be utterly worthless for offence, or defence; for the redress of grievances, or the protection of rights; for the happiness, or good order, or safety of the people.

§ 1559. The next power is to receive ambassadors and other public ministers. This has been already incidentally touched. A similar power existed under the confederation; but it was confined to receiving "ambassadors," which word, in a strict sense, (as has been already started,) comprehends the highest grade only of ministers, and not those of an inferior character. The policy of the United States would ordinarily prefer the employment of the inferior grades; and therefore the description is properly enlarged, so as to include all classes of ministers.3 Why the receiving of consuls

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1 See 1 Tuck. Black. Comm. App. 343, 344, 345; The Federalist, No. 78; Rawle on Const. ch. 16, p. 175.

2 Id. ibid.

3 The Federalist, No. 42.

was not also expressly mentioned, as the appointment of them is in the preceding clause, is not easily to be accounted for, especially as the defect of the confederation on this head was fully understood.1 The power, however, may be fairly inferred from other parts of the constitution; and indeed seems a general incident to the executive authority. It has constantly been exercised without objection; and foreign consuls have never beer allowed to discharge any functions of office, until they have received the exequatur of the president.2 Consuls, indeed, are not diplomatic functionaries, or political representatives of a foreign nation; but are treated in the character of mere commercial agents.3

§ 1560. The power to receive ambassadors and ministers is always an important, and sometimes a very delicate function; since it constitutes the only accredited medium, through which negotiations and friendly relations are ordinarily carried on with foreign powers. A government may in its discretion lawfully refuse to receive an ambassador, or other minister, without its affording any just cause of war. But it would generally be deemed an unfriendly act, and might provoke hostilities, unless accompanied by conciliatory explanations. A refusal is sometimes made on the ground of the bad character of the minister, or his former offensive conduct, or of the special subject of the embassy not being proper, or convenient for discussion.4 This, however, is rarely done. But a much more delicate occasion is,

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1 The Federalist, No. 42.

2 Rawle on Const. ch. 24, p. 224, 225.

3 Ibid.; 1 Kent's Comm. Lect. 2 p. 40 to 44; The Indian Chief, 3 Rob. R. 22; The Bello Corunnes, 6 Wheat. R. 152, 168; Viveash v. Buker, 3 Maule & Selw. R. 284.

4 1 Kent's Comm. Lect. 2, p. 89; Rutherforth's Instit. B 2, ch. 9, § 20, Grotius, Lib. 2, ch. 8, § 1, 3, 4.

when a civil war breaks-out in a nation, and two nations are formed, or two parties in the same nation, each claiming the sovereignty of the whole, and the contest remains as yet undecided, flagrante bello. In such a case a neutral nation may very properly withhold its recognition of the. supremacy of either party, or of the existence of two independent nations; and on that account refuse to receive an ambassador from either.1 It is obvious, that in such cases the simple acknowledgment of the minister of either party, or nation, might be deemed taking part against the other; and thus as affording a strong countenance, or opposition, to rebellion and civil dismemberment. On this account, nations, placed in such a predicament, have not hesitated sometimes to declare war against neutrals, as interposing in the war; and have made them the victims of their vengeance, when they have been anxious to assume a neutral position. The exercise of this prerogative of acknowledging new nations, or ministers, is, therefore, under such circumstances, an executive function of great delicacy, which requires the utmost caution and deliberation. If the executive receives an ambassador, or other minister, as the representative of a new nation, or of a party in a civil war in an old nation, it is an acknowledgment of the sovereign authority de facto of such new nation, or party. If such recognition is made, it is conclusive upon the nation, unless indeed it can be reversed by an act of congress repudiating it. If, on the other hand, such recognition has been refused by the executive, it is said, that congress may, notwithstanding, solemnly

1 1 Kent's Comm. Lect. 2, p. 39; Rawle on Const. ch. 20, p. 195; Gelston v. Hoyt, 3 Wheat. R. 324; United States v. Palmer, 3 Wheat. R. 630; Serg. on Const. ch. 28, p. 324, 325, (2d edit. ch. 30, p. 336, 337, 338.)

acknowledge the sovereignty of the nation, or party.1 These, however, are propositions, which have hitherto remained, as abstract statements, under the constitution; and, therefore, can be propounded, not as absolutely true, but as still open to discussion, if they should ever arise in the course of our foreign diplomacy. The constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them.2 At all events, in the case of a revolution, or dismemberment of a nation, the judiciary cannot take notice of any new government, or sovereignty, until it has been duly recognised by some other department of the government, to whom the power is constitutionally confided.3

§ 1561. That a power, so extensive in its reach over our foreign relations, could not be properly conferred on any other, than the executive department, will admit of little doubt. That it should be exclusively confided to that department, without any participation of the senate in the functions, (that body being conjointly entrusted with the treaty-making power,) is

1 Rawle on Constitution, ch. 20, p. 195, 196.

2 It is surprising, that the Federalist should have treated the power of receiving ambassadors and other public ministers, as an executive function of little intrinsic importance. Its language is, "This, though it has been a rich theme of declamation, is more a matter of dignity, than of authority. It is a circumstance, which will be without consequence in the administration of the government. And it was far more convenient, that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor." The Federalist, No. 69.

3 United States v. Palmer, 3 Wheat. R. 610, 634, 643; Hoyt v. Gelston, 3 Wheat. R. 246, 323, 324; Rose v. Himely, 4 Cranch, 441; The Divina Pastora, 4 Wheat. R. 599 and note 65; The Neustra Sonora de la Carldad, 4 Wheat. R. 497.

not so obvious. Probably the circumstance, that in all foreign governments1 the power was exclusively confided to the executive department, and the utter impracticability of keeping the senate constantly in session, and the suddenness of the emergencies, which might require the action of the government, conduced to the establishment of the authority in its present form.2 It is not, indeed, a power likely to be abused; though it is pregnant with consequences, often involving the question of peace and war. And, in our own short experience, the revolutions in France, and the revolutions in South America, have already placed us in situations, to feel its critical character, and the necessity of having, at the head of the government, an executive of sober judgment, enlightened views, and firm and exalted patriotism.3

§ 1562. As incidents to the power to receive ambassadors and foreign ministers, the president is understood to possess the power to refuse them, and to dismiss those who, having been received, become obnoxious to censure, or unfit to be allowed the privilege, by their improper conduct, or by political events.4 While, however, they are permitted to remain, as public functionaries, they are entitled to all the immunities and rights, which the law of nations has provided at once for their dignity, their independence, and their inviolability.5

§ 1563. There are other incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are

1 See 1 Black. Comm. 953.

2 The Federalist, No. 69.

See 5 Marshall's Life of Washington, ch. 6, p. 398, 399, 404, 405, 411, 412; 1 Tuck Black. Comm. App. 341.

4 See 5 Marshall's Life of Washington: ch. 6: p. 443, 444; 7 Wait's State Papers, 282, 283, 302.

5 1 Kent's Comm. Lect. 2, p. 37, 38, 39.

confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to

possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience. His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive. But he has no authority to control other officers of the government, in relation to the duties imposed upon them by law, in cases not touching his political powers.1

§ 1564. In the year 1793, president Washington thought it his duty to issue a proclamation, forbidding the citizens of the United States to take any part in the hostilities, then existing between Great Britain and France; warning them against carrying goods, contraband of war; and enjoining upon them an entire abstinence from all acts, inconsistent with the duties of neutrality.2 This proclamation had the unanimous approbation of his cabinet.3 Being, however, at variance with the popular passions. and prejudices of the day, this exercise of incidental authority was assailed with uncommon vehemence, and was denied to be constitutional. It seems wholly unnecessary now to review

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1 Marbury v. Madison, 1 Cranch. 137, S. C.; 2 Peters's Cond. R. 276, 277.

2 1 Wait's American State Papers, 44.

3 5 Marshall's Life of Washington, ch. 6, p. 404, 408.

the grounds of the controversy, since the deliberate sense of.the nation has gone along with the exercise of the power, as one properly belonging to the executive duties.1 If the President is bound to see to the execution of the laws, and treaties of the United States; and if the duties of neutrality, when the nation has not assumed a belligerent attitude, are by the law of nations obligatory upon it, it seems. difficult to perceive any solid objection to a proclamation, stating the facts, and admonishing the citizens of their own duties and responsibilities.2

§ 1565. We have seen, that by law the president possesses the right to require the written advice and opinions of his cabinet ministers; upon all questions connected with their respective departments. But, he does not possess a like authority, in regard to the judicial department. That branch of the government can be called upon only to decide controversies, brought before them in a legal form; and therefore are bound to abstain from any extra-judicial opinions upon points of law, even though solemnly requested by the executive.3

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1 Rawle on Const. ch. 20, p. 197. -- The learned reader, who wishes to review the whole ground, will find it treated in a masterly manner, in the letters of Pacificus, written by Mr. Hamilton in favour of the power, and in the letters of Helvidius, written by Mr. Madison against it. They will both be found in the edition of the Federalist, printed at Washington, in 1818, and in Hallowell, in 1826, in the Appendix.

2 1 Tuckers Black. Comm. App. 346.--Both houses of Congress, in their answers to the President's speech at the ensuing session, approved of his conduct, m issuing the proclamation. -- 1 Tucker's Black. Comm. App. 346.

3 5 Marshall's Life of Washington, ch. 6, p. 433, 441; Serg. Const. ch. 29, [ch. 31.] See also Hayburn's case, 2 Dall. R. 409, 410, and note; Marbury v. Madison, 1 Cranch. 137, 171. -- President Washington, in 1793, requested the opinion of the Judges of the Supreme Court, upon the construction of the treaty with France, of 1778; but they declined

§ 1566. The remaining section of the fourth article, declaring that the President, Vice-President, and all civil officers of the United States shall be liable to impeachment, has been already fully considered in another place. And thus is closed the examination of the rights, powers, and duties of the executive department. Unless my judgment has been unduly biassed, I think it will be found impossible to hold from this part of the constitution a tribute of profound respect, if not of the liveliest admiration. All, that seems desirable in order to gratify the hopes, secure the reverence, and sustain the dignity of the nation, is, that it should always be occupied by a man of elevated talents, of ripe virtues, of incorruptible integrity, and of tried patriotism; one, who shall forget his own interests, and remember, that he represents not a party, but the whole nation; one, whose fame may be rested with posterity, not upon the false eulogies of favourites, but upon the solid merit of having preserved the glory, and enhanced the prosperity of the country.1

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to give any opinion, upon the ground stated in the text. 5 Marshall's Life of Washington, ch. 6, p. 433, 441.

1 In consequence of President Jackson's Message, negativing the Bank of the United States, July 10, 1832, in which be advances the doctrine, that the decisions made by other departments of the government, including the Judiciary, and even by his predecessors in office in approving laws, are not obligatory on him; the question has been a good deal agitated by statesmen and constitutional lawyers.

The following extract from a letter, written by Mr. Madison to Mr. C. J. Ingersoll, on 25th of June, 1831, contains reasoning on this subject, worthy of the judgment of that great man.

"The charge of inconsistency between my objection to the constitutionality of such a bank, in 1791, and my assent, in 1817, turns to the question how far legislative precedents, expounding the constitution, ought to guide succeeding legislatures, and to overrule individual opinions.

"Some obscurity has been thrown over the question, by confounding

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it with the respect due from one legislature, to laws passed by preceding legislatures. But the two cases are essentially different. A constitution, being derived from a superior authority, is to be expounded and obeyed, not controlled or varied by the subordinate authority of a legislature. A law, on the other hand, resting on no higher authority, than that possessed by every successive legislature; its expediency, as well as its meaning, is within the scope of the latter.

"The case in question has its true analogy, in the obligation arising from judicial expositions of the law on succeeding judges, the constitution being a law to the legislator, as the law is a rule of decision to the judge.

"And why are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regar ded as of binding influence, or rather of authoritative force, in settling the meaning of a law? It must be answered, 1st, because it is a reasonable and established axiom, and the good of society requires, that the rules of conduct of its members, should be certain and known, which would not be the case if any judge, disregarding the decisions of his predecessors, should vary the rule of law, according to his individual interpretation of it. Misera est servitus ubi jus aut vagum aut incognitum. 2d, because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those, who, having made the law through their legislative organ, appear under such circumstances, to have determined its meaning through their judiciary organ.

"Can it be of less consequence, that the meaning of a constitution should be fixed and known, than that the meaning of a law should be so? Can, indeed, a law be fixed in its meaning and operation, unless the constitution be so? On the contrary, if a particular legislature, differing in the construction of the constitution, from a series of preceding constructions, proceed to act on that difference, they not only introduce uncertainty and instability in the constitution, but in the laws themselves; inasmuch as all laws, preceding the new construction, and inconsistent with it, are not only annulled for the future, but virtually pronounced nullities from the beginning.

"But, it is said, that the legislator, having sworn to support the constitution, must support it in his own construction of it, however different from that put on by his predecessors, or whatever be the consequences of the construction. And is not the judge under the same oath to support the law? yet, has it ever been supposed, that he was required, or at liberty, to disregard all precedents, however solemnly repeated and regularly observed; and by giving effect to his own abstract and individual opinions, to disturb the established course of practice, in the business of the community? Has the wisest and most conscientious judge ever scrupled to acquiesce in decisions, in which he

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has been overruled by the matured opinions of the majority or his colleagues; and subsequently to conform himself thereto, as to authoritative expositions of the law? And is it not reasonable, that the same view of the official oath should be taken by a legislator, acting under the constitution, which is his guide, as.is token by a judge, acting under the law, which is his?

"There is, in fact and in common understanding, a necessity of regarding a course of practice, as above characterized, in the light of a legal rule of interpreting a law: end there is a like necessity of considering it a constitutional rule of interpreting a constitution.

"That there may be extraordinary and peculiar circumstances controlling the rule in both cases, may be admitted; but with such exceptions, the rule will force itself on the practical judgment of the most ardent theorist. He will find it impossible to adhere to, and act officially upon his solitary opinions, as to the meaning of the law or constitution, in opposition to a construction reduced to practice, during a reasonable period of time; more especially, where no prospect existed of a change of construction, by the public or its agents. And if a reasonable period of time, marked with the usual sanctions, would not bar the individual prerogative, there could be no limitation to its exercise, although the danger of error must increase with the increasing oblivion of explanatory circumstances, and with the continual changes in the import of words and phrases.

"Let it then be left to the decision of every intelligent and candid judge, which, on the whole, is most to be relied on for the true and safe construction of a constitution; that which has the uniform sanction of successive legislative bodies through a period of years, and under the varied ascendancy of parties; or that which depends upon the opinions of every new legislature, heated as it may be by the spirit of party, eager in the pursuit or some favourite object, or led astray by the eloquence and address of popular statesmen, themselves, perhaps, under the influence of the same misleading causes.

"It was in conformity with the view here token, of the respect due to deliberate and reiterated precedents, that the bank of the United States, though on the original question held to be unconstitutional, received the executive signature in the year 1817. The act originally establishing a bank, had undergone ample discussions in its passage through the several branches of the government. It had been carried into execution throughout a period of twenty years, with annual legislative recognitions; in one instance, indeed, with a positive ramification of it into a new state; and with the entire acquiescence of all the local authorities, as well as of the nation at large; to all of which may be added a decreasing prospect of any change in the public opinion, adverse to the constitutionality of such an institution. A veto from the executive under these circumstances; with an admission of.the expediency and almost necessity of the measure, would have been a

defiance of all the obligations derived from a course of precedents, amounting to the requisite evidence of the national judgment and intention.

"It has been contended that the authority or precedents was in that case invalidated, by the consideration, that they proved only a respect for the stipulated duration of the bank, with a toleration of it, until the law should expire; and by the casting vote given in the senate by the Vice-President, in 1811, against a bill for establishing a National Bank, the vote being expressly given on the ground of unconstitutionality. But if the law itself was unconstitutional, the stipulation was void, and could not be constitutionally fulfilled or tolerated. And as to the negative or the senate, by the casting vote of the presiding officer; it is a fact well understood at the time, that it resulted not from an equality of opinions in that assembly, on the power or congress to establish a bank, but from a junction of those, who admitted the power, but disapproved the plan, with those who denied the power. On a simple question of constitutionality, there was a decided majority in favour of it"

There is also a very cogent argument, on the same side, in Mr. Webster's Speech in the senate, in July, 1832, on the Veto Message of the President.

CHAPTER XXXVIII.
JUDICIARY -- ORGANIZATION AND POWERS.

§ 1567. THE order of the subject next conducts us to the consideration of the third article of the constitution, which embraces the organization and powers of the judicial department.

§ 1568. The importance of the establishment of a judicial department in the national government has been already incidentally discussed under other heads. The want of it constituted one of the vital defects of the confederation.1 And every government must, in its essence, be unsafe and unfit for a free people, where such a department does not exist, with powers co-extensive with those of the legislative department.2 Where there is no judicial department to interpret, pronounce, and execute the law, to decide controversies, and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty.3 The will

1 The Federalist, No. 22; Cohen, v. Virginia, 6 Wheat. R. 388; 1 Kent's Comm. Lect. 14, p. 277.

2 The Federalist, No. 80; 1 Kent's Comm. Lect. 14, p. 277; Cohens v. Virginia, 6 Wheat. R. 384; 2 Wilson's Law Lect. ch. 3, p. 201; 3 Elliot's Deb. 143; Osborne v. Bank of United States, 9 Wheat. R. 818, 819. -- Mr. Justice Wilson has traced out, with muchminuteness of detail, the nature and character of the judicial department in ancient, as well as modern nations, and especially in England; and a perusal of his remarks will be found full of instruction. 2 Wilson's Law Lect. ch. 3, p. 201, &c.

3 1 Kent's Comm. Lect. 14, p. 277. -- It has been finely remarked by Mr. Chief Justice Marshall, that "the judicial department has no will.in any case. Judicial power, as contradistinguished from the power of

of those, who govern, will become, under such circumstances, absolute and despotic; and it is wholly immaterial, whether power is vested in a single tyrant, or in an assembly of tyrants. No remark is better founded in human experience, than that of Montesquieu, that "there is no liberty, if the judiciary power be not separated from the legislative and executive powers."1 And it is no less true, that personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.2 If that government can be truly said to be despotic and intolerable, in which the law is vague and uncertain; it cannot but be rendered still more oppressive and more mischievous, when the actual administration of justice is dependent upon caprice, or favour, upon the will of rulers, or the influence of popularity. When power becomes right, it is of little consequence, whether decisions rest upon corruption, or weakness, upon the accidents of chance, or upon deliberate wrong. In every well organized government, therefore, with reference to the security both of public rights and private rights, it is indispensable, that there should be a judicial department to ascertain, and decide rights, to punish crimes, to administer justice, and to protect the innocent from injury and usurpation.3

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the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to fellow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."*

1 Montesquieu's Spirit of Laws, B. 11, ch. 13.

2 1 Kent's Comm. Lect. 14, p. 273.

3 Rawle on Constitution, ch. 21, p. 199.

*** Osborne v. Bank of United States, 9 Wheat. R. 806.**

§ 1569. In the national government the power is equally as important, as in the state governments. The laws and treaties, and even the constitution, of the United States, would become a dead letter without it. Indeed, in a complicated government, like ours, where there is an assemblage of republics, combined under a common head, the necessity of some controlling judicial power, to ascertain and enforce the powers of the Union, is, if possible, still more striking. The laws of the whole would otherwise be in continual danger of being contravened by the laws of the parts.1 The national government would be reduced to a servile dependence upon the states; and the same scenes would be again acted over in solemn mockery, which began in the neglect, and ended in the ruin, of the confederation.2 Power, without adequate means to enforce it, is like a body in a state of suspended animation. For all practical purposes it is, as if its faculties were extinguished. Even if there were no danger of collision between the laws and powers of the Union, and those of the states, it is utterly impossible, that, without some superintending judiciary establishment, there could be any uniform administration, or interpretation of them. The idea of uniformity of decision by thirteen independent and co-ordinate tribunals (and the number is now advanced to twenty-four) is absolutely visionary, if not absurd. The consequence would necessarily be, that neither the constitution, nor the laws, neither the rights and powers of the Union, nor those of the states, would be the same in any two states. And there would be per-

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1 The Federalist, No. 22; Chisholm v. Georgia, 2 Dall. 419, 474; ante, Vol. 1. p. 246, 247; 3 Elliot's Deb. 142.

2 See Cohens v. Virginia, 6 Wheat. R. 384 to 390; Id. 402 to 404, 415; Osborne v. Bank of United States, 9 Wheat. R. 818, 819; ante, Vol. 1. § 266, 267.

petual fluctuations and changes, growing out of the diversity of judgment, as well as of local institutions, interests, and habits of thought.1

§ 1570. Two ends, then, of paramount importance, and fundamental to a free government, are proposed to be attained by the establishment of a national judiciary. The first is a due execution of the powers of the government; and the second is a uniformity in the interpretation and operation of those powers, and of the laws enacted in pursuance of them. The power of interpreting the laws involves necessarily the function to ascertain, whether they are conformable to the constitution, or not; and if not so conformable, to declare them void and inoperative. As the constitution is the supreme law of the land, in a conflict between that and the laws, either of congress, or of the states, it becomes the duty of the judiciary to follow that only, which is of paramount, obligation. This results from the very theory of a republican constitution of government; for otherwise the acts of the legislature and executive would in effect become supreme and uncontrollable, notwithstanding any prohibitions or limitations contained in

the constitution; and usurpations of the most unequivocal and dangerous character might be assumed, without any remedy within the reach of the citizens.2 The people would thus be at the mercy of their rulers,

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1 Martin v. Hunter, 1 Wheat. R. 304, 345 to 349; The Federalist, No. 22.

2 The Federalist, No. 78, 80, 81, 82; 1 Tuck. Black. Comm. App. 355 to 360; 3 Elliot's Deb. 134.- This subject is very elaborately discussed in the Federalist, No. 78, from. which the following extract is made: "The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, 1 understand one, which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no

in the state and national governments; and an omnipotence would practically exist, like that claimed for the British Parliament. The universal sense of America

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ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination, that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged, that the authority, which can declare the acts of another void, must necessarily be superior to the one; whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds, on which it rests, cannot be unacceptable.

"There is no position, which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission, under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can he valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do, not only what their powers do not authorize, but what they forbid.

"If it be said, that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed, that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: in other words. the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents.

"Nor does the conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes, that the power of

has decided, that in the last resort the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments, so far as they are

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the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those, which are not fundamental.

"This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing st one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In

such a case, it is the province of the courts to liquidate and fix their meaning and operation: so far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate, that this should be done: where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule, which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an equal authority, that which was the last indication of its will, should have the preference.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us, that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

"It can be of no weight to say, that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the.substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove, that there ought to be no judges distinct from that body."

The reasoning of Mr. Chief Justice Marshall on this subject in Cohens

cognizance of the judiciary, its judgments must be conclusive; for otherwise they may be disregarded, and the acts of the legislature and executive enjoy a secure and capable of being made the subject of judicial controversy.1 It follows, that, when they are subjected to the

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v. Virginia, (6 Wheat R. 384 to 390,) has been already cited at large, ante Vol. 1. p. 369 to 372. See also 6 Wheat R. 413 to 423, and the Federalist, No. 22, on the same subject.

1 1 Kent's Comm. Lect. 20, p. 420 to 426. See also Cohens v. Virginia, 6 Wheat. R. 386 to 390. -- The reasoning of the Supreme Court in Marbury v. Madison, (1 Cranch, 137,) on this subject is so clear and convincing, that it is deemed advisable to cite it in this place, as a corrective to those loose and extraordinary doctrines, which sometimes find their way into opinions possessing official influence.

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to ,their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organises the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits, not to be transcended by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons, on whom they are imposed, and if acts prohibited, and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by

irresistible triumph.1 To the people at large, therefore, such an institution is peculiarly valuable; and it ought to be eminently cherished by them. On its firm and inde-

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ordinary means, or it is on a level with Ordinary legislative acts, and like other acts, is alterable, when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

"Certainly all those, who have framed.written constitutions, contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject. If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative, as if it was a law? This would be to overthrow in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say, what the law is. Those, who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case; so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine, which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case, to which they both apply.

"Those, then, who controvert the principle, that the constitution is to he considered, in courts, as a paramount law, are reduced to the necessity of maintaining, that courts must close their eyes on the constitution and see only the law. This doctrine would subvert the very foundation

1 1 Kent's Comm. Lect. 20, p. 420 to 425. See also 1 Tuck. Black. Comm. App. 354 to 357; The Federalist, No. 3, 22, 80, 82: 2 Elliot's Deb. 380.

pendent structure they may repose with safety, while they perceive in it a faculty, which is only set in motion, when applied to; but which, when thus brought

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of all written constitutions. It would declare, that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do, what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath, which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring, that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions -- a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

"The judicial power of the United States is extended to all cases, arising under the constitution. Could it be the intention of those, who gave this power, to say, that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument, under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

"There are many other parts of the constitution, which serve to illustrate this subject. It is declared, that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law? The constitution declares,

that 'no bill of attainder or ex post facto law shall be passed.' If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims, whom the constitution endeavours to preserve? 'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.' Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

"From these, and many other selectious, which might be made, it is apparent, that the framers of the constitution contemplated that instru-

into action, must proceed with competent power, if required to correct the error, or subdue the oppression of the other branches of the government.1 Fortunately

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ment, as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, 'I do solemnly swear, that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States.' Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

"It is also not entirely unworthy of observation, that in declaring, what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United. States generally, but those only, which shall be made in pursuance of the constitution, have that rank. Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are hound by that instrument."

In the Virginia Convention, Mr. Patrick Henry (a most decided opponent of the Constitution of the United States) expressed a strong opinion in favour of the right of the judiciary to decide upon the constitutionality of laws. His fears were, that the national judiciary was not so organized, as that it would possess an independence sufficient for this purpose. His language was: "The honourable gentleman did our judiciary honour in saying, that they had firmness enough to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this land-mark to guide us. They had fortitude to declare, that they were the judiciary, and would oppose unconstitutional acts. Are you sure, that your federal judiciary will act thus?

1 Rawle on Const. ch. 21, p. 199; Id. ch. 30, p. 275, 276; 1 Wilson's Law Lect. 460, 461; 3 Elliot's Deb. 143; Id. 245; Id. 280.

too for the people, the functions of the judiciary, in deciding on constitutional questions, is not one, which it is at liberty to decline. While it is bound not to take jurisdiction, if it should not, it is equally true, that it must take jurisdiction, if it should. It cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. It cannot pass it by, because it is doubtful. With whatever doubt, with whatever difficulties a case may be attended, it must decide it, when it arises in judgment. It has no more right to decline the exercise of a jurisdiction, which is given, than to usurp that, which is not given. The one, or the other would be treason to the constitution.1

§ 1571. The framers of the constitution, having these great principles in view, adopted two fundamental rules with entire unanimity; first, that a national judiciary ought to be established; secondly, that the national judiciary ought to possess powers co-extensive with

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Is that judiciary so well constituted, and so independent of the other branches, as our state judiciary? Where are your land-marks in this government? I will be bold to say, you cannot find any. I take it, as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary." 2 Elliot's Debates, 248.

1 Cohens v. Virginia, 6 Wheat. R. 404; 1 Wilson's Law Lect. 461, 462.--Mr. Justice Johnson, in Fullerton v. Bank of United States, (1 Peters's R. 604, 614,) says, "What is the course of prudence and duty, where these cases of difficult distribution as to power and right present themselves? It is to yield rather, than to encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our many peculiar relations, cases may occur, in which the maintenance of principle and the constitution, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty." This is a very just admonition, when addressed to other departments of the government. But the judiciary has no authority to adopt any middle course. It is compelled, when called upon, to

those of the legislative department.1 Indeed, the latter necessarily flowed from the former, and was treated, and must always be treated, as an axiom of political government.2 But these provisions alone would not be sufficient to, ensure a complete administration of public justice, or to give permanency to the republic. The judiciary must be so organized, as to carry into complete effect all the purposes of its establishment. It must possess wisdom, learning, integrity, independence, and firmness. It must at once possess the power and the means to check usurpation, and enforce execution of its judgments. Mr. Burke has, with singular sagacity and pregnant brevity, stated the doctrine, which every republic should steadily sustain, and conscientiously inculcate. "Whatever," says he, "is supreme in a state ought to have, as much as possible, its judicial authority so constituted, as not only not to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its judicature, as it were, something exterior to the state."3 The best manner, in which this is to be accomplished, must mainly depend upon the mode of appointment, the tenure of office, the compensation of the judges, and the jurisdiction confided to the department in its various branches.

§ 1572. Let us proceed, then, to the consideration of the judicial department, as it is established by the

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decide, whether a law is constitutional, or not. If it declines to declare it unconstitutional, that is an affirmance of its constitutionality. 1 Journ. of Convention, 69, 98, 121, 137, 186, 188, 189, 212; The Federalist, No. 77, 78; 2 Elliot's Debates. 380 to 394; Id. 404.

2 Cohen, v. Virginia, 6 Wheat. R. 384; 1 Tucker's Black. Comm. App. 350; The Federalist, No. 80; 2 Elliot's Debates, 380, 390, 404; 3 Elliot's Debates, 134, 143; Osborn v. Bank of United States, 9 Wheat. R. 818, 819; 1 Kent's Comm. Lect. 14, p. 277.

3 Burke's Reflections on the French Revolution.

constitution, and see, how far adequate means are provided for all these important purposes.

§ 1573. The first section of the third article is as follows: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour; and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office." To this may be added the clause in the enumeration of the powers of congress in the first article, (which is but a mere repetition,) that congress 'shall have power "to constitute tribunals inferior to the Supreme Court."1

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1 It is manifest, that the constitution contemplated distinct appointments of the judges of the courts of the United States. The judges of the Supreme Court are expressly required to be appointed by the president, by and with the advice and consent of the senate. They are, therefore, expressly appointed for that court, and for that court only. Can they be constitutionally required to act, as judges of any other court? This question (it now appears) was presented to the minds of the judges of the Supreme Court, who were first appointed under the constitution; and the chief justice (Mr. Jay) and some of his associates were of opinion, (and so stated to President Washington, in 1790, in a letter, which will be cited below at large,) that they could not constitutionally be appointed to hold any other court. They were, however, required to perform the duty of circuit judges in the circuit courts, until the year 1801; and then a new system was established. The latter was repealed in 1802; and the judges of the Supreme Court were again required to perform duty in the circuit courts. In 1803, the point was directly made before the

Supreme Court; but the court were then of opinion, that the practice and acquiescence, for such a period of years, commencing with the organization of the judicial system, had fixed the construction, and it could not then be shaken. Stuart v. Laird, (1 Cranch's R. 299, 309.) That there have, notwithstanding, been many scruples and doubts upon the subject, in the minds of the judges of the Supreme Court, since that period, is well known. See 1 Paine's Cirt. Rep.

We here insert the letter of Mr. Chief Justice Jay and his associates,

§ 1574. In the convention, which framed the constitution, no diversity of opinion existed, as to the establishment of a supreme tribunal. The proposition

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for which we are indebted to the editors of that excellent work, the American Jurist. It is in the number for October, 1830, (vol. 4, p. 294, &c.)

"The representation alluded to was in answer to a letter, addressed by General Washington to the court upon its organization, which we have therefore prefixed to it.

United Sates, April 3d, 1790.

"'Gentlemen: I have always been persuaded, that the stability and success of the national government, and consequently the happiness of the people of the United States, would depend, in a considerable degree, on the interpretation of its laws. In my opinion, therefore, it is important, that the judiciary system should not only be independent in its operations, but as perfect, as possible, in its formation.

"'As you are about to commence your first circuit, and many things may occur in such an unexplored field, Which it would be useful should be known, I think it proper to acquaint you, that it will be agreeable to me to receive such information and remarks on this subject, as you shall from time to time judge it expedient to make. Geo. Washington.

"'The Chief Justice and Associate Justice. of the Supreme Court. of the United States.'

"'Sir: We, the Chief Justice and Associate Justices of the Supreme Court of the United States, in pursuance of the letter, which you did us the honour to write, on the third of April last, take the liberty of submitting to your consideration the following remarks on the "Act to establish the Judicial Courts of the United States."

"'It would doubtless have been singular, if a system so new and untried, and which was necessarily formed more on principles of theory, and probable expediency, than former experience, had, in practice, been found entirely free from defects.

"'The particular and continued attention, which our official duties called upon us to pay to this act, has produced reflections, which at the time it was made and passed, did not, probably, occur in their full extent either to us or others.

"'On comparing this act with the constitution, we perceive deviations, which, in our opinions, are important.

"'The first section of the third article of the constitution declares, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as the congress may, from time to time, ordain and establish."

was unanimously adopted.1 In respect to the establishment of inferior tribunals, some diversity of opinion was in the early stages of the proceedings exhibited.

"'The second section enumerates the cases, to which the judicial power shall extend. It gives to the Supreme Court original jurisdiction in only two cases, but in all the others, vests it with appellate jurisdiction; and that with such exceptions, and under such regulations, as the congress shall make.

"'It has long and very universally been deemed essential to the due administration of justice, that some national court, or council should be instituted, or authorized to examine the acts of the ordinary tribunals, and ultimately, to affirm or reverse their judgments and decrees; it being important, that these tribunals should be confined to the limits of their respective jurisdiction, and that they should uniformly interpret and apply the law in the same sense and manner.

"'The appellate jurisdiction of the Supreme Court enables it to confine inferior courts to their proper limits, to correct their involuntary errors, and, in general, to provide, that justice be administered accurately, impartially, and uniformly. These controlling powers were unavoidably great and extensive;

and of such a nature, as to render their being combined with other judicial powers, in the same persons, unadvisable.

"'To the natural. as well as legal incompatibility of ultimate appellate jurisdiction, with original jurisdiction, we ascribe the exclusion of the Supreme Court from the latter, except in two cases. Had it not been for this exclusion, the unalterable, ever binding decisions of this important court, would not have been secured against the influences of those predilections for individual opinions, and of those reluctances to relinquish sentiments publicly, though, perhaps, too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men, some degree of partiality for their official and public acts.

"'Without such exclusion, no court, possessing the last resort of justice, would have acquired and preserved that public confidence, which is really necessary to render the wisest institutions useful. A celebrated writer justly observes, that "next to doing right, the great object in the administration of public justice should be to give public satisfaction."

"'Had the constitution permitted the Supreme Court to sit in judgment, and finally to decide on the acts and errors, done and committed by its own members, as judges of inferior and subordinate courts, much room would have been left for men, on certain occasions, to suspect, that

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1 Journal of Convention, 69, 98, 137, 186.

A proposition to establish them was at first adopted. This was struck out by the vote of five states against four, two being divided; and a proposition was then

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an unwillingness to be thought and found in the wrong, had produced an improper adherence to it; or that mutual interest had generated mutual civilities and tenderness injurious to right.

"'If room had been left, for such suspicions, there would have been reason to apprehend, that the public confidence would diminish almost in proportion to the number of cases, in which the Supreme Court might affirm the acts of any of its members.

"'Appeals are seldom made, but in doubtful cases, and in which there is, at least, much appearance of reason on both sides; in such cases, therefore, not only the losing party, hut others, not immediately interested, would sometimes be led to doubt, whether the affirmance was entirely owing to the mere preponderance of right.

"'These, we presume, were among the reasons, which induced the convention to confine the Supreme Court, and consequently its judges, to appellate jurisdiction. We say "consequently its judges," because the reasons for the one apply also to the other.

"'We are aware of the distinction between a court and its judges; and are far from. thinking it illegal or unconstitutional, however it may be inexpedient, to employ them for other purposes, provided the latter purposes be consistent and compatible with the former. But from this distinction it cannot, in our opinions, be inferred, that the judges of the Supreme Court may also be judges of inferior and subordinate courts, and be at the same time both the controllers and the controlled.

"'The application of these remarks is obvious. The Circuit Courts established by the act are courts inferior and subordinate to the Supreme Court. They are vested with original jurisdiction in the cases, from which the Supreme Court is excluded; and to us it would appear very singular, if the constitution was capable of being so construed, as to exclude the court, but yet admit the judges of the court. We, for our parts, consider the constitution, as plainly opposed to the appointment of the same persons to both offices; nor have we any doubts of their legal incompatibility.

"'Bacon, in his Abridgment, says, that" offices are said to be incompatible and inconsistent, so as to be executed by one person, when from the multiplicity of business in them, they cannot be executed with care and ability; or when their being subordinate, and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty; and this, my Lord Coke says, is of that importance, that if all offices, civil and ecclesiastical, &c. were only executed, each by different persons, it would be for the good of the commonwealth and

adopted, "that the national legislature be empowered to appoint inferior tribunals," by the vote of seven states against three, one being divided;1 and ultimately this proposition received the unanimous approbation of the convention.2

advancement of justice, and preferment of deserving men. If a forester, by patent for his life, is made justice in Eyre of the same forest, hac vice, the forestership is become void; for these offices are incompatible, because the forester is under lite correction of the justice in Eyre, and he cannot judge himself. Upon a mandamus to restore one to the place of town-clerk, it was returned, that he was elected mayor and sworn, and, therefore, they chose another town-clerk; and the court. were strong of opinion, that the offices were incompatible, because of the subordination. A coroner, made a sheriff, ceases to be a coroner; so a parson, made a bishop, and a judge of the Common Pleas, made a judge of the King's Bench," &c.

"'Other authorities on this point might be added; but the reasons, on which they rest, seem to us to require little elucidation, or support.

"'There is in the act another deviation from the constitution, which we think it incumbent on us to mention. "'The second section of the second article of the constitution declares, that the president shall nominate, and by and with the advice and consent of the senate, "shall appoint judges of the Supreme Court, and all other officers of the United States, whose appointments are not therein otherwise provided for."

"'The constitution not having otherwise provided for the appointment of the judges of the inferior courts, we conceive, that the appointment of some of them, viz. of the Circuit Courts, by an act of the legislature, is a departure from the constitution, and an exercise of powers, which constitutionally and exclusively belong to the president and senate.

"'We should proceed, sir, to take notice of certain defects in the act relative to expediency, which we think merit the consideration of the congress. But, as these are doubtless among the objects of the late reference, made by the house of representatives to the attorney-general, we think it most proper to forbear making any remarks on this subject at present.

"'We have the honour to be most respectfully,

"'Sir, your obedient and humble servants.

"'The President of the United States.'"

1 Journal of Convention, 69, 98, 99, 102, 137. 2 Id. 188, 212.

§ 1575. To the establishment of one court of supreme and final jurisdiction, there do not seem to have Seen any strenuous objections generally insisted on in the state conventions, though many were urged against certain portions of the jurisdiction, proposed by the constitution to be vested in the courts of the United States.1 The principal question seems to have been of a different nature, whether it ought to be a distinct coordinate department, or a branch of the legislature. And here it was remarked by the Federalist, that the same contradiction of opinion was observable among the opponents of the constitution, as in many other cases. Many of those, who objected to the senate, as a court of impeachment, upon the ground of an improper intermixture of legislative and judicial functions, were, at least by implication, advocates for the propriety of vesting the ultimate decision of all causes in the whole, or in apart of the legislative body.2

§ 1576. The arguments, or rather suggestions, upon which this scheme was propounded, were to the following effect. The authority of the Supreme Court of the United States, as a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the constitution will enable that court to mould them into whatever shape, it may think proper; especially, as its decisions will not be in any manner subject to the revision and correction of the legislative body. This is as unprecedented, as it is dangerous. In Great Britain the judicial power in the last resort resides in the house of lords, which is a branch of the legislature. And this part of the British government has been imi-

1 See 2 Elliot's Debates, 380 to 427.

2 The Federalist, No. 81.

rated in the state constitutions in general. The parliament of Great Britain, and the legislaturesof the several states, can at any time rectify by law the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable, and remediless.1

§ 1577. The friends of the constitution, in answer to these suggestions, replied, that they were founded in false reasoning, or a misconception of fact. In the first place, there was nothing in the plan, which directly empowered the national courts to construe the laws according to the spirit of the constitution, or which gave them any greater

latitude in this respect, than what was claimed and exercised by the state courts. The constitution, indeed, ought to be the standard of construction for the laws; and wherever there was an opposition, the laws ought to give place to the constitution. But this doctrine was not deducible from any circumstance peculiar to this part of the constitution, but from the general theory of a limited constitution; and, as far as it was true, it was equally applicable to the state governments.

§ 1578. So far as the objection went to the organization of the Supreme Court, as a distinct and independent department, it admitted of a different answer. It was founded upon the general maxim of requiring a separation of the different departments of government, as most conducive to the preservation of public liberty and private rights. It would not, indeed,

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1 The Federalist, No. 81. -- The learned reader will trace out, in subsequent periods of our history, the same objections revived, in other imposing forms under the sanction of men, who have attained high ascendancy and distinction in the struggles of party.

absolutely violate that maxim, to allow the ultimate appellate jurisdiction to be vested in one branch of the legislative body. But there were many urgent reasons, why the proposed organization would be preferable. It would secure greater independence, impartiality, and uniformity in the administration of justice.

§ 1579. The reasoning of the Federalist1 on this point is so clear and satisfactory, and presents the whole argument in so condensed a form, that it supersedes all farther formal discussion. "From a body, which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit, which had operated in making them, would be too apt to influence their construction; still less could it be expected, that men, who had infringed the constitution, in the character of legislators, would be disposed to repair the breach in that of judges. Nor is this all. Every reason, which recommends the tenure of good behaviour for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men selected for the knowledge of the laws, acquired by long and laborious study, to the revision and control of men, who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications, which fit men for the stations of judges; and as, on this account, there will be great

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1 The Federalist, No. 81.

reason to apprehend all the ill consequences of defective information; so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear, that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice both of law and equity.

§ 1580. "These considerations teach us to applaud the wisdom of those states, who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those, who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New-Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia; and the preference, which has been given to these models, is highly to be commended.1

§ 1581. "It is not true, in the second place, that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense, than might be done by a future legislature of the United States. The theory, neither of the British nor the state constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there any thing in the proposed constitution, more than in either of them, by which it is forbidden. In the former, as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot re-

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1 At the present time the same scheme of organizing the judicial power exists substantially in every state in the Union, except in N. York.

verse a determination, once made, in a particular case; though. it may prescribe a new rule for future cases. This is the principle, and it applies, in all its consequences, exactly in the same manner and extent to the state governments,

as to the national government, now under consideration. Not the least difference can be pointed out in any view of the subject.

§ 1582. "It may, in the last place, be observed, that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is, in reality, a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive, as to amount to an inconvenience, or, in any sensible degree, to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects, to which it relates; from the manner, in which it is exercised; from its comparative weakness; and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger, that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument

for constituting the senate a court for the trial of impeachments."

§ 1583. In regard to the power of constituting inferior courts of the Union, it is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It enables the 'national government to institute, or authorize, in each state or district of the United States, a tribunal competent to the determination of all matters of national jurisdiction within its limits. One of two courses only could be open for adoption; either to create inferior courts under the national authority, to reach all cases fit for the national jurisdiction, which either constitutionally, or conveniently, could not be of original cognizance in the Supreme Court; or to confide jurisdiction of the same cases to the state courts, with a right of appeal to the Supreme Court. To the latter course solid objections were thought to apply, which rendered it ineligible and unsatisfactory. In the first place, the judges of the state courts would be wholly irresponsible to the national government for their conduct in the administration of national justice; so, that the national government would, or might be, wholly dependent upon the good will, or sound discretion of the states, in regard to the efficiency, promptitude, and ability, with which the judicial authority of the nation was administered. In the next place, the prevalency of a local, or sectional spirit might be found to disqualify the state tribunals for a suitable discharge of national judicial functions; and the very modes of appointment of some of the state judges might render them improper channels of the judicial authority of the Union.1

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1 The Federalist, No. 81. See also Cohens v. Virginia, 6 Wheat. 386, 387.

State judges, holding their offices during pleasure, or from year to year, or for other short periods, would, or at least might, be too little independent to be relied upon for an inflexible execution of the national laws. What could be done, where the state itself should happen to be in hostility to the national government, as might well be presumed occasionally to be the case, from local interests, party spirit, or peculiar prejudices, if the state tribunals were to be the sole depositaries of the judicial powers of the Union, in the ordinary administration of criminal, as well as of civil justice? Besides; if the state tribunals were thus entrusted with the ordinary administration of the criminal and civil justice of the Union, there would be a necessity for leaving the door of appeal as widely open, as possible. In proportion to the grounds of confidence in, or distrust of the subordinate tribunals, ought to be the facility or difficulty of appeals. An unrestrained course of appeals would be a source of much private, as well as public inconvenience. It would encourage litigation, and lead to the most oppressive expenses.1 Nor should it be omitted, that this very course of appeals would naturally lead to great jealousies, irritations, and collisions between the state courts and the Supreme Court, not only from differences of opinions, but from that pride of character, and consciousness of independence, which would be felt by state judges, possessing the confidence of their own state, and irresponsible to the Union.2

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1 The Federalist, No. 81.

2 Mr Rawle has remarked, that "the state tribunals are no part of the government of the United States. To render the government of the United States dependent on them, would be a solecism almost as great, as to leave out an executive power entirely, and to call on the states alone to enforce the laws or the Union." Rawle on Const. ch. 21, p. 20

§ 1584. In considering the first clause of the third section, declaring, that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as the congress may from time to time ordain and establish," we are naturally led to the inquiry, whether congress possess any discretion, as to the creation of a Supreme Court and inferior courts, in whom the constitutional jurisdiction is to be vested. This was at one time matter of much discussion; and is vital to the existence of the judicial department. If congress possess any discretion on this subject, it is obvious, that the judiciary, as a co-ordinate department of the government, may, at the will of congress, be annihilated, or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner, or at what time, or under what circumstances it may, or ought to be exercised. The whole argument, upon which such an interpretation has been attempted to be maintained, is, that the language of the constitution, "shall be vested," is not imperative, but simply indicates the future tense. This interpretation has been overruled by the Supreme Court, upon solemn deliberation.1 "The language of the third article," say the court, "throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States shall be vested (not may be vested) in one Supreme Court, and in such inferior courts, as congress

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1 See Martin v. Hunter, 1 Wheat. R. 304, 316. -- The Commentator, in examining the structure and jurisdiction of the judicial department, is compelled by a sense of official reserve to confine his remarks chiefly to doctrines, which are settled, or which have been deemed incontrovertible, leaving others to be discussed by those, who are unrestrained by such considerations.

may, from time to time, ordain and establish. Could congress have lawfully refused to create a Supreme Court, or to vest in it the constitutional jurisdiction? 'The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive, for their services, a compensation, which shall not be diminished during their continuance in office.' Could congress create or limit any other tenure of the judicial office? Could they refuse to pay, at stated times, the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions; it must be in the negative. The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial department. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the constitution. How, otherwise, could crimes against the United States be tried and punished? How could causes between two states be heard and determined? The judicial power must, therefore, be vested in some court by congress; and to suppose, that it was not an obligation binding on them, but might, at their pleasure, be omitted, or declined, is to suppose, that, under the sanction of the constitution, they might defeat the constitution itself. A construction, which would lead to such a result, cannot be sound.

§ 1585. "The same expression, 'shall be vested,' occurs in other parts of the constitution, in defining the powers of the other co-ordinate branches of the government. The first article declares, that 'all legislative powers herein granted shall be vested in a congress of the United States.' Will it be contended, that the

legislative power is not absolutely vested? that the words merely refer to some future act, and mean only, that the legislative power may hereafter be vested? The second article declares, that 'the executive power shall he vested in a president of the United States of America.' Could congress vest it in any other person; or, is it to await their good pleasure, whether it is to vest at all? It is apparent, that such a construction, in either case, would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department?

§ 1586. If, then, it is a duty of congress to vest the judicial power of the United States, it is a duty to vest the whole judicial power. The language, if imperative, as to one part, is imperative, as to all. If it were otherwise, this anomaly would exist, that congress. might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdiction, as to all; for the constitution has not singled out any class, on which congress are bound to act in preference to others.

§ 1587. "The next consideration is as to the courts, in which the judicial power shall be vested. It is manifest, that a supreme court must be established;but whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If congress may lawfully omit to establish inferior courts, it might follow, that, in some of the enumerated cases, the judicial power could nowhere exist. The supreme court can have original jurisdiction in two classes of cases only, viz. in cases affecting ambassadors, other public ministers and consuls, and in cases, in which

a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself; and if, in any of the

cases enumerated in the constitution, the state courts did not then possess jurisdiction, the appellate jurisdiction of the supreme court (admitting that it could act on state courts) could not reach those cases; and, consequently, the injunction of the constitution, that the judicial power 'shall be vested,' would be disobeyed. It would seem, therefore, to follow, that congress are bound to create some inferior courts, in which to vest all that jurisdiction, which, under the constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.

§ 1588. "This construction will be fortified by an attentive examination of the second section of the third article. The words are 'the judicial power shall extend,' &c. Much minute and elaborate criticism has been employed upon these words. It has been argued, that they are equivalent to the words 'may extend,' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons, which have been already stated, we are of opinion, that the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted; for the American people had not made. any previous grant. The constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between states; and its structure and powers were

wholly unlike those of the national government. The constitution was an act of the people of the United States to supersede the confederation, and not to be ingrafted on it, as a stock through which it was to receive life and nourishment.

§ 1589. "If, indeed, the relative signification could be fixed upon the term 'extend,' it would not (as we shall hereafter see) subserve the purposes of the argument, in support of which it has been adduced. This imperative sense of the words 'shall extend,' is strengthened by the context. It is declared, that 'in all cases affecting ambassadors, &,c, the supreme court shall have original jurisdiction.' Could congress withhold original jurisdiction in these cases from the supreme court? The clause proceeds --'in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make.' The very exception here shows, that the framers of the constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception, congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.

§ 1590. "Other clauses in the constitution might be brought in aid of this construction; but a minute examination of them cannot be necessary, and would occupy too much time. It will be found, that, whenever a par-

ticulat object is to be effected, the language of the constitution is always imperative, and cannot be disregarded, without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised." We shall presently see the important bearing, which this reasoning has upon the interpretation of that section of the constitution, which concerns the jurisdiction of the national tribunals.

§ 1591. The constitution has wisely established, that there shall be one Supreme Court, with a view to uniformity of decision in all cases whatsoever, belonging to the judicial department, whether they arise at the common law or in equity, or within the admiralty and prize jurisdiction; whether they respect the doctrines of mere municipal law, or constitutional law, or the law of nations. It is obvious, that, if there were independent supreme courts of common law, of equity, and of admiralty, a diversity of judgment might, and almost necessarily would spring up, not only, as to the limits of the jurisdiction of each tribunal; but as to the fundamental doctrines of municipal, constitutional, and public law. The effect of this diversity would be, that a different rule would, or might be promulgated on the most interesting subjects by the several tribunals; and thus the citizens be involved in endless doubts, not only as to their private rights, but as to their public duties. The constitution itself would or might speak a different language according to the tribunal, which was called upon to interpret it; and thus interminable disputes embarrass the administration of justice throughout the whole country.1 But the same reason did not

1 Dr. Paley's remarks, though general in their character, show a striking coincidence of opinion between the wisdom of the new, and the

apply to the inferior tribunals. These were, therefore, left entirely to the discretion of congress, as to their number, their jurisdiction, and their powers. Experience might, and probably would, show good grounds for varying and modifying them from time to time. It would not only have been unwise, but exceedingly inconvenient, to have fixed the arrangement of these courts in the constitution itself; since congress would have been disabled thereby from adapting them from time to time to the exigencies of the country.2 But, whatever may be the extent, to which the power of congress reaches, as to the establishment of inferior tribunals, it is clear from what has been already stated, that all the jurisdiction contemplated by the constitu-

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wisdom of the old world. Speaking on the subject or the necessity of one supreme appellate tribunal he says: "But, lastly, if several courts, co-ordinate to and independent or each other, subsist together in the country, it seems necessary, that the appeals from all of them should meet and terminate in the same judicature; in order, that one supreme tribunal, by whose final sentence all others are hound and concluded, may superintend and preside over the rest. This constitution is necessary for two purposes; -- to preserve a uniformity in the decisions of inferior courts, and to maintain to each the proper limits or its jurisdiction. Without a common superior, different courts might establish contradictory rules or adjudication, and the contradiction be final and without remedy; the same question might receive opposite determinations, according as it was brought before one court or another, and the determination in each be ultimate and irreversible. A common appellant jurisdiction prevents or puts an end to this confusion. For when the judgments upon appeals are consistent, (which may be expected, while it is the same court, which is at last resorted to,) the different courts, from which the appeals are brought will be reduced to a like consistency with one another. Moreover, if questions arise between courts independent or each other, concerning the extent and boundaries of their respective jurisdiction, as each will be desirous or enlarging it, own, an authority, which both acknowledge, can alone adjust the controversy. Such a power, therefore, must reside somewhere, lost the rights and repose of the country be distracted by the endless opposition and mutual encroachments of its courts of justice."

2 See 2 Elliot's Debates, 380.

tion must be vested in some of its courts, either in an original, or an appellate form.

§ 1592. We next come to the consideration of those securities, which the constitution has provided for the due independence and efficiency or the judicial department.

§ 1593. The mode of appointment of the judges has necessarily come under review, in the examination of the structure and powers of the executive department. The president is expressly authorized, by and with the consent of the senate, to appoint the judges of the Supreme Court. The appointment of the judges of the inferior courts, is not expressly provided for; but has either been left to the discretion of congress, or silently belongs to the president, under the clause of the constitution authorizing him to appoint "all other officers of the United States, whose appointments are not herein otherwise provided for."1 In the convention, a proposition at first. prevailed, for the appointment of the judges of the Supreme Court by the senate, by a decided majority.2 At a later period, however, upon the report of a committee, the appointment of the judges of the Supreme Court, was given to the president, subject to the advice and consent of the senate, by a unanimous vote.3 The reasons for the change, were doubtless the same as those, which

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1 Whether the Judges of the inferior. courts of the United Slates are such inferior officers, as the constitution contemplates to be within the power of congress, to prescribe the mode of appointment of so as to vest it in the president alone, or in the courts of law, or in the heads of departments, is a point, upon which no solemn judgment has ever been had. The practical construction has uniformly been, that they are not such inferior officers. And no act of congress prescribes the mode of their appointment. See the American Jurist for October, 1830, vol. 4, art. V.p. 298.

2 Journal of Convention, 19, 98, 121, 137, 186, 187, 195, 196, 211, 212.

3 Id. 325, 326, 340.

led to the vesting of other high appointments in the executive department.1

§ 1594. The next consideration is the tenure, by which the judges hold their offices. It is declared that "the judges, both of the Supreme and In-

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1 The Federalist, No. 78. -- Mr. Chancellor Kent has summed up the reasoning, in favour of an appointment of he judges by the executive, with his usual strength. "The advantages of the mode of appointment of public officers by the president and senate have been already considered. This mode is peculiarly fit and proper, in respect to the judiciary department. The just and vigorous investigation and punishment of every species of fraud and violence, and the exercise of the power of compelling every men, to the punctual performance of his contracts, are grave duties, not of the most popular character, though the faithful discharge of them, will certainly command the calm approbation of the judicious observer. The fittest men would probably have too much reservedness of manners, and severity of morals, to secure an election resting on universal suffrage. Nor can the mode of appointment by a large deliberative assembly be entitled to unqualified approbation. There are too many occasions, and too much temptation for intrigue, party prejudice, and local interests, to permit such a body of men to act, in respect to such appointments, with a sufficiently single and steady regard for the general welfare. In ancient Rome, the praetor was chosen annually by the people, but it was in the comitia by centuries; and the choice was confined to persons belonging to the patrician order, until the close of the fourth century of the city, when the office was rendered accessible to the plebeians; and when they became licentious, says Montesquieu, the office became corrupt. The popular elections did very well, u he observes. so long as the people were free, and magnanimous, and virtuous, and the public was without corruption. But all plans of government, which suppose the people will always act with wisdom and integrity, are plainly Utopian, and contrary to uniform experience. Government must be framed for man, as he is, and not for man, as he would be, if he were free from vice. Without referring to those cases in our own country, where judges have been annually elected by a popular assembly, we may take the less invidious case of Sweden. During the diets, which preceded the revolution in 1772, the states of the kingdom sometimes appointed commissioners to act as judges. The strongest party, says Catteau, prevailed in the trials, that came before them; and persons condemned by one tribunal were acquitted by another" 1 Kent's Comm. Lect 14, p. 273, 274, (2d edition. p. 291, 292.)

ferior Courts shall hold their offices during good behaviour."1 Upon this subject, the Federalist has spoken with so much clearness and force, that little can be added to its reasoning. "The standard of good behaviour, for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince: in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient, which can be devised in any government, to secure a steady, upright, and impartial administration of the laws. Whoever attentively considers the different departments of power, must perceive, that in a government, in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy, or injure them. The executive not only dispenses the honours, but holds the sword of the community. The legislature, not only commands the purse, but prescribes the rules, by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword, or the purse; no direction either of the strength, or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force, nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm, for the efficacious exercise even of this faculty.

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1 For the interpretation of the meaning of the words. good behaviour, see the judgment of Lord Holt, in Harcourt v. Fox; 1 Shower's R. 426, 506, 536. S. C. Shower's Cases in Parl. 158.

§ 1595. "This simple view of the matter suggests several important consequences. It proves incontestibly that the judiciary is, beyond comparison, the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that, though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislature and executive. -- For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.' It proves, in the last place, that as liberty can have nothing to

fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that, as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; that, as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may, therefore, be justly regarded, as an indispensable ingredient in its constitution; and, in a great measure, as the citadel of the public justice and the public security."

§ 1596. "If then, the courts of justice are to be considered, as the bulwarks of a limited constitution against legislative encroachments; this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute, so much

as this, to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty. This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves; and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though, I trust, the friends of the proposed constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the fight of the people to alter or abolish the established constitution, whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of

fortitude in the judges to do their duty, as faithful guardians of the constitution, where legislative invasions of it have been instigated by the major voice of the community.

§ 1597. "But it is not with a view to infractions of the constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no further, than to the injury of the private rights of particular classes of citizens by unjust and partial laws. Here, also, the firmness of the judicial magistracy is of vast importance, in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those, which may have been passed; but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may imagine. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those, whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure, that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable ten-

dency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

§ 1598. "That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges, who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch, which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance, that nothing would be consulted, but the constitution and the laws.

§ 1599. "There is yet a further and a weighty reason for the permanency of judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable, that they should be bound down by strict rules and precedents, which serve to define, and point out their duty in every particular case, that comes before them. And it will readily be conceived, from the variety or controversies, which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably

swell to a very considerable bulk, and must demand long and laborious study, to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those, who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands, less able, and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those, in which it is likely to be for a long time to come, the disadvantages on this score would be greater, than they may at first sight appear; but it must be confessed, that they are far inferior to those, which present themselves under the other aspects of the subject.

§ 1600. "Upon the whole, there can be no room to doubt, that the convention acted wisely in copying from the models of those constitutions, which have established good behaviour,as the tenure of judicial offices in point of duration; and that, so far from being blameable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government The experience of Great Britain affords an illustrious comment on the excellence of the institution."

§ 1601. These remarks will derive additional

strength and confirmation, from a nearer survey of the judicial branch of foreign governments, as well as of the several states composing the Union. In England, the king is considered, as the fountain of justice; not indeed as the author, but as the distributer of it; and he possesses the exclusive prerogative of erecting courts of judicature, and appointing the judges.1 Indeed, in early times, the kings of England often in person heard and decided causes between party and party. But as the constitution of government became more settled, the whole judicial power was delegated to the judges of the several courts of justice; and any attempt, on the part of the king, now to exercise it in person, Would be deemed an usurpation.2 Anciently, the English judges held their offices according to the tenure of their commissions, as prescribed by the crown, which was generally during the pleasure of the crown, as is the tenure of office of the Lord Chancellor, the judges of the courts of admiralty, and others, down to the present day. In the time of Lord Coke, the Barons of the Exchequer held their offices during good behaviour, while the judges of the other courts of common law held them only during pleasure.3 And it has been said, that, at the time of the restoration of Charles the Second, the commissions of the judges were during good behaviour.4 Still, however, it was at the

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1 1 Black. Comm. 267; 2 Hawk. B. 2, ch. 1, § 1, 2, 3; Corn. Dig. Prerogative, D. 28; Id. Courts, A; Id. Officers, A.; Id. Justices, A.

2 Ibid; 1 Woodes. Lect. III, p. 87; 4 Inst. 70, 71; 2 Hawk. B. 2, ch. 1, § 2, 3; 1 Black. Comm. 41, and note by Christian.

3 4 Coke Inst. ch. 12, p. 117; Id. ch. 7, p. 75. -- The tenure of office of the Attorney and Solicitor General was at this period during good behaviour; 4 Coke, Inst. 117.

4 1 Kent's Comm. Lect. 14, p. 275.

pleasure of the crown, to prescribe what tenure of office it might choose, until after the revolution of 1688; and there can be no doubt, that a monarch so profligate as Charles the Second, would avail himself of the prerogative, as often as it suited his political, or other objects.

§ 1609. It is certain, that this power of the crown must have produced an influence upon the administration, dangerous to private rights, and subversive of the public liberties of the subjects. In political accusations, in an especial manner, it must often have produced the most disgraceful compliances with the wishes of the crown; and the most humiliating surrenders of the rights of the accused.1 The Statute of 13 Will. 3, ch. 2, provided, that the

commissions of the judges of the courts of common law should not be as formerly durante bene placito, but should be quam din bene se gesserint, and their salaries be ascertained, and established. They were made removeable, however, by the king, upon the address of both houses of parliament; and their offices expired by the demise of the king. Afterwards by a statute enacted in the reign of George the Third, at the earnest recommendation of the king, a noble improvement was made in the law, by which the judges are to hold their offices during go od behaviour, notwithstanding any demise of the crown; and their full salaries are secured to them, during the continuance of their commissions.2 Upon that occasion, the monarch made a declaration, worthy of perpetual

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1 See De Lolme, B. 2, ch. 16, p. 350 to 354, 362. -- The State Trials before the year 1688 exhibit the most gross and painful illustrations of these remarks. Subserviency to the crown was so general in state prosecutions, that it ceased almost to attract public indignation.

2 1 Black. Comm. 267, 268.

remembrance, that "he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honour of the crown."1 Indeed, since the independence of the judges has been secured by this permanent duration of office, the administration of justice has, with a single exception,2 flowed on in England, with an uninterrupted, and pure, and unstained current. It is due to the enlightened tribunals of that nation to declare, that their learning, integrity, and impartiality, have commanded the reverence and respect, as well of America, as Europe.3 The judges of the old parliaments of France (the judicial tribunals of that country) were, before the revolution, appointed by the crown; but they held their offices for life; and this tenure of office gave them substantial independence. Appointed by the monarch, they were considered as nearly out of his power. The most determined exertions of that authority against them only showed their radical independence. They composed permanent bodies politic, constituted to resist arbitrary innovation; and from that corporate constitution, and from most of their powers they were well calculated to afford both certainty and stability to the laws. They had been a safe asylum to secure their laws, in all the revolutions of human opinion. They had saved that sacred deposit of the

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1 1 Black. Comm. 267, 268.

2 Lord Macclesfield.

3 De Lolme has dwelt on this subject, with abundant satisfaction. (De Lolme, B. 2, ch. 16, p. 363 to 365.) The Eulogy of Emerigon has been often quoted, and in,Iced is as true, as it is striking. 2 Emerigon, 67, cited in 1 Marshall on Insurance, Preliminary Discourse, p. 30, note.

country during the reigns of arbitrary princes, and the struggles of arbitrary factions. They kept alive the memory and record of the constitution. They were the great security to private property, which might be said (when personal liberty had no existence,) to be as well guarded in France, as in any other country.1

§ 1603. The importance of a permanent tenure of office, to secure the independence, integrity, and impartiality of judges, was early understood in France. Louis the Eleventh, in 1467, made a memorable declaration, that the judges ought not to be deposed, or deprived of their offices, but for a forfeiture previously adjudged, and judicially declared by a competent tribunal. The same declaration was often confirmed by his successors; and after the first excesses of the French revolution were passed, the same principle obtained a public sanction. And it has now become incorporated, as,a fundamental principle, into the present charter of France, that the judges appointed by the crown shall be irremoveable.2 Other European nations have followed the same example;3 and it is highly probable, that as the principles of free governments prevail, the necessity of thus establishing the independence of the judiciary will be generally felt, and firmly provided for.4

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1 This is the very language of Mr. Burke in his Reflections on the French Revolution. See also De Lolme, B. 1, ch. 12, p. 159, note.

2 Merlin's Repertoire, art. Juge, No. 3.

3 1 Kent's Comm. Lect. 14. p. 275.

4 Dr. Paley's remarks on this subject are not the least valuable of his excellent writings. "The next security for the impartial administration of justice, especially in decisions, to which government is a party, is the independency of the judges. As protection against every illegal attack upon the rights of the

subject by the servants of the crown is to be sought for from these tribunals, the judges of the land become not unfrequently the arbitrators between the king and the people; on

§ 1604. It has sometimes been suggested, that, though in monarchial governments the independence of the judiciary is essential, to guard the rights of the subjects from the injustice and oppression of the crown; yet that the same reasons do not apply to a republic, where the popular will is sufficiently known, and ought always to be obeyed.1 A little consideration of the subject will satisfy us, that, so far from this being true, the reasons in favour of the independence of the judiciary apply with augmented force to republics; and especially to such as possess a written constitution with defined powers, and limited rights.

§ 1605. In the first place, factions and parties are quite as common, and quite as violent in republics, as in monarchies; and the same safeguards are as indispensable in the one, as in the other, against the encroachments of party spirit, and the tyranny of factions. Laws, however wholesome or necessary, are frequently the objects of temporary aversion, and popular odium, and sometimes of popular resistance.2

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which account they ought to be independent of either; or, what is the same thing, equally dependent upon both: that is, if they be appointed by the one, they should be removable only by the other. This was the policy, which dictated the memorable improvement in our constitution, by which the judges, who before the revolution held their offices during the pleasure of the king, can now be deprived of them only by an address from both houses of parliament; as the most regular, solemn, and authentic way, by which the dissatisfaction of the people can be expressed. To make this independency of the judges complete, the public salaries of their office ought not only to be certain both in amount and continuance, but so liberal, as to secure their integrity from the temptation of secret bribes; which liberality will answer, also, the further purpose of preserving their jurisdiction from contempt, and their characters from suspicion; as well as of rendering the office worthy of the ambition of men of eminence in their procession." 1 4 Jefferson's Corresp. 287, 288, 289, 316, 352.

2 1 Kent's Comm. Lect. 14, p. 275.

Nothing is more facile in republics, than for demagogues, under artful pretences, to stir up combinations against the regular exercise of authority. Their selfish purposes are too often interrupted by the firmness and independence of upright magistrates, not to make them at all times hostile to a power, which rebukes, and an impartiality, which condemns them. The Judiciary, as the weakest point in the constitution, on which to make an attack, is therefore, constantly that, to which they direct their assaults; and a triumph here, aided by any momentary popular encouragement, achieves a lasting victory over the constitution itself. Hence, in republics, those, who are to profit by public commotions, or the prevalence of faction, are always the enemies of a regular and independent administration of justice. They spread all sorts of delusion, in order to mislead the public mind, and excite the public prejudices. They know full well, that, without the aid of the people, their schemes must prove abortive; and they, therefore, employ every art to undermine the public confidence, and to make the people the instruments of subverting their own rights and liberties.

§ 1606. It is obvious, that, under such circumstances, if the tenure of office of the judges is not permanent, they will soon be rendered odious, not because they do wrong; but because they refuse to do wrong; and they will be made to give way to others, who shall become more pliant tools of the leading demagogues of the day. There can be no security for the minority in a free government, except through the judicial department. In a monarchy, the sympathies of the people are naturally enlisted against the meditated oppressions of their ruler; and they screen his victims from his vengeance. His is the cause of one against the

community. But, in free governments, where the majority, who obtain power for the moment, are supposed to represent the will of the people, persecution, especially of a political nature, becomes the cause of the community against one. It is the more violent and unrelenting, because it is deemed indispensable to attain power, or to enjoy the fruits of victory. In free governments, therefore, the independence of the judiciary becomes far more important to the security of the rights of the citizens, than in a monarchy; since it is the only barrier against the oppressions of a dominant faction, armed for the moment.with power, and abusing the influence, acquired under accidental excitements, to overthrow the institutions and liberties, which have been the deliberate choice of the people.1

§ 1607. In the next place, the independence of the judiciary is indispensable to secure the people against the intentional, as well as unintentional, usurpations of the executive and legislative departments. It has been observed with great sagacity, that power is perpetually stealing from the many to the few; and the tendency of the legislative

department to absorb all the other powers of the government has always been dwelt upon by statesmen and patriots, as a general truth, confirmed by all human experience.2 If the judges are appointed at short intervals, either by the legislative, or the executive department, they will naturally, and, indeed, almost necessarily, become mere dependents upon the appointing power. If they have any desire to obtain, or to hold office, they will at all times evince a desire to follow, and obey the will of the predominant power

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1 1 Kent's Comm. Lect. 14, p. 275, 276.

2 1 Wilson's Law Lect. 461, 462, 463.

in the state. Justice will be administered with a faultering and feeble hand. It will secure nothing, but its own place, and the approbation of those, who value, because they control it. It will decree, what best suits the opinions of the day; and it will forget, that the precepts of the law rest on eternal foundations. The rulers and the citizens will not stand upon an equal ground in litigations. The favourites of the day will overawe by their power, or seduce by their influence; and thus, the fundamental maxim of a republic, that it is a government of laws, and not of men, will be silently disproved, or openly abandoned.1

§ 1608. In the next place, these considerations acquire (as has been already seen) still more cogency and force, when applied to questions of constitutional law. In monarchies, the only practical resistance, which the judiciary can present, is to the usurpations of a single department of the government, unaided, and acting for itself. But, if the executive and legislative departments are combined in any course of measures, obedience to their will becomes a duty, as well as a necessity. Thus, even in the free government of Great Britain, an act of parliament, combining, as it does, the will of the crown, and of the legislature, is absolute and omnipotent. It cannot be lawfully resisted, or disobeyed. The judiciary is bound to carry it into effect at every hazard, even though it should sub-

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1 It is far from being true, that the gross misconduct of the English Judges in many state prosecutions, while they held their offices during the pleasure of the crown, was in compliance only with the mere will of the monarch. On the contrary, they administered but too keenly to popular vengeance, acting under delusions of an extraordinary nature, sometimes political, sometimes religious, and sometimes arising from temporary prejudices.

vert private rights and public liberty.1 But it is far otherwise in a republic, like our own, with a limited constitution, prescribing at once the powers of the rulers, and the rights of the citizens.2 This very circumstance would seem conclusively to show, that the independence of the judiciary is absolutely indispensable to preserve the balance of such a constitution. In no other way can there be any practical restraint upon the acts of the government, or any practical enforcement of the rights of the citizens.3 This. subject has been already examined very much at large, and needs only to be touched in this place. No man can deny the necessity of a judiciary to interpret the constitution and laws, and to preserve the citizens against oppression and usurpation in civil and criminal prosecutions. Does it not follow, that, to enable the judiciary to fulfil its functions, it is indispensable, that the judges should not hold their offices at the mere pleasure of those, whose acts they are to check, and, if need be, to declare

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1 See 1 Black. Comm. 9; Woodeson's Elements of Jurisprudence, Lect. 3, p. 48.

2 1 Wilson's Law Lect. 460, 462.

3 The remarks of Mr. Boudinot on this subject, in a debate in the house of representatives, deserve insertion in this place, from his high character for wisdom and patriotism. "It has been objected," says he, "that, by adopting the bill before us, we expose the measure to be considered, and defeated t,y the judiciary of the United States, who may adjudge it to be contrary to the constitution, and therefore void, and not lend their aid to carry it into execution. This gives me no uneasiness. I am so far from controverting this right in the judiciary, that it is my boast, and my confidence. It leads me to greater decision on all subjects of a constitutional nature, when I reflect, that, if from inattention, want of precision, or any other defect, I should do wrong, there is a power in the government, which can constitutionally prevent the operation of a wrong measure from affecting my constituents. I am legislating for a nation, and for thousands yet unborn; and it is the glory of the constitution, that there is a remedy for the failures even of the legislature itself." 1 Wilson's Law Lect. 462, 463.

void? Can it be supposed for a moment, that men holding their offices for the short period of two, or four, or even six years, will be. generally found firm enough to resist the will of those, who appoint them, and may remove them?

§ 1609. The argument of those, who contend for a short period of office of the judges, is founded upon the necessity of a conformity to the will of the people. But the argument proceeds upon a fallacy, in supposing, that the will of the rulers, and the will of the people are the same. Now, they not only may be, but often actually are, in direct variance to each other. No man in a republican government can doubt, that the will of the people is, and ought to be, supreme. But it is the deliberate will of the people, evinced by their solemn acts, and not the momentary ebullitions of those, who act for the majority, for a day, or a month, or a year. The constitution is the will, the deliberate will, of the people. They have declared under what circumstances, and in what manner it shall be amended, and altered; and until a change is effected in the manner prescribed, it is declared, that it, shall be the supreme law of the land, to which all persons, rulers, as well as citizens, must bow in obedience. When it is constitutionally altered, then and not until then, are the judges at liberty to disregard its original injunctions. When, therefore, the argument is pressed, that the judges ought to be subject to the will of the people, no one doubts the propriety of the doctrine in its true and legitimate sense.

§ 1610. But those, who press the argument, use it in a far broader sense. In their view, the will of the people, as exhibited in the choice of the rulers, is to be followed. If the rulers interpret the constitution dif-

ferently from the judges, the former are to be obeyed, because they represent the opinions of the people; and therefore, the judges ought to be removable, or appointed for a short period, so as to became subject to the will of the people, as expressed by and through their rulers. But, is it not at once seen, that this is in fact subverting the constitution? Would it not make the constitution an instrument of flexible and changeable interpretation, and not a settled form of government with fixed limitations? Would it not become, instead of a supreme law for ourselves and our posterity, a mere oracle of the powers of the rulers of the day, to which implicit homage is to be paid, and speaking at different times the most opposite commands, and in the most ambiguous voices? In short, is not this an attempt to erect, behind the constitution, a power unknown, and unprovided for by the constitution, and greater than itself? What become of the limitations of the constitution, if the will of the people, thus inofficially promulgated, forms, for the time being, the supreme law, and the supreme exposition of the law? If the constitution defines the powers of the government, and points out the mode of changing them; and yet, the instrument is to expand in the hands of one set of rulers, and to contract in those of another, where is the standard? If the will of the people is to govern in the construction of the powers of the constitution, and that will is to be gathered at every successive election at the polls, and not from their deliberate judgment, and solemn acts in ratifying the constitution, or in amending it, what certainty can there be in those powers? If 'the constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to

prevail, the first, or the last? When, therefore, it is said, that the judges ought to be subjected to the will of the people, and to conform to their interpretation of the constitution, the practical meaning must be, that they should be subjected to the control of the representatives of the people in the executive and legislative departments, and should interpret the constitution, as the latter may, from time to time, deem correct.

§ 1611. But it is obvious, that ejections can rarely, if ever, furnish any sufficient proofs, what is deliberately the will of the people, as to any constitutional or legal doctrines. Representatives and rulers must be ordinarily chosen for very different purposes; and, in many instances, their opinions upon constitutional questions must be unknown to their constituents. The only means known to the constitution, by which to ascertain the will of the people upon a constitutional question, is in the shape of an affirmative or negative proposition by way of amendment, offered for their adoption in the mode prescribed by the constitution. The elections in one year may bring one party into power; and in the next year their opponents, embracing opposite doctrines, may succeed; and so alternate success and defeat may perpetually recur in the same districts, and in the same, or different states.

§ 1612. Surely it will not be pretended, that any constitution, adapted to the American people, could ever contemplate the executive and legislative departments of the government, as the ultimate depositaries of the power to interpret the constitution; or as the ultimate representatives of the will of the people, to change it at pleasure. If, then, the judges were appointed for two, or four, or six years, instead of during good behaviour, the only security, which the peo-

pie would have for a due administration of public justice, and a firm support of the constitution, would be, that being dependent upon the executive for their appointment during their brief period of office, they might, and would represent more fully, for the time being, the constitutional opinion of each successive executive; and thus carry into effect his system of government. Would this be more wise, or more safe, more for the permanence of the constitution, or the preservation of the liberties of the people, than the present system? Would the judiciary, then,

be, in fact, an independent co-ordinate department? Would it protect the people against an ambitious or corrupt executive; or restrain the legislature from acts of unconstitutional authority?1

§ 1613. The truth is, that, even with the most secure tenure of office, during good behaviour, the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day. In a monarchy, the judges, in the performance

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1 Mr. Jefferson, during the latter years of his life, and indeed from the time, when he became president of the United States, was a most strenuous advocate of the plan of making the judges hold their offices for a limited term of years only lie proposed, that their appointments should be for four, or six years, renewable by the president and senate. It is not my purpose to bring his opinions into review, or to comment on the terms, in which they are expressed. It is impossible not to perceive, that he entertained a decided hostility to the judicial department; and that he allowed himself in language of insinuation against the conduct of judges, which is little calculated to add weight to his opinions. He wrote on this subject apparently with the feelings of a partisan, and under influences, which his best friends will most regret. See 1 Jefferson's Corresp. 65, 66; 4 Jefferson's Corresp. 74, 75, 287, 288, 289, 317, 337, 352. His earlier opinions were of a different character. See Jefferson's Notes on Virginia, 195; Federalist, No. 48.

of their duties with uprightness and impartiality, will always have the support of some of the departments of the government, or at least of the people. In republics, they may sometimes find the other departments combined in hostility against the judicial; and even the people, for a while, under the influence of party spirit and turbulent factions, ready to abandon them to their fate.1 Few men possess the firmness to resist the torrent of popular opinion; or are content to sacrifice present ease and public favour, in order to earn the slow rewards of a conscientious discharge of duty; the sure, but distant, gratitude of the people; and the severe, but enlightened, award of posterity.2

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1 An objection was taken in the Pennsylvania convention against the constitution of the United States, that the judges were not made sufficiently independent, because they might hold other offices. 3 Elliot's Debates, 300, 313, 314.

2 Mr. (now Judge) Hopkinson has treated this subject, as he has treated every other, failing within the range of his forensic or literary labours, in a masterly manner. I extract the following passages from his Defence of Mr. Justice Chase, upon his Impeachment, as equally remarkable for truth, wisdom, and eloquence.

"The pure and upright administration of justice is of the utmost importance to any people; the other movements of government are not of such universal concern. Who shall be president,.or what treaties or general statutes shall be made, occupies the attention of a few busy politicians; but these things touch not, or but seldom, the private interests and happiness of the great mass of the community. But the settlement of private controversies, the administration of law between man and man, the distribution of justice and right to the citizen in his private business and concern, comes to every man's door, and is essential to every man's prosperity and happiness. Hence I consider the judiciary of our country most important among the branches of government, and its purity and independence of the most interesting consequence to every man. Whilst it is honorably and fully protected from the influence of favour, or fear, from any quarter, the situation of a people can never be very uncomfortable or unsafe. But if a judge is for ever to be exposed to prosecutions and impeachments for his official conduct on the mere suggestions of caprice, and to be condemned by the mere voice of prejudice, under the specious name of common sense, can he hold

§ 1614. If passing from general reasoning, an appeal is made to the lessons of experience, there is every thing to convince us, that the judicial depart-

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that firm and steady hand his high functions require? No; if his nerves ere of iron, they must tremble in so perilous a situation. In England the complete independence of the judiciary has been considered, and has been found the best and surest safeguard of true liberty, securing a government of known and uniform laws, acting alike upon every man. It has, however, been suggested by some of our newspaper politicians, perhaps from a higher source, that although this independent judiciary is very necessary in a monarchy to protect the people from the oppression of a court, yet that in our republican institution the

same reasons for it do not exist; that it is indeed inconsistent with the nature of our government, that any part or branch of it should be independent of the people, from whom the power is derived. And, as the house of representatives come most frequently from this great source of power, they claim the best right of knowing and expressing its will; and of course the right of a controlling influence over the other branches. My doctrine is precisely the reverse of this.

"If I were called upon to declare, whether the independence of judges were more essentially important in a monarchy, or a republic, I should certainly say, in the latter, all governments require, in order to give them firmness, stability, and character, some permanent principle; some settled establishment. The want of this is the great deficiency in republican institutions; nothing can be relied upon; no faith can be given, either at home or abroad, to a people, whose systems, and operations, and policy, are constantly changing with popular opinion; if, however, the judiciary is stable and independent; if the rule of justice between men rests on permanent and known principles, it gives a security end character to a country, which is absolutely necessary in its intercourse with the world, and in its own internal concerns. This independence is further requisite, as a security from oppression. History demonstrates; from page to page, that tyranny and oppression have not been confined to despotisms, but have been freely exercised in republics, both ancient and modern; with this difference, -- that in the latter, the oppression has sprung from the impulse of some sudden gust of passion or prejudice, while, in the former, it is systematically planned and pursued, as an ingredient and principle of the government; the people destroy not deliberately, and will return to reflection and justice, if passion is not kept alive and excited by artful intrigue; but, while the fit is on, their devastation and cruelty is more terrible and unbounded, than the most monstrous tyrant. It is for their own benefit, and to protect them from the violence of their own passions, that it is essential to have some firm, unshaken, independent, branch of government, able

ment is safe to a republic, with the tenure of office during good behaviour; and that justice will ordinarily be best administered, where there is most independence. Of the state constitutions, five only out of twentyfour have provided for any other tenure of office, than during good behaviour; and those adopted by the new states admitted into the Union, since the formation of the national government, have, with two or three exceptions only, embraced the same permanent tenure of office.1 No one can hesitate to declare, that in the states, .where the judges hold their offices during good. behaviour, justice is administered with wisdom, moderation, and firmness; and that the public confidence has reposed upon the judicial department, in the most critical times, with unabated respect. If the same can be said in regard to other states, where the judges enjoy a less permanent tenure of office, it will not answer the reasoning, unless it can also be shown, that the judges have never been removed for political causes, wholly distinct from their own merit; and yet have often deliberately placed themselves in opposition to the popular opinion.2

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and willing to resist their phrenzy; if we have read of the death of Seneca, under the ferocity of a Nero; we have read too of the murder of a Socrates, under the delusion of a republic. An independent and firm judiciary, protected god protecting by the laws, would have snatched the one from the fury of a despot, and preserved the other from the madness ore people." 2 Chase's Trial, 18, 19, 20. 1 Dr. Lieber's Encyclopedia Americana, Art. Constitutions of the United Stales.

2 It affords me very great satisfaction to be able to cite the opinions of two eminent commentators on this subject, who, differing in many other views of constitutional law, concur in upholding the necessity of an independent judiciary in a republic. Mr. Chancellor Kent, in his Commentaries, says:

"In monarchical governments, the independence of the judiciary is essential to guard the rights of the subject from the injustice of the crown; but in republics it is equally salutary, in protecting the constitution and

§ 1615. The considerations above stated lead to the conclusion, that in republics there are, in reality, stronger reasons for an independent tenure of office

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laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object or temporary aversion, and sometimes of popular resistance. It is requisite, that the courts of justice should be able at all times, to present a determined countenance against all licentious acts; and, to give them the firmness to do it, the judges ought to be confident of the security of their stations. Nor is an independent judiciary less useful, as a check upon the legislative power. which is sometimes disposed, from the force of passion, or the temptations of interest, to make a sacrifice of

constitutional rights; and it is a wise and necessary principle of our government, as will be shown hereafter in the course of these lectures, that legislative acts are subject to the severe scrutiny and impartial interpretation of the courts of justice, who are bound to regard the constitution, as the paramount law, and the highest evidence of the will of the people." 1 Kent's Comm. Lect 14, p. 293, 294.

Mr. Tucker, in his Commentaries, makes the following remarks:

"The American constitutions appear to be the first, in which this absolute independence of tim judiciary hag formed one of the fundamental principles of the government. Doctor Ratherforth considers the judiciary, as a branch only of the executive authority; and such, in strictness, perhaps, it is in other countries, its province being to advise the executive, rather than to act independently of it." "But, in the United States of America, the judicial power is a distinct, separate, independent, and co-ordinate branch of the government; expressly recognized as such in our state bill of rights, and constitution. and demonstrably so, likewise, by the federal constitution, from which the courts of the United States derive all their powers, in like manner, as the legislative and executive departments derive. theirs. The obligation, which the constitution imposes upon the judiciary department, to support the constitution of the United States, would be nugatory, if it were dependent upon either of the other branches of the government, or in any manner subject to their control, since such control might operate to the destruction, instead of the support, of the constitution. Nor can it escape observation, that to require such an oath on the part of the judges, on the one hand, and yet suppose them hound by acts of the legislature, which may violate the constitution, which they have sworn to support. carries with it such a degree of impiety, as well as absurdity, as no man, who pays any regard to the obligations of an oath, can be supposed, either to contend for, or to defend.

"This absolute independence of the judiciary, both of the executive and the legislative departments, which I contend is to be found, both

by the judges, a tenure during good behaviour, than in a monarchy. Indeed, a republic with a limited constitution, and yet without a judiciary sufficiently inde-

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in the letter, and spirit of our constitutions, is not less necessary to the liberty and security of the citizen, and his property, in a republican government, than in a monarchy. If, in the latter, the will of the prince may be considered, as likely to influence the conduct of judges created occasionally, and holding their offices only during his pleasure, more especially in eases, where a criminal prosecution may be carried on by his orders, and supported by his influence; in a republic, on the other hand, the violence and malignity of party spirit, as well in the legislature, as in the executive, requires not less the intervention of, calm, temperate, upright, and independent judiciary, to prevent that violence and malignity from exerting itself 'to crush in dust and ashes' all opponents to its tyrannical administration, or ambitious projects. Such an independence can never be perfectly attained, but by a constitutional tenure of office, equally independent of the frowns and smiles of the other branches of the government. Judges ought, not only to be incapable of holding any other office at the same time, but even of appointment to any but a judicial office. For the hope of favour is always more alluring, and generally more dangerous, than the fear of offending. In England, according to the principles of the common law, a judge cannot hold any other office; and according to the practice there for more than a century, no instance can, I believe, be shown, where a judge has been appointed to any other, than a judicial office, unless it be the honorary post of privy counsellor, to which no emolument is attached. And even this honorary distinction is Seldom conferred, but upon the chief justice of the king's bench, if I have been rightly informed. To this cause, not less than to tile tenure of their offices during good behaviour, may we ascribe that pre-eminent integrity, which amidst surrounding corruption, beams with genuine lustre from the English courts of judicature, as from the sun through surrounding clouds and mists. To emulate both their wisdom and integrity is an ambition, worthy of the greatest characters in any country.

"If we consider the nature of the judicial authority, and the manner, in which it operates, we shall discover, that it cannot, of itself oppress any individual; for the executive authority must lend its aid in every instance, where oppression can ensue from its decisions: whilst, on the contrary, its decisions in favour of the citizen are carried into instantaneous effect, by delivering him from the custody and restraint of the executive officer, the moment, that an acquittal is pronounced. And herein consists one of the great excellencies of our constitution: that no individual can be oppressed, whilst this branch of the government remains independent, and uncorrupted: it being a necessary check

pendent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd, as a society organized without any restraints of law. It would become a democracy with unlimited powers, exercising through its rulers a universal despotic sovereignty. The very theory of a balanced republic of restricted powers presupposes some organized means to control, and resist, any excesses of authority. The people may, if they please, submit all power to their rulers for the time being; but, then, the government should receive its true appellation and character. It would be a government of tyrants, elective, it is true, but still tyrants; and it would become the more fierce, vindictive, and sanguinary, because it would perpetually generate factions in its own bosom, who could succeed only by the ruin of their enemies. It would be alternately characterized, as a reign of terror, and a reign of imbecility. It would be as cor-

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upon the encroachments, or usurpations of power, by either of the other."

"That absolute independence of the judiciary, for which we contend, is not, then, incompatible with the strictest responsibility; (for a judge is no more exempt from it, than .any other servant of the people, according to the true principles of the constitution;) but such an independence of the other co-ordinate branches of the government, as seems absolutely necessary to secure to them the free exercise of their constitutional functions, without the hope of pleasing, or the fear of offending. And, as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches, who have the custody of the purse and sword of the confederacy; and as nothing can contribute so much to its firmness and independence, as permanency in office, this quality, therefore, may be justly regarded, as an indispensable ingredient in its constitution; and in great measure, as the citadel of the public justice, and the public security." 1 Tuck. Black. Comm. App. 354, 356 to 360.

There is also a very temperate, and, at the same time, a very satisfactory elucidation of the same subject, in Mr. Rawle's work on the Constitution, (ch. 30.) It would be cheerfully extracted, if this note had not already been extended to an inconvenient length.

rupt, as it would be dangerous. It would form another model of that profligate and bloody democracy, which, at one time, in the French revolution, darkened by its deeds the fortunes of France, and left to mankind the appalling lesson, that virtue, and religion, genius, and learning, the authority of wisdom, and the appeals of innocence, are unheard and unfelt in the frenzy of popular excitement; and, that the worst crimes may be sanctioned, and the most desolating principles inculcated, under the banners, and in the name of liberty. In human governments, there are but two controlling powers; the power of arms, and the power of laws. If the latter are not enforced by a judiciary above all fear, and above all reproach, the former must prevail; and thus lead to the triumph of military over civil institutions. The framers of the constitution, with profound wisdom, laid the corner stone of our national republic in the permanent independence of the judicial establishment. Upon this point. their vote was unanimous.1 They adopted the results of an enlightened experience. They were not seduced by the dreams of human perfection into the belief, that all power might be safely left to the unchecked operation of the private ambition, or personal virtue of rulers. Nor, on the other hand, were they so lost to a just estimate of human concerns, as not to feel, that confidence must be reposed somewhere; if either efficiency, or safety are to be consulted in the plan of government. Having provided amply for the legislative and executive authorities, they established a balance-wheel, which, by its independent structure, should adjust the irregularities, and check the excesses of the occasional movements of the system.

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1 Journal of Convention, 100, 188.

§ 1616. In the convention a proposition was offered to make the judges removeable by the president, upon the application of the senate and house of representatives; but it received the support of a single state only.1

§ 1617. This proposition doubtless owed its origin to the clause in the act of parliament, (13 Will. 3 ch. 2,) making it lawful for the king to remove the judges on the address of both houses of parliament, notwithstanding the tenure of their offices during good behaviour, established by the same act.2 But a moment's reflection will teach us, that there is no just analogy in the cases. The object of the act of parliament was to secure the judges from removal at the mere pleasure of the crown; but not to render them independent of the action of parliament. By the theory of the British constitution, every act of parliament is supreme and omnipotent. It may change the succession to the crown; and even the very fundamentals of the constitution. It would have been absurd, therefore, to have exempted the judges alone from the general jurisdiction of this supreme authority in the realm. The clause was not introduced into the

act, for the purpose of conferring the power on parliament, for it could not be taken away, or restricted; but simply to recognize it, as a qualification of the tenure of office; so that the judges should have no right to complain of any breach of an implied contract with them, and the crown should not be deprived of the means to remove an unfit judge, whenever parliament should in their discretion signify their assent. Besides; in England the judges are not, and cannot be, called upon to de-

1 Journ. of Convention, 296.

2 1 Black. Comm. 266.

cide any constitutional questions; and therefore there was no necessity to place them, and indeed there would have been an impropriety in placing them, even if it had been possible, (which it clearly was not) in a situation, in which they would not have been under the control of parliament.

§ 1618. Far different is the situation of the people of the United States. They have chosen to establish a constitution of government, with limited powers and prerogatives, over which neither the executive, nor the legislature, have any power, either of alteration or control. It is to all the departments equally a supreme, fundamental, unchangeable law, which all must obey, and none are at liberty to disregard. The main security, relied on to check any irregular, or unconstitutional measure, either of the executive, or the legislative department, was (as we have seen) the judiciary. To have made the judges, therefore, removable, at the pleasure of the president and congress, would have been a virtual surrender to them of the custody and appointment of the guardians of the constitution. It would have been placing the keys of the citadel in the possession of those, against whose assaults the people were most strenuously endeavouring to guard themselves. It would be holding out a temptation to the president and congress, whenever they were resisted in any of their measures, to secure a perfect irresponsibility by removing those judges from office, who should dare to oppose their will. In short, in every violent political commotion or change, the judges would be removed from office, exactly as the lord chancellor in England now is, in order, that a perfect harmony might be established between the operations of all the departments of government. Such a power would have

been a signal proof of a solicitude to erect defences round the constitution, for the sole purpose of surrendering them into the possession of those, whose acts they were intended to guard against. Under such circumstances, it might well have been asked, where could resort be had to redress grievances, or to overthrow usurpations? Quis custodiet oustodes?

§ 1619. A proposition of a more imposing nature was to authorize a removal of judges for inability to discharge the duties of their offices. But all considerate persons will readily perceive, that such a provision would either not be practised upon, or would be more liable to abuse, than calculated to answer any good purpose. The mensuration of the faculties of the mind has no place in the catalogue of any known art or science. An attempt to fix the boundary between the region of ability and inability would much oftener give rise to personal, or party attachments and hostilities, than advance the interests of justice, or the public good.1 And instances of absolute imbecility would be too rare to justify the introduction of so dangerous a provision.

§ 1620. In order to avoid investigations of this sort, which must for ever be vague and unsatisfactory, some persons have been disposed to think, that a limitation of age should be assumed as a criterion of inability; so that there should be a constitutional removal from office, when the judge should attain a certain age. Some of the state constitutions have adopted such a limitation. Thus, in New-York, sixty years of age is a disqualification for the office of judge; and in some other states the period is prolonged to seventy. The value of these

1 The Federalist, No. 79. See Rawle on Constitution, ch. 30, p. 278, 279.

provisions has never, as yet, been satisfactorily established by the experience of any state. That they have worked mischievously in some cases is matter of public notoriety. The Federalist has remarked, in reference to the limitation in New-York,1 "there are few at present, who do not disapprove of this provision. There is no station, in which it is less proper, than that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men, who survive it. And when, in addition to this circumstance, we consider how few there are, who outlive the season of intellectual vigour, and how improbable it is, that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude, that limitations of this sort have little to recommend them. In a

1 The limitation of New-York struck from its bench one of the greatest names, that ever adorned it, in the full possession of his extraordinary powers. I refer to Mr. Chancellor Kent, to whom the jurisprudence of New-York owes a debt of gratitude, that can never be repaid. He is at once the compeer of Hardwicke and Mansfield. Since his removal from the bench, he has composed his admirable Commentaries,* a work, which will survive, as an honor to the country, long after all the perishable fabrics of our day shall be buried in oblivion. If he had not thus secured an enviable fame since his retirement, the public might have had cause to regret, that New-York should have chosen to disfranchise her best citizens at the time, when their services were most important, and their judgments most mature. Even the age of seventy would have excluded from public service some of the greatest minds which have belonged to our country. At eighty, said Mr. Jefferson, Franklin was the ornament of human nature. At eighty, Lord Mansfield still possessed in vigor his almost unrivalled powers. If seventy had been the limitation in the constitution of the United States, the nation would have lost seven years of as brilliant judicial labors, us have ever adorned the annals of the jurisprudence of any country.

*** While the present work was passing through the press, a second edition has been published by the learned author; and it his been greatly improved by his severe, gate, and accurate judgment.**

republic, where fortunes are not affluent, and pensions not expedient, the dismission of men from stations, in which they have served their country long and usefully, and on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity, than is to be found in the imaginary danger of a superannuated bench."1

§ 1621. It is observable, that the constitution has declared, that the judges of the inferior courts, as well as of the Supreme Court, of the United States, shall hold their offices during good behaviour. In this respect there is a marked contrast between the English government and our own. In England the tenure is exclusively confined to the judges of the superior courts, and does not (as we have already seen) even embrace all of these. In fact, a great portion of all the civil and criminal business of the whole kingdom is performed by persons delegated, pro hac vice, for this purpose under commissions issued periodically for a single circuit.2 It is true, that it is, and for a long period has been, ordinarily administered by the judges of the courts of King's Bench, Common Pleas, and Exchequer; but it is not so merely virtute officii, but under special commissions investing them from time to time with this authority in conjunction with other persons named in the commission. Such are the commissions of oyer and terminer, of assize, of gaol delivery, and of nisi prius, under which all civil and criminal trials of matters of fact are had at the circuits, and in the metropolis.3 By the constitu-

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1 The Federalist, No. 79. See Rawle on Const. ch. 30, p. 278, 279.

2 1 Wilson's Law Lect. 463, 464; 2 Wilson's Law Lect. 258, 259.

3 See 3 Black. Comm. 58, 59, 60.

tion of the United States all criminal and civil jurisdiction must be exclusively confided to judges holding their office during good behaviour; and though congress may from time to time distribute the jurisdiction among such inferior courts, as it may create from time to time, and withdraw it at their pleasure, it is not competent for them to confer it upon temporary judges, or to confide it by special commission. Even if the English system be well adapted to the wants of the nation, and secure a wise and beneficent administration of justice in the realm, as it doubtless does; still it is obvious, that, in our popular government, it would be quite too great a power, to trust the whole administration of civil and criminal justice to commissioners, appointed at the pleasure of the president. To the constitution of the United States, and to those, who enjoy its advantages, no judges are known, but such, as hold their offices during good behaviour.1

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1 1 Wilson's Law Lect. 464, 465. -- Mr. Tucker has spoken with a truly national pride and feeling on the subject of the national judiciary, in comparing it with that of England. "Whatever then has been said," says he, "by Baron Montesquieu, De Lolme, or Judge Blackstone, or any other writer, on the security derived to the subject from the independence of the judiciary of Great Britain, will apply at least as forcibly to that of the United States. We may go still further. In England the judiciary may be overwhelmed by a combination between the executive and the legislature. In America, (according to the true theory of our constitution,) it is rendered absolutely independent of, and superior to the attempts of both, to control, or crush it: First, by the tenure of office, which is during good behaviour; these words (by a long train of decisions in England, even as far back, as the reign of Edward the Third) in all

commissions and grants, public or private, importing an office, or estate, for the life of the grantee, determinable only by his death, or breach of good behaviour. Secondly, by the independence of the judges, in respect to their salaries, which cannot be diminished. Thirdly, by the letter of the constitution, which defines and limits the powers of the several co-ordinate branches of the government; and the spirit of it, which forbids any attempt on the part of either to subvert the

§ 1622. The next clause of the constitution declares, that the judges of the supreme and inferior courts "shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Without this provision the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery. The Federalist has here also spoken in language so direct and convincing, that it supersedes all other argument.

§ 1623. "Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. The remark made in relation to the president is equally applicable here. In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resource on the occasional grants of the latter. The enlightened friends to good government in every state have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these indeed have declared, that permanent salaries should be established for the judges; but the experiment has in some instances shown, that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been

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constitutional independence of the others. Lastly, by that uncontrollable authority in all eases of litigation, criminal or civil, which from the very nature of things is exclusively vested in this department, and extends to every supposable case, which can affect the life, liberty, or property of the citizens of America, under the authority of the federal constitution, and laws, except in the case of an impeachment." 1 Tuck. Black. Comm. App. 353, 354.

evinced to be requisite. The plan of the convention accordingly has provided, that the judges of the United States "shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office."

§ 1624. "This, all circumstances considered, is the most eligible provision, that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands; and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause, which has been quoted, combines both advantages. The salaries of judicial offices may from time to time be altered, as occasion shall require; yet so as never to lessen the allowance, with which any particular judge comes into office, in respect to him. It will be observed, that a difference has been made by the convention between the compensation of the president and of the judges. That of the former can neither be increased, nor diminished. That of the latter can only not be diminished. This probably arose from the difference in the duration of the respective offices. As the president is to be electedfor no more than four years, it can rarely happen, that an adequate salary, fixed at the commencement of that period, will not

continue to be such to its end. But with regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

§ 1625. "This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed, that together With the permanent tenure of their offices, it affords a better prospect of their independence, than is discoverable in the constitutions of any of the states, in regard to their own judges. The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for maleconduct by the house of representatives, and tried by the senate; and, if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point, which is

consistent with the necessary independence of the judicial character; and is the only one, which we find in our own constitution, in respect to our own judges."1

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1 Mr. Chancellor Kent has written a few brief but pregnant sentences on this subject; and he has praised the constitution of the United States, as in this respect an improvement upon all previously existing constitutions, in this, or in any other country. 1 Kent's Comm. Lect. 14, p. 276. In big second edition, (Id. p. 294,) he has in some manure limited the generality of expression of the first, by stating, that by the English act of settlement, of 12 &, 13 Will. 3, it was declared, that the salaries of the judges should be ascertained and established; and by the statute 1 George 3, the salaries of the judges were absolutely secured to them, during the continuance of their commissions.* Still there remains a striking difference in favour of the American constitution, inasmuch as in England the compensation, as well as the tenure of office, is within

*** See l Black. Comm. 267, 268.**

§ 1626. Mr. Justice Wilson also has, with manifest satisfaction, referred to the provision, as giving a decided superiority to the national judges over those of England. "The laws," says he, "in England, respecting the independency of the judges, have been construed, as confined to those in the superior courts. In the United States, this independency extends to judges in courts inferior, as well as supreme. This independency reaches equally their salaries, and their commissions. In England, the judges of the superior courts do not now, as they did formerly, hold their commissions and their salaries at the pleasure of the crown; but they still hold them at the pleasure of the parliament: the judicial subsists, and may be blown to annihilation, by the breath of the legislative department. In the United States, the judges stand upon the sure basis of the constitution: the judicial department is independent of the department of legislature. No act of congress can shake their commissions, or reduce their salaries. 'The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished, during their continuance in office.' It is not lawful for the president of the United States to remove them on the address of the two houses of congress. They may be removed, however, as they ought to be, on conviction of high crimes and misdemeanours. The judges of the United States stand on a much more independent footing, than that on which the judges of England stand, with

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the reach of the repealing power of parliament; but in the national government it constitutes a part of the supreme fundamental law, unalterable, except by an amendment of the constitution.

with regard to jurisdiction, as well as with regard to commissions and salaries. In many cases, the jurisdiction of the judges of the United States is ascertained, and secured by the constitution. As to these, the power of the judicial is co-ordinate with that of the legislative department. As to the other cases, by the necessary result of the constitution, the authority of the former is paramount to the authority of the latter."

§ 1627. It would be a matter of general congratulation, if this language had been completely borne out by the perusal, of our juridical annals. But, unfortunately, a measure was adopted in 1802 under the auspices of president Jefferson,1 which, if its constitutionality can be successfully vindicated, prostrates in the dust the independence of all inferior judges, both as to the tenure of their office, and their compensation for services, and leaves the constitution a miserable and vain delusion. In the year 1801, congress passed an act2 reorganizing the judiciary, and authorizing the appointment of sixteen new judges, with suitable salaries, to hold the circuit courts of the United States, in the different circuits created by the act, Under this act the circuit judges received their appointments, and performed the duties of their offices, until the year 1802, when the courts, established by the act, were abolished by a general repeal of it by congress, without in the slightest manner providing for the payment of the salaries of the judges, or for any continuation of their offices.3 The result of this act, therefore, is

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1 See Mr. Jefferson's Message, Dec. 8, 1801; 4 Wait's State Papers, p. 332.

2 Act of 1801, ch. 75.

3 Act of 8th of March, 1809. ch. 8.

(so far as it is a precedent,) that, notwithstanding the constitutional tenure of office of the judges of the inferior courts is during good behaviour, congress may, at any time, by a mere act of legislation, deprive them of their offices at pleasure, and with it take away their whole title to their salaries.1 How this can be reconciled with the terms, or the intent of the constitution, is more, than any ingenuity of argument has ever, as yet, been able to

demonstrate.2 The system fell, because it was unpopular with those, who were then in possession of power; and the victims have hitherto remained without any indemnity from the justice of the government.

§ 1628. Upon this subject a learned commentator3 has spoken with a manliness and freedom, worthy of himself and of his country. To those, who are alive to the just interpretation of the constitution; those, who, on the one side, are anxious to guard it against usurpations of power, injurious to the states; and those, who, on the other side, are equally anxious to

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1 See Sergeant on Const. ch. 30, [ch. 32.]

2 The act gave rise to one of the most animated debates, to be found in the annals of congress; and was resisted by a power of argument and eloquence, which has never been surpassed. These debates were collected, and printed in a volume at Albany in 1802; and are worthy of the* most deliberate perusal of every constitutional lawyer. The act may be asserted, without fear of contradiction, to have been against the opinion of a great majority of all the ablest lawyers at the time; and probably now, when the passions of the day have subsided, law lawyers will be found to maintain the constitutionality of the act. No one can doubt the perfect authority of congress to remodel their courts or to confer, or withdraw their jurisdiction at their pleasure. But the question is, whether they can deprive them of the tenure of their office, and their salaries, after they have once become constitutionally vested in them. See 3 Tuck. Black. Comm. App. 22 to 25.

3 Mr. Tucker, 1 Tuck. Black. Comm. App. 360; 3 Tuck. Black. Comm. App. 22 to 25.

prevent a prostration of any of its great departments to the authority of the others; the language can never be unseasonable, either for admonition or instruction, to warn us of the facility, with which public opinion may be persuaded to yield up some of the barriers of the constitution under temporary influences, and to teach us the duty of an unsleeping vigilance to protect that branch, which, though weak in its powers, is yet the guardian of the rights and liberties of the people. "It was supposed," says the learned author, "that there could not be a doubt, that those tribunals, in which justice is to be dispensed, according to the constitution and laws of the confederacy; in which life, liberty, and property are to be decided upon; in which questions might arise as to the constitutional powers of the executive, or the constitutional obligation of an act of the legislature; and in the decision of which the judges might find themselves constrained by duty, and by their oaths, to pronounce against the authority of either, should be stable and permanent; and not dependent upon the will of the executive or legislature, or both, for their existence. That without this degree of permanence, the tenure of office during good behaviour could not secure to that department the necessary firmness to meet unshaken every question, and to decide, as justice and the constitution should dictate, without regard to consequences. These considerations induced an opinion, which, it was presumed, was general, if not universal, that the power vested in congress to erect, from time to time, tribunals inferior to the supreme court, did not authorize them, at pleasure, to demolish them. Being built upon the rock of the constitution, their foundations were supposed to partake of its perma-

nency, and to be equally incapable of being shaken by the other branches of the government. But a different construction of the constitution has lately prevailed. It has been determined, that a power to ordain and establish from time to time, carries with it a discretionary power to discontinue, or demolish. That although the tenure of office be during good behaviour, this does not prevent the separation of the office from the officer, by putting down the office; but only secures to the officer his station, upon the terms of good behaviour, so long as the office itself remains. Painful indeed is the remark, that this interpretation seems calculated to subvert one of the fundamental pillars of free governments, and to have laid the foundation of one of the most dangerous political schisms, that has ever happened in the United States of America."1

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1 Whether justices of the peace, appointed under the authority of the United States, are inferior courts, within the sense of the constitution, has been in former times a matter of some controversy, but has never been decided by the Supreme Court. They ere doubtless officers of the government of the United States; but their duties are partly judicial, and partly executive or ministerial.* In these respects they have been supposed to be like commissioners of excise, of bankruptcy, commissioners to take depositions, and commissioners under treaties. And it has been said, that the constitution, in speaking of courts and judges, means those, who exercise all the regular and permanent duties, which belong to a court in the ordinary popular signification of the terms.+

At present the courts of the United States, organized under the constitution, consist of district courts, (one of which at least is established in every state in the Union,) of circuit courts, and of a Supreme Court, the latter being composed of seven judges. The judiciary act of 1789, ch. 20; and the judiciary act of 1802, ch. 31, are those, which make the general provisions for the establishments of these courts, and for their jurisdiction, original and appellate. Mr. Chancellor Kent has given a brief but accurate account of the examination of the courts of the United States. 1 Kent's Comm. Lect 14, p. 279 to 985. [2d edit p. 298 to 305.]

*** Wise v. Withers, 3 Cranch's R. 336; S. C. 1 Peters's Cond. R. 552.**

+ Sergeant on Const. (2d edit.) ch. 32, p. 377, 378.

§ 1629. It is almost unnecessary to add, that, although the constitution has, with so sedulous a care, endeavoured to guard the judicial department from the overwhelming influence or power of the other coordinate departments of the government, it has not conferred upon them any inviolability, or irresponsibility for an abuse of their authority. On the contrary for any corrupt violation or omission of the high trusts confided to the judges, they are liable to be impeached, (as we have already seen,) and upon conviction, removed from office. Thus, on the one hand, a pure and independent administration of public justice is amply provided for; and, on the other hand, an urgent responsibility secured for fidelity to the people.

§ 1630. The judges of the inferior courts, spoken of in the constitution, do not include the judges of courts appointed in the territories of the United States under the authority, given to congress, to regulate the territories of the United States. The courts of the territories are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are legislative courts, created in virtue of the general sovereignty, which exists in the national government over its territories. The jurisdiction, with which they are invested, is not a part of the judicial power, which is defined in the third article of the constitution; but arises from the same general sovereignty. In legislating for them, congress exercises the combined powers of the general, and of a state government. Congress may, therefore, rightfully limit the tenure of office of the judges of the territorial courts, as well as their jurisdiction; and it

has been accordingly limited to a short period of years.1

§ 1631. The second section of the third article contains an exposition of the jurisdiction appertaining to the, judicial power of the national government. The first clause is as follows: "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies, to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state, claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."2

§ 1632. Such is the judicial power, which the constitution has deemed essential, in order to follow out one of its great objects stated in the preamble, "to establish justice." Mr. Chief Justice Jay, in his very

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1 The American Insurance Company v. Canter, 1 Peters's Sup. R. 511, 546.

2 It has been very correctly remarked by Mr. Justice Iredell, that "the judicial power of the United States is of a peculiar kind. It is, indeed, commensurate with the ordinary legislative and executive powers of the general government, and the powers, which concern treaties. But it also goes further. When certain parties are concerned, although the subject in controversy does not relate to any special objects of authority of the general government, wherein the separate sovereignties of the separate states are blended in one common mass of supremacy; yet the general government has a judicial authority in regard to such subjects of controversy; and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect." Chisholm v. Georgia, 2 Dall. 433, 431; S. C. 2 Peters's Cond. R. 641.

able opinion, in Chisholm v. The State of Georgia,1 has drawn up a summary of the more general reasoning, on which each of these delegations of power is founded. "It may be asked," said he, "what is the precise sense and latitude, in which the words 'to establish justice,' as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the second section of the

third article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases, viz. 1. To all cases arising under this constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, not by authority derived only from one of them. 2. To all cases arising under the laws of the United States; because, as such laws, constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party, from whom they are due, but by a tribunal deriving authority from both the parties. 3. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected, or regulated by the local laws, or courts of a part of the nation. 4. To all cases affecting ambassadors, or other public ministers, and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect, and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property

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1 2 Dill R. 419, 475; S. C. 2 Peters's Cond. R. 635,671.

of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6. To controversies, to which the United States shall be a party; because in cases, in which the whole people are interested, it would not be equal, or wise, to let any one state decide, and measure out the justice due to others. 7. To controversies between two or more states; because domestic tranquillity requires, that the contentions of states should be peaceably terminated by a common judicatory; and, because, in a free country, justice ought not to depend on the will of either of the litigants. 8. To controversies between a state and citizens of another state; because, in case a state (that is, all the citizens of it) has demands against some citizens of another state, it is better, that she should prosecute their demands in a national court, than in a court of the state, to which those citizens belong; the danger of irritation and crimination, arising from apprehensions and suspicions of partiality, being thereby obviated. Because, in cases, where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid, that the latter should be the sole judges of the justice due to the latter; and true republican government requires, that free and equal citizens should have free, fair, and equal justice. 9. To controversies between citizens of the same state, claiming lands under grants of different states; because, as the rights of the two states to grant the land are drawn into question, neither of the two states ought to decide the controversy. 10. To controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects; because, as

every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the. importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal rights of the people."

§ 1633. This opinion contains a clear, and, as far as it goes, an exact outline; but it will be necessary to examine separately every portion of the jurisdiction here given, in order that a more full and comprehensive understanding of all the reasons, on which it is founded, may be attained. And I am much mistaken, if such an examination will not display in a more striking light the profound wisdom and policy, with which this part of the constitution was framed.

§ 1634. And first, the judicial power extends to all cases in law and equity, arising under the constitution, the laws, and the treaties of the United States.1 And by cases in this clause we are to understand criminal, as well as civil cases.2

§ 1635. The propriety of the delegation of jurisdiction, in "cases arising under the constitution," rests on the obvious consideration, that there ought always to be some constitutional method of giving effect to

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1 In the first draft of the constitution the clause was, "the jurisdiction of the Supreme Court shall extend to all cases arising under the laws passed by the legislature of the United States;" the other words, "the constitution," and "treaties," were afterwards added without any apparent objection. Journal of Convention, 226, 297, 298.

2 1 Tucker's Black. Comm. App. 420, 421; Cohen, v. Virginia, 6 Wheat. It. 399; Rawle on Const. ch. 24, p. 226.

constitutional provisions.1 What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them?2 The states are by the

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1 Cohens v. Virginia, 6 Wheat. R. 415; Id. 402 to 404, ante, Vol. l. § 266, 267.

2 Mr. Madison, in the Virginia Resolutions and Report, January, 1800, says, that "cases arising under the constitution," in the sense of this clause, are of two descriptions. One of these comprehends the cases growing out of the restrictions on the legislative power of the states, such as emitting bills of credit, making any thing but gold and silver a tender in payment of debts. "Should this prohibition be violated," says he, "and a suit between citizens of the same stale be the consequence, this would be a case arising under the constitution before the judicial power of the United States. A second description comprehends suits between citizens and foreigners, or citizens of different states, to be decided according to the state or foreign laws; but submitted by the constitution to the judicial power of the United States; the judicial power being, in several instances, extended beyond the legislative power of the United States." [p. 28.] Mr. Tucker. in his Commentaries uses the following language: "The judicial power of the federal government extends to all cases in law and equity arising under the constitution. Now, the powers granted to the federal government, or prohibited to the states, being all enumerated, the cases arising under the constitution can only be such, as arise out of some enumerated power delegated to the federal government, or prohibited to those of the several states. These general words include what is comprehended in the next clause, viz. cases arising under the laws of the United States. But, as contradistinguished from that clause, it comprehends some cases afterwards enumerated; for example, controversies between two or more states; between a state and foreign states; between citizens of the same state claiming lands under grants of different states; all which may arise under the constitution, and not under any law of the United States. Many other cases might be enumerated, which would fall strictly under this clause, and no other. As, ifs citizen of one state should be denied the privileges of a citizen in another; so, if a person held to service or labour in one state, should escape into another and obtain protection there, as a free man; so, if a state should coin money, and declare the same to be a legal tender in payment of debt, the validity of such a tender, if made, would fail within the meaning of this clause. So also, if a state should, without the consent of congress, lay any duty upon goods imported, the question, as to the validity of such an act, if disputed, would come within the meaning of this clause and not of any other.

constitution prohibited from doing a variety of things; some of which are incompatible with the interests of the Union; others with its peace and safety; others with the principles of good government," The imposition of duties on imported articles, the declaration of war, and the emission of paper money, are examples of each kind. No man of sense will believe, that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain, or correct the infractions of them.1 The power must be either a direct negative on the state laws, or an authority in the national courts to overrule such, as shall manifestly be in contravention to the constitution. The latter course was thought by the convention to be preferable to the former; and it is, without question, by far the most acceptable to the states.2

§ 1636. The same reasoning applies with equal force to "cases arising under the laws of the United States." In fact, the necessity of uniformity in the interpretation of these laws would of itself settle every doubt, that could be raised on the subject. "Thirteen independent: courts of final jurisdiction (says the Federalist) over the same causes is a

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In all these cases equitable circumstances may arise, the cognizance of which, as well as such, as were strictly legal, would belong to the federal judiciary, in virtue of this clause." 1 Tuck. Black. Comm. App. 418, 419. See also 2 Elliot's Debates, 380, 383, 390, 400, 418, 419.

1 See 3 Elliot's Debates, 142.

2 The Federalist, No. 80. See also Id. No. 22; 2 Elliot's Debates, 389, 390. -- The reasonableness of this extent of the judicial power is very much considered by Mr. Chief Justice Marshall, in delivering the opinion of the court, in Cohens v. Virginia, (6 Wheat. R. 413 to 423,) from which some extracts will be made, in considering the appellate jurisdiction of the Supreme Court, in a future page.

Hydra in government, from which nothing but contradiction and confusion can proceed."1

§ 1637. There is still more cogency, if it be possible, in the reasoning, as applied to "cases arising under treaties made, or which shall be made, under the authority of the United States." Without this power, there would be perpetual danger of collision, and even of war, with foreign powers, and an utter incapacity to fulfil the ordinary obligations of treaties.2 The want of this power was (as we have seen3) a most mischievous defect in the confederation; and subjected the country, not only to violations of its plighted faith, but to the gross, and almost proverbial imputation of punic insincerity.4

§ 1638. But, indeed, the whole argument on this subject has been already exhausted in the preceding part of these Commentaries, and therefore it may be dismissed without farther illustrations, although many humiliating proofs are to be found in the records of the confederation.5

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1 The Federalist, No. 80; Id. No. 22; Id. No. 15; 2 Elliot's Debates, 389, 590: 3 Elliot's Debates, 142, 143. -- In the Convention, which framed the constitution, the following resolution was unanimously adopted. "That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions, as involve the national peace and harmony." Journ. of Convention, 188, 189.

2 The Federalist, No. 22 No. 80; 2 Elliot's Debates, 390, 400; The Federalist, No. 80. -- The remarks of The Federalist, No. 80, on this subject will be found very instructive, and should be perused by every constitutional lawyer.

3 Ante, Vol. I. § 266, 267, 483, 484; 3 Elliot's Debates, 148, 280.

4 3 Elliot's Debates, 281.

5 Ante, Vol. I. § 266, 267, 483, 484; The Federalist, No. 22, No. 80; 1 Tuck. Black. Comm. App. 418, 419, 420. -- This clause was opposed with great earnestness in some of the state conventions, and particularly in that of Virginia, as alarming and dangerous to the rights and

§ 1639. It is observable, that the language is, that "the judicial power shall extend 10 all cases in law and equity," arising under the constitution, laws, and treaties of the United States.1 What is to be understood by "cases in law and equity," in this clause? Plainly, cases at the common law, as contradistinguished from cases in equity, according to the known distinction in the jurisprudence of England, which our ancestors brought with them upon their emigration, and with which all the American states were familiarly acquainted.2 Here, then, at least, the constitution of the United States appeals to, and adopts, the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union.3 If the remedy must be in law, or in equity, according to the course of proceedings at the common law, in cases arising under the constitution, laws, and treaties, of the United States, it would seem irresistibly

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liberties of the states, since it would bring every thing within the vortex of the national jurisdiction. It was defended with great ability and conclusiveness of reasoning, as indispensable to the existence of the national government, and perfectly consistent with the safety and prerogatives of the states. See 2 Elliot's Debates, 380 to 427; 3 Elliot's Debates, 125, 128, 129, 133, 143; Id. 280; 4 Elliot's Debates; (Martin's Letter,) 45.

1 Bee 3 Elliot's Debates, 127, 198, 129, 130, 133, 141, 143, 154.

2 See Robinson v. Campbell, 3 Wheat. R. 212, 221, 223.

3 It is a curious fact, that while the adoption of the common law, as the basis of the national jurisprudence, has been, in later times, the subject of such deep political alarm with some statesmen, the non-existence of it, as such a basis, was originally pressed by some of the ablest opponents of the constitution, as a principal defect. Mr. George Mason of Virginia urged that the want of a clause in the constitution, securing to the people the enjoyment of the common law, was a fatal defect. 2 American Museum, 534; ante, Vol. 1. p. 275. Yet the whole argument in the celebrated Resolutions of Virginia of January, 1800, supposes, that the adoption of it would have been a moat mischievous provision.

to follow, that the principles of decision, by which these remedies must be administered, must be derived from the same source. Hitherto, such has been the uniform interpretation and mode of administering justice in civil cases, in the courts of the United States in this class of cases.1

§ 1640. Another inquiry may be, what constitutes a case, within the meaning of this clause. It is clear, that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws, and treaties of

the United States, whenever any question respecting, them shall assume such a form, that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the constitution, arises, when some subject, touching the constitution, laws, or treaties of the United States, is submitted to the courts by a party, who asserts his rights in the form prescribed by law.2 In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and, when it involves any question arising under the constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union.3

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l See Cox & Dick v. United States, 6 Peters's Sup. R. 172, 203; Robinson v. Campbell, 3 Wheat. R. 212. See Madison's Report, 7 January, 1800, p. 28, 29; Chisholm's Execulors v. Georgia, 2 Dall. R. 419, 433, 437; S. C. 2 Cond. R. 635, 640, 642, per Iredell J.; The Federalist, No. 80, No. 83.

2 Osborn v. The Bank of the United States, 9 Wheat. R. 819. See Mr. Marshall's Speech on the case of Jonathan Robbins; Bee's Adm. R. 277.

3 See 1 Tuck. Black. Comm. App. 418, 419, 420; Madison's Virginia

§ 1641. Cases arising under the constitution, as contradistinguished from those, arising under the laws of the United States, are such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibitions contained in the constitution itself, independent of any particular statute enactment. Many cases of this sort may easily be enumerated. Thus, if a citizen of one state should be denied the privileges of a citizen in another state;1 if a state should coin money, or make paper money a tender; if a person, tried for a crime against the United States, should be denied a trial by jury, or a trial in the state, where the crime is charged to be committed; if a person, held to labour, or service in one state, under the laws thereof, should escape into another, and there should be a refusal to. deliver him up to the party, to whom such service or labour may be due; in these, and many other cases, the question, to be judicially decided, would be a case arising under the constitution.2 On the other hand, cases arising under the laws of the United States are such, as grow out of the legislation of congress, within the scope of their constitutional authority, whether they constitute the right, or privilege, or claim, or protection, or defence, of the party, in whole or in part, by whom they are asserted.3 The same reasoning applies to cases arising under treaties. Indeed, wherever, in a judi-

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Resolutions and Report, January, 1800, p. 28; Marbury v. Madison, 1 Cranch's R. 137, 173, 174; Owing v. Norwood, 5 Cranch, R. 344. See 2 Elliot's Debates, 4 18, 419.

1 The Federalist, No. 80.

2 1 Tucker's Black. Comm. App. 418, 419; ante, Vol. II. §

3 Marbury v. Madison, 1 Cranch, 137, 173, 174.

cial proceeding, any question arises, touching the validity of a treaty, or statute, or authority, exercised under the United States, or touching the construction of any clause of the constitution, or any statute, or treaty of the United States; or touching the validity of any statute, or authority exercised under any state, on the ground of repugnancy to the constitution, laws, or treaties, of the United States, it has been invariably held to be a case, to which the judicial power of the United States extends.1

§ 1642. It has sometimes been suggested, that a case, to be within the purview of this clause, must be one, in which a party comes into court to demand something conferred on him by the constitution, or a law, or a treaty, of the United States. But this construction is clearly too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution, or a law, or a treaty, of the United States, whenever its correct decision depends on the construction of either. This is manifestly the construction given to the clause by congress, by the 25th section of the Judiciary Act, (which was almost contemporaneous with the constitution,) and there is no reason to doubt its solidity or correctness.2 Indeed, the main object of this clause would be defeated by any narrower construction; since the power was conferred for the purpose, in an especial manner, of

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1 See Judiciary Act of 1789, ch. 20, § 25; Martin v. Hunter, 1 Wheat. R. 304; Cohens v. Virginia, 6 Wheat. R. 264; Osborn v. Bank of the United States, 9 Wheat. R. 738; Gibbons v. Ogden, 9 Wheat. R. 1.

2 Cohens v. Virginia, 6 Wheat. R. 378, 379, 391, 392. See also 1 Tuck. Black. Comm. App. 419, 420; Judiciary Actor 1789, ch. 20.

producing a uniformity of construction of the constitution, laws, and treaties of the United States.1

§ 1643. This subject was a good deal discussed in a recent case 2 before the Supreme Court, where one of the leading questions was, whether congress could constitutionally confer upon the bank of the United States, (as it has done by the seventh section of its charter,3) general authority to sue, and be sued in the circuit courts of the United States. It was contended, that they could not, because several questions might arise in such suits, which might depend upon. the general principles of law, and not upon any act of congress. It was held, that congress did constitutionally possess the power, and had rightfully conferred it in that charter.

§ 1644. The reasoning, on which this decision was founded, cannot be better expressed, than in the very language, in which it was delivered by Mr. Chief Justice Marshall. "The question," said he, "is whether it (the case) arises under a law of the United States. The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of congress. If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United

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1 The Federalist, No. 80; Cohens v. Virginia, 6 Wheat. R. 391, 392.

2 Osborn v. Bank of the United States, 9 Wheat R. 738, 819, 820.

3 Act of 1816, ch, 44, § 7.

States. The questions, whether the fact, alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has, in any manner, released his claims; are questions, some or all, of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words, which seem intended to be as extensive, as the constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing."1

§ 1645. After adverting to the fact, that there is nothing in the constitution to prevent congress giving to inferiour courts original jurisdiction in cases, to which the appellate power of the Supreme Court may extend, he proceeds: "We perceive, then, no ground, on which the proposition can be maintained, that congress is incapable of giving the circuit courts original jurisdiction, in any case, to which the appellate jurisdiction extends. We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right, set up by the party, may be defeated by one construction of the constitution or law of the United

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1 Osborn v. Bank of the United States, 9 Wheat. R. 819, 820.

States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided, as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution; but to those parts of cases only, which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case; because, if the circumstance, that other points are involved in it, shall disable congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal; and thus it will be restricted to a single question in that cause. And words obviously intended to secure to those, who claim rights under the constitution, laws, or treaties, of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape, which may be given to it by another tribunal, into which he is forced against his will. We think, then, that when a question, to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

§ 1646. "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty, which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter; and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions, and all its rights are dependent on the same law. Can a being, thus constituted, have a case, which does not arise literally, as well as substantially, under the law? Take the case of a contract, which is put as the strongest against the bank. When a bank sues, the first question, which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of congress was exercised antecedently to the first decision on that right; and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the

question, respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause: Whether it be in fact relied on, or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defence, which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things, when the action is brought. The questions, which the case involves, then, must determine its character, whether those questions be made in the cause or not. The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that, from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin, than the charter of incorporation. The action still originates in, and is sustained by, that charter.

§ 1647. "The clause, giving the bank.a right to sue in the circuit courts of the United States, stands on the same. principle with the acts authorizing officers of the United States, who sue in their own names, to sue in the courts of the United States. The post-master general, for example, cannot sue

under that part of the constitution, which gives jurisdiction to the federal courts, in consequence of the character of the party, nor is he authorized to sue by the judiciary act. He comes into the courts of the Union under the authority of an act of congress, the constitutionality of which can only be sustained by the admission, that his suit is a case arising under a law of the United States. If it be said, that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

§ 1648. "If it be said, that a suit brought by the bank may depend in fact altogether on questions, unconnected with any law of the United States, it is equally true with respect to suits brought by the post-master general. The plea in bar may be payment, if the suit be brought on a bond, or nonassumpsit, if it be brought on an open account, and no other question may arise, than what respects the complete discharge of the demand. Yet the constitutionality of the act, authorizing the post-master general to sue in the courts of the United States, has never been drawn into question. It is sustained singly by an act of congress, standing on that construction of the constitution, which asserts the right of the legislature to give original jurisdiction to the circuit courts, in cases arising under a law of the United States. The clause in the patent law, authorizing suits in the circuit courts, stands, we

think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point, which requires the construction of an act of congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position: that the case does not arise under a law of the United States.

§ 1649. "It is said, that a clear distinction exists between the party and the cause; that the party may originate under a law, with which the cause has no connexion; and that congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank. This distinction is not denied; and,if the act of congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being. it has made, all the faculties and capacities, which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the bank arises out of this law. A naturalized citizen is indeed made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize con-

gress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other fights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances, under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none. There is, then, no resemblance between the act incorporating the bank, and the general naturalization law. Upon the best consideration, we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the bank to sue in the courts of the United States, is consistent with the constitution, and to be obeyed in all courts."1

§ 1650. Cases may also arise under laws of the United States by implication, as well as by express enactment; so, that due redress may be administered by the judicial power of the United States. It is not unusual for a legislative act to involve consequences, which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say, that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from state control. The collectors of the revenue, the carriers of the mail, the mint

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1 Osborn v. Bank of the United State, 9 Wheat R. 821 to 828. See also Bank of the United States v. Georgia, 9 Wheat. R. 904.

establishment, and all those institutions, which are public in their nature, are examples in point. It has never been doubted, that all, who are employed in them, are protected, while in the line of their duty; and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts, by which those institutions are created; and is secured to the individuals, employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.1

§ 1651. It has also been asked, and may again be asked, why the words, "cases in equity," are found in this clause? What equitable causes can grow out of the constitution, laws, and treaties of the United States? To this the general answer of the Federalist2 seems at once clear and satisfactory. "There is hardly a subject of litigation between individuals, which may not involve those ingredients of fraud, accident, trust, or hardship, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states. It is the peculiar province, for instance, of a court of equity, to relieve against what are called hard bargains: these are contracts, in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law; yet there may have been some undue, and unconscionable advantage taken of the necessities, or misfortunes of one of the parties, which a

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1 Osborn v. Bank of United States, 9 Wheat. R. 865, 866; Id. 847, 848.

2 The Federalist, No. 80. See also 1 Tuck. Black. Comm. App. 418, 419; 2 Elliot's Debates, 389, 390.

court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice, without an equitable, as well as a legal jurisdiction. Agreements to convey lands, claimed under the grants of different states, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those states, where the formal and technical distinction between taw and Equity is not maintained, as in this state, where it is exemplified by every day's practice."

§ 1652. The next clause, extends the judicial power "to all cases affecting ambassadors, other public ministers, and consuls." The propriety of this delegation of power to the national judiciary will scarcely be questioned by any persons, who have duly reflected upon the subject. There are various grades of public ministers, from ambassadors (which is the highest grade,) down to common resident ministers, whose rank, and diplomatic precedence, and authority, are well known, and well ascertained in the law and usages of nations.1 But whatever may be their relative rank and grade, public ministers of every class are the immediate representatives of their sovereigns. As such representatives, they owe no subjection to any laws, but those of their own

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1 Three classes are usually distinguished in diplomacy; 1. Ambassadors, who are the highest order, who are considered as personally representing their sovereigns; 2. Envoys Extraordinary, and ministers plenipotentiary; 3. Ministers resident, and ministers charges d'affaires. Mere common charges d'affaires, are deemed of still lower rank. Dr. Lieber's Encyclopedia Americana, art. Ministers, Foreign. Vattel, B. 4, ch. 6, § 71 to 74.

country, any more than. their sovereign; and their actions are not generally deemed subject to the control of the private law of that state, wherein they are appointed to reside. He, that is subject to the coercion of laws, is necessarily dependent on that power, by whom those laws were made. But public ministers ought, in order to perform their duties to their own sovereign, to be independent of every power, except that by which they are sent; and, of consequence, ought not to be subject to the mere municipal law of that nation, wherein they are to exercise their functions.1 The rights, the powers, the duties,

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1 1 Black. Comm. 253; Vattel, B. 4, ch. 7, § 80, 81, 92, 99, 101; l Kent's Comm. Lect. 2, p. 37, 38. (2d edition, p. 38, 39.) -- In the cue of the Schooner Exchange v. M'Faddon, (7 Cranch, 116, 138,) the Supreme Court state the grounds of the immunity of foreign ministers, in a very clear manner, leaving the important question, whether that immunity can be forfeited by misconduct, open to future decision. "A second case," (says Mr. Chief Justice Marshall, in delivering the opinion of the court,) "standing on the same principles with the first, is the immunity, which all civilized nations allow to foreign ministers. Whatever may be the principle, on which his immunity is established, whether we consider him, as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign, at whose court he resides; still, the immunity itself is granted by the governing power of the nation, to which the minister is deputed. This fiction of ex-territoriality could not be erected, and supported against the will of the sovereignof the territory. He is supposed to assent to it.

"This consent is not expressed. It is true, that, in some countries, and in this, among others, a special law is enacted for. the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege, which he would not otherwise possess.

"The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction, which are admitted to attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the ob-

and the privileges of public ministers are, therefore, to be determined, not by any municipal constitutions, but by the law of nature and nations, which is equally obligatory upon all sovereigns, and all states.1 What these rights, powers, duties, and privileges are, are inquiries properly belonging to a treatise on the law of nations, and need not be discussed here.2 But it is obvious, that every question, in which these rights, powers, duties, and privileges are involved, is so intimately connected with the public peace, and policy, and diplomacy of the nation, and touches the dignity and interest of the sovereigns of the ministers concerned so deeply, that it would be unsafe, that they should be submitted to any other, than, the highest judicature of the nation.

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jects of his mission. A sovereign, committing the interests of his nation with a foreign power to the care of a person, whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent, that he shall possess those

privileges, which his principal intended he should retain--privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

"In what cases a minister, by infracting the laws of the country, in which he resides, may subject himself to other punishment, than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such, as to render him amenable to the local jurisdiction, it must be, because they forfeit the privileges annexed to his character; and the minister, by violating the conditions, under which he was received, as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them." See also I Black. Comm. 254, and Christian's note, (4); Vattel, B. 4, ch. 7, § 92, 99, 101; Id. ch. 8, § 113, 114, 115, 116; Id. ch. 9, § 117, 119, 120, 121, 122, 123, 124; 1 Kent's Comm. Lect 2.

1 Ex parte Cabrera, 1 Wash. Cir. R. 232.

2 Vattel discusses the subject of the rights, privileges, and immunities of foreign ambassadors very much at large, in B. 4, ch. 7, of his Treatise on the Law of Nations.

§ 1653. It is most fit, that this judicature should, in the first instance, have original jurisdiction of such cases,1 so that, if it should not be exclusive, it might at least be directly resorted to, when the delays of a procrastinated controversy in inferior tribunals might endanger the repose, or the interests of the government.2 I.t is well known, that an arrest of the Russian ambassador in a civil suit in England, in the reign of Queen Anne, was well nigh bringing the two countries into open hostilities; and was stoned for only by measures, which have been deemed, by her own writers, humiliating. On that occasion, an act of parliament was passed, which made it highly penal to arrest any ambassador, or his domestic servants, or to seize or distrain his goods; and this act, elegantly engrossed and illuminated, accompanied by aletter from the queen, was sent by an ambassador extraordinary, to propitiate the offended czar.3 And a statute to the like effect exists in the criminal code established by the first congress, under the constitution of the United States.4

§ 1654. Consuls, indeed, have not in strictness a diplomatic character. They are deemed, as mere commercial agents; and therefore partake of the ordinary character of such agents; and are subject to the municipal laws of the countries, where they re-

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1 The Federalist, No. 80. See also 2 Elliot's Debates, 390, 400; The Federalist, No. 80; Marbury v. Madison, 1 Cranch, R. 137, 174, 175.

2 1 Tuckers Black. Comm. App. 361; Ex parte Cabrera, 1 Wash. Cirt. R. 232.

3 1 Black. Comm. 255, 256; 4 Id. 70.

4 Act of 1790, ch. 36, § 26, 27; 1 Kent's Comm. Lect. 9, p. 170, 171, (2d edition, p. 182, 183.)

side.1 Yet, as they are the public agents of the nation, to which they belong, and are often entrusted with the performance of very delicate functions of state, and as they might be greatly embarrassed by being subject to the ordinary jurisdiction of inferior tribunals, state and national, it was thought highly expedient to extend the original jurisdiction of the Supreme Court to them also.2 The propriety of vesting jurisdiction, in such cases, in some of the national courts seems hardly to have been questioned by the most zealous opponents of the constitution.3 And in cases against ambassadors, and other foreign ministers, and consuls, the jurisdiction has been deemed exclusive.4

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1 See Vattel, B. 2, ch. 2, § 34; Id. B. 4, ch. 6, § 75; Wicquefort, B. 1, § 5; 1 Kent's Comm. Lect. 2, p. 40, 43, [2d edition, p. 41 to 44;] 2 Brown's Adm. Law, ch. 14, p. 503; Viveash v. Becket, 3 Maule & Sel. R. 284; Rawle on Const. ch. 24, p. 224 to 226.

2 The Federalist, No. 80; Cohens, v. Virginia, 6 Wheat. R. 396; 1 Kent's Comm. Lect. 9. p. 44, (2d edition, p. 45;) Rawle on Const. ch. 24, p. 224 to 226.

3 2 Elliot's Debates, 383, 384, 418; 3 Id. 281; 1 Tuckers Black. Comm. App. 183. -- Under the confederation no power existed in the national government, to punish any person for the violation of the rights of ambassadors, and other foreign ministers, and consuls. Congress, in November, 1781, recommended to the legislatures of the states, to pass laws punishing infractions of the law of Nations, committed by violating safe conducts, or passports granted by congress; by acts of hostility against persons in amity with the United States; by infractions of the immunities of ambassadors; by infractions of treaties, or conventions; and to erect a tribunal, or to vest one, already existing, with power to decide on offences against the law of nations; and to authorize suits for damages by the party injured, and for compensation to the United States, for damages sustained by them, from an injury done to a foreign

power by a citizen. This, like other recommendations, was silently disregarded, or openly refused. See Journal of Congress, 23d of Nov. 1781, p. 934. Sergeant on Const. Introduction, p. 16, (2d edition.) 4 Rawle on Constitution, ch. 91, p. 903; Id. ch. 94, p. 229, 223;

§ 1655. It has been made a question, whether this clause, extending jurisdiction to all cases affecting ambassadors, ministers, and consuls, includes cases of indictments found against persons for offering violence to them; contrary to the statute of the United States, punishing such offence. And it has been held, that it does not. Such indictments are mere public prosecutions, to which the United States and the offender only are parties, and which are conducted by the United States, for the purpose of vindicating their own laws, and the law of nations. They are strictly, therefore, cases affecting the United States; and the minister himself, who has been injured by the offence, has no concern in the event of the prosecution, or the costs attending it.1 Indeed, it seems difficult to conceive, how there can be a case affecting an ambassador, in the sense of the constitution, unless he is a party to the suit on record, or is directly affected, and bound by the judgment.2

§ 1656. The language of the constitution is perhaps broad enough to cover cases, where he is not a party; but may yet be affected in interest. This peculiarity in the language has been taken notice of, in a recent case, by the Supreme Court.3 "If a suit

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1 Kent's Comm. Lect, 2, p. 44, (2d edition, p. 45); hi. Lect. 15, p. 294, 295, (2d edition, p. 314, 315); Commonwealth v. Kosloff, 5 Serg. & Rawle, 545; Hail v. Young, 3 Pick. R. 80; United States v. Ortega, 11 Wheat. R. 467, and Mr. Wheaton's note, Id. 469 to 475; Manhardt v. Soderstrom, l Binn. R. 138; United States v. Ravara, 2 Doll. R. 297; Cohens v. Virginia, 6 Wheat. II. 396, 397; Osborn v. Bank of United States, 9 Wheat. R. 820, 821; Chisholm v. Georgia, 2 Doll. R. 431, per Iredell, J.

1 United States v. Ortega, II Wheat. R. 467. See also Osborn v. Bank of United States, 9 Wheat. R. 854, 855.

2 Ibid.

3 4 Ibid.

be brought against a foreign minister," (Said Mr. Chief Justice Marshall, in delivering the opinion of the court) "the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought, which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit; but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This court can take cognizance of all cases, 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on .the party named in the record. But this language changes, when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons, which all comprehend, to give the national courts jurisdiction over all cases, by which they were in any manner affected. In the case of states, whose immediate, or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only, to which they were actual parties."

§ 1657. The next clause extends the judicial power "to all cases of admiralty and maritime jurisdiction."

§ 1658. The propriety of this delegation of power seems to have been little questioned at the time of adopting the constitution. "The most bigotted idol-

izers of state authority," said the Federalist,1 "have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations, which are relative to the public peace." The subject is dismissed with an equally brief notice by Mr. Chief Justice Jay, in the case of Chisholm v. Georgia, in the passage already cited.2 It demands, however, a more enlarged examination, which will clearly demonstrate its utility and importance, as a part of the national power.

§ 1659. It has been remarked by the Federalist, in another place, that the jurisdiction of the court of admiralty, as well as of other courts, is a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits, by which it is circumscribed.3 This remark is equally tree in respect to England and America; to the high court of admiralty sitting in the parent country; and to the vice-admiralty courts sitting in the colonies. At different periods, the jurisdiction has been exercised to a very different extent; and in the colonial courts it seems to have had

boundaries different from those prescribed to it in England. It has been exercised to a larger extent in Ireland, than in England; and down to this very day it has a most comprehensive reach in Scotland.4 The jurisdiction claimed by the courts of admiralty, as properly belonging to them, extends to all acts and

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1 The Federalist, No. 80. See also 2 Elliot's Debates, 383, 384, 390, 418, 419.

2 2 Dall. R. 475; ante Vol. 111. § 1633.

3 The Federalist, No. 37. See 1 Kent's Comm. Lect. 17.

4 See De Lovto v. Boit, 2 Gallison's R. 398; 1 Kent's Comm. Lect. 17, passim.

torts done upon the high seas, and within the ebb and flow of the sea, and to all maritime contracts, that is, to all contracts touching trade, navigation, or business upon the sea, or the waters of the sea within the ebb and flow of the tide. Some part of this jurisdiction has been matter of heated controversy between the courts of common law, and the high court of admiralty in England, with alternate success and defeat. But much of it has been gradually yielded to the latter, in consideration of its public convenience, if not of its paramount necessity. It is not our design to go into a consideration of these vexed questions, or to attempt any general outline of the disputed boundaries. It will be sufficient in this place to present a brief view of that, which is admitted, and is indisputable.1

§ 1660. The admiralty and maritime jurisdiction, (and the word, "maritime," was doubtless added to guard against any narrow interpretation of the preceding word, "admiralty,") conferred by the constitution, embraces two great classes of cases; one dependent upon locality, and the other upon the nature of the contract. The first respects acts or injuries done upon the high sea, where all nations claim a

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1 Upon this subject the learned reader is referred to Sergeant on Const. Law, ch. 21, and the authorities there cited; to Gordon's Digest, art. 763 to 792; to 1 Kent's Comm. Lect. 17, passim; 2 Brown's Adm. Law, ch. 4, 6, 19. Mr. Sergeant, in his introduction to the second edition of his very valuable work on Constitutional Law, (p. 3, 4, and note,) seems to suppose, that the admiralty commission of the governor of New-Hampshire, referred to in De Lovio v. Boit, 2 Gallison's R. 470, 471, might be an extension of the ordinary commissions of the colonial admiralty judges, It is believed, that he is mistaken in this, supposition. In Stokes's History of the Colonies there is a commission similar in its main clauses; and Mr. Stokes says, that it was the usual form of the commissions. Stokes's Hist. of Colon. ch. 4, p. 166. See also Mr. Wheaton's Notes to the case of United States v. Bevans, 3 Wheat. R. 336, 357, 361, 365.

common right and common jurisdiction; or acts, or injuries done upon the coast of the sea; or, at farthest, acts and injuries done within the ebb and flow of the tide. The second respects contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches, one embracing captures, and questions of prize arising jure belli; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations.1

§ 1661. By the law of nations the cognizance of all captures, jure belli, or, as it is more familiarly phrased, of all questions of prize, and their incidents, belongs exclusively to the courts of the country, to which the captors belong, and from whom they derive their authority to make the capture. No neutral nation has any right to inquire into, or to decide upon, the validity of such capture, even though it should concern property belonging to its own citizens or subjects, unless its own sovereign or territorial rights are violated; but the sole and exclusive jurisdiction belongs to the courts of the capturing belligerent. And this jurisdiction, by the common consent of nations, is vested exclusively in courts of admiralty, possessing an original, or appellate jurisdiction. The courts of common law are bound to abstain from any decision of questions of this sort, whether they arise directly or indirectly in judgment. The remedy for illegal acts of capture is by the institution of proper prize proceedings in the prize courts of the captors.2 If justice be there denied, the nation itself

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1 See Martin v. Hunter, 1 Wheat. R. 335.

2 Le Caux v. Eden, Doug. R. 594; Lindo v. Rodney, Doug. R. 613, note; L'Invincible, 1 Wheat. R. 238; The Estrella, 4 Wheat. R. 298;

becomes responsible to the parties aggrieved; and if every remedy is refused, it then becomes a subject for the consideration of the nation, to which the parties aggrieved belong, which may vindicate their rights, either by a peaceful appeal to negotiation, or a resort to arms.

§ 1662. It is obvious upon the slightest consideration, that cognizance of all questions of prize, made under the authority of the United States, ought to belong exclusively to the national courts. How, otherwise, can the legality of the captures be satisfactorily ascertained, or deliberately vindicated? It seems not only a natural, but a necessary appendage to the power of war, and negotiation with foreign nations. It would otherwise follow, that the peace of the whole nation might be put at hazard at any time by the misconduct of one of its members. It could neither restore upon an illegal capture; nor in many cases afford any adequate redress for the wrong; nor punish the aggressor. It would be powerless and palsied. It could not perform, or compel the performance of the duties required by the law of nations. It would be a sovereign without any solid attribute of sovereignty; and move in vinculis only to betray its imbecility. Even under the confederation, the power to decide upon questions of capture and prize was exclusively conferred in the last resort upon the national court of appeals.1 But like all other powers conferred by that instrument, it was totally disregarded, wherever it interfered with state policy, or with extensive popular interests. We have seen, that the sentences of the

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Bingham v. Cabot, 3 Dall. 19; La Amistad de Rues, 5 Wheat. R. 385; 1 Kent's Comm. Lect. 17, p. 334, (2 edition, p. 356.)

1 Confederation, Art. 9.

national prize court of appeals were treated, as mere nullities; and were incapable of being enforced, until after the establishment of the present constitution.1 The same reasoning, which conducts us to the conclusion, that the national courts ought to have jurisdiction of this class of admiralty cases, conducts us equally to the conclusion, that, to be effectual for the administration of international justice, it ought to be exclusive. And accordingly it has been constantly held, that this jurisdiction is exclusive in the courts of the United States.2

§ 1663. The other branch of admiralty jurisdiction, dependent upon locality, respects civil acts, torts, and injuries done on the sea, or (in certain cases) on waters of the sea, where the tide ebbs and flows, without amy claim of exercising the rights of war. Such are cases of assaults, and other personal injuries; cases of collision, or running of ships against each other; cases of spoliation and damage, (as they are technically called,) such as illegal seizures, or depredations upon property; cases of illegal dispossession, or withholding possession from the owners of ships, commonly called possessory suits; cases of seizures under municipal authority for supposed breaches of revenue, or other prohibitory laws; and cases of salvage for meritorious services performed in saving property, whether derelict, or wrecked, or captured, or otherwise in imminent hazard from extraordinary perils.3

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1 See Penhallow v. Doane, 3 DaIl. R. 52; Jennings v. Carson, 4 Cranch 2; ante, Vol. I, §

2 See Martin v. Hunter, 1 Wheat. R. 345, 337; United States v. Bevans, 3 Wheat. R. 387; Houston v. Moore, 5 Wheat. It. 49; Ogden v. Saunders, 12 Wheat. R. 278; 1 Kent's Comm. Lect. 17, p. 330 to 337, [2 edition, p. 353 to 360.]

3 See La Vengeanee, 3 Dall. R. 297; Martin v. Hunter, 1 Wheat. R. 335, 337; The Sarah, 8 Wheat. R. 391, 394; McDonough v. Dannery,

§ 1664. It is obvious, that this class of cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states; and raise many questions of international law, not merely touching private claims, but national sovereignty, and national reciprocity. Thus, for instance, if a collision should take place at sea between an American and a foreign ship, many important questions of public law might be connected with its just decision; for it is obvious, that it could not be governed by the mere municipal law of either country. So, if a case of recapture, or other salvage service performed to a foreign ship, should occur, it must be decided by the general principles of maritime law, and the doctrines of national reciprocity. Where a recapture is made of a friendly ship from the hands of its enemy, the general doctrine now established is, to restore it upon salvage, if the foreign country, to which it belongs, adopts a reciprocal rule; or to condemn it to the recaptors, if the like rule is adopted in the foreign country. And in other cases of salvage the doctrines of international and maritime law come into full activity, rather than those of any mere municipal code.1 There is, therefore, a peculiar fitness in

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3 Dall. R. 189; The Blaireau, 2 Cranch, 249; The Amiable Nancy, 3 Wheat. R. 546; The General Smith, 4 Wheat R. 438; Rose v. Himeley, 4 Cranch, 241; Manro v. Almeida, 10 Wheat R. 473; The Apollon, 9 Wheat. R. 369; The Marianna Flora, 11 Wheat. R. 1, 42; The Fabius, 2 Rob. R. 245; The Thames, 5 Rob. R. 345; The St. Juan Baptista, 5 Rob. R. 33, 40, 41; Abbott on Shipping, P. 2, ch. 4, note to American

edition, 1829, p. 139. 138; The Dundee, 1 Hagg. Adm. R. 109; The Ruckers, 4 Rob. R. 73; 1 Kent's Comm. Lect. 17, p. 342 to 352, [2 edition, p. 365 to 377 4 The Agincourt, l Hagg. R. 271.

1 The Santa Cruz, 1 Rob. R. 50; The San Francisco, 1 Edw. p. 179; The Adeline, 9 Cranch, 344; 2 Wheat. R. App. 40 to 45; Abbott on Shipping, (Amer. edit. 1823,) P. 3, ch. 10, p. 397, 417, 422.

appropriating this class of cases to the national tribunals; since they will be more likely to be there decided upon large and comprehensive principles, and to receive a more uniform adjudication; and thus to become more. satisfactory to foreigners.

§ 1665. The remaining class respects contracts, claims, and services purely maritime. Among these are the claims of material-men and others for repairs and outfits of ships belonging to foreign nations, or to other states;1 bottomry bonds for monies lent to ships in foreign ports to relieve their distresses, and enable them to complete their voyages;2 surveys of vessels damaged by perils of the seas;3 pilotage on the high seas;4 and suits for mariners wages.5 These, indeed, often arise in the course of the commerce and navigation of the United States; and seem emphatically to belong, as incidents, to the power to regulate commerce. But they may also affect the commerce and navigation of foreign nations. Repairs may be done, and supplies furnished to foreign ships; money may be lent on foreign bottoms; pilotage and mariners' wages may become due in voyages in foreign employment; and in such cases the general maritime law enables the courts of admiralty to administer a wholesome and prompt justice.6 Indeed, in many of these cases, as the courts of admiralty entert ain suits

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1 The St. Jago de Cuba, 9 Wheat. R. 409, 416; The Aurora, l Wheat. R. 105.

2 The Aurora, 1 Wheat. R. 96.

3 Janney v. Columbia Insurance Company, 10 Wheat. R. 412, 415, 418.

4 The Anne, 1 Mason's R. 508.

5 The Thomas Jefferson, 10 Wheat.R. 428.

6 The Two Friends, 1 Rob. R. 271; The Helena, 4 Rob. R. 3; The Jacob, 4 Rob. R. 245; The Gratitudine, 3 Rob. R. 240; The Favourite, 2 Rob. R. 232; Abbott on Shipping, P. 2, ch. 3, p. 115, Story's note; Id. P. 4, ch. 4; The Aurora, 1 Wheat R. 96.

in rem, as well as in personam, they are often the only courts, in which an effectual redress can be afforded, especially when it is desirable to enforce a specific maritime lien.1

§ 1666. So that we see, that the admiralty jurisdiction naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations, and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic.2 There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort, which cannot be wielded, except for the general good; and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home. It may be added, that, in many of the cases included in these latter classes, the same reasons do not exist, as in cases of prize, for an exclusive jurisdiction; and, therefore, whenever the common law is competent to give a remedy in the state courts, they may retain their accustomed concurrent jurisdiction in the administration of it.3

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1 Manro v. Almeida, 10 Wheat R. 473; The Merino, 9 Wheat. R. 391, 416, 417; The General Smith, 4 Wheat. R. 438; The Thomas Jefferson, 10 Wheat. R. 428; Sheppard v. Taylor, 5 Peters's Sup. R. 675; 1 Kent's Comm. Lect 17, p. 352 to 354, (2 edition, p. 378 to 381;) 2 Brown's Adm. Law, ch. 71.

2 "The admiralty jurisdiction," said the Supreme Court in a celebrated case, "embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested. It embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromit the national sovereignty." Martin v. Hunter, 1 Wheat. R. 335.

3 Mr. Chancellor Kent and Mr. Rawle seem to think,* that the admiralty jurisdiction, given by the constitution, is in all cases necessarily

*** 1 Kant's Comm. Lect. 17, p. 351, (2 edit. p. 377;) Rawle on the Const. ch. 21, p. 202. See also 1 Tucker's Black. Comm. App 181, 182; 2 Elliot's Deb. 390; 10 Wheat. R. 418.**

§ 1667. We have been thus far considering the admiralty and maritime jurisdiction in civil cases only. But it also embraces all public offences, committed on the high seas, and in creeks, havens, basins, and bays within the ebb and flow of the tide, at least in such as are out of the body of any county of a state. In these places the jurisdiction of the

courts of admiralty over offences is exclusive; for that of the courts of common law is limited to such offences, as are committed within the body of some county. And on the sea coast, there is an alternate, or divided

exclusive. But it is believed, that this opinion is founded in a mistake. It is exclusive in all matters of prize, for the reason, that at the common law this jurisdiction is vested in the courts of admiralty, to the exclusion of the .courts of common law. But in cases, where the jurisdiction of the courts of common law and the admiralty are concurrent, (as in cases of possessory suits, mariners, wages, and marine torts,) there is nothing in the constitution, necessarily leading to the conclusion, that the jurisdiction was intended to be exclusive; and there is as little ground, upon general reasoning, to contend for it. The reasonable interpretation of the constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications, in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. Hence, the states could have no right to create courts of admiralty, as such, or to confer on their own courts, the cognizance of such cases, as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases, of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction, than cases of common law jurisdiction. The judiciary act, of 1789, ch. 20, § 9, has manifestly proceeded upon this supposition; for, while it has conferred on the District Courts, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," it has, at the same time, saved "to the suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." We shall, hereafter, have occasion to consider more at large, in what cases there is a concurrent jurisdiction in the national and state courts.

jurisdiction of the courts of common law, and admiralty, in places between high and low water mark; the former having jurisdiction when, and as fat as the lids is out, and the latter when, and as far as the tide is in, usque ad filum aquae, or to high water mark.1 This criminal jurisdiction of the admiralty is therefore exclusively vested in the national government; and may be exercised over such crimes and offences, as congress may, from time to time, delegate to the cognisance of the national courts.2 The propriety of vesting this criminal jurisdiction in the national government depends upon the same reasoning, and is established by the same general considerations, as have been already suggested in regard to civil cases. It is essentially connected with the due regulation, and protection of our commerce and navigation on the high seas, and with our rights and duties in regard to foreign nations, and their subjects, in the exercise of common sovereignty on the ocean. The states, as such, are not known in our intercourse with foreign nations, and not recognised as common sovereigns on the ocean. And if they were permitted to exercise criminal or civil jurisdiction thereon, there would be endless embarrassments, arising from the

1 Constable's cue, 5 Co. R. 106; 2 Instit. 51; 1 Black. Comm. 110; Hale in Harg. Law Tracts, pt. 1, ch. 3; Id. ch. 4, p. 10, 12, pt. 2, ch. 7, p. 88; 2 Hale, P.C.p. 13, &c.; 64 Corn. Dig. Navigation, A. & B.; Id. Admiralty, E. J.; United States v. Grush, 5 Mason's R. 290; l Kent's Comm. Lect 17, p. 337 to 342, [2d edition, p. 360 to 365;] United States v. Bevans, 3 Wheat. R. 336; Id. 357; Mr. Wheaton's notes, 357, 361, 365, 366, 368, 369; Beeve's case, 2 Leach. Cir. Cas. 1093, (4th edition;) Ryan & Russ. Cas. 243; 4 Tucker's Black. Comm. App. 7.

2 United States v. Bevans, 3 Wheat. R. 356, 386 to 389; 4 Elliot's Deb. 290, 1291; 1 Kent's Comm. Lect. 16, p. 319, 320, (2d edition, p. 339, 340;) Lect. 17, p. 337, (2d edition, p. 360.)

conflict of their laws, and the most serious dangers of perpetual controversies with foreign nations. In short, the peace of the Union would be constantly put at hazard by acts, over which it had no control; and by assertions of right, which it might wholly disclaim.1

§ 1668. The next clause extends the judicial power "to controversies, to which the United States shall be a party."2 It scarcely seems possible to raise a rea-

1 It has been made a question, whether the admiralty jurisdiction can be exercised within the territories of the United States by the judges of the territorial courts, appointed under the territorial governments, as they are appointed for a limited term only, and not during good behaviour. The decision has been in favour of the jurisdiction, upon the ground, (already suggested,) that congress have the exclusive power

to regulate such territories, as they may choose; and they may confer on the territorial government such legislative powers, is they may choose. The courts appointed in such territories, are not constitutional courts, in which the judicial powers conferred by constitution on the general government can be deposited. They are merely legislative courts; and the jurisdiction, with which they are invested, is not a part of the judicial power, defined in the third article of the constitution. The American Insurance Company v. Canter, 1 Peters's Sup. R. 511.

2 Mr. Tucker, distinguishes between the word "cases," used in the preceding clauses, and the word "controversies" here used. The former he deems to include all suits, criminal as well as civil. The latter, as including such only, as are of a civil nature. As here applied, controversies "seem" (says he) "particularly appropriated to such disputes, as might arise between the United States, and any one or more states, respecting territorial or fiscal matters; or between the United States and their debtors, contractors, and agents. This construction is confirmed by the application of the word in the ensuing clauses, where it evidently refers to disputes of a civil nature only, such, for example, as may arise between two or more states, or between citizens of different states, or between a state and the citizens of another state, &c." l Tucker's Black. Comm. App. 420, 421. Mr. Justice Iredell, in his opinion in Chisholm v. Georgia, 2 Dull. R. 419, 431, 432, gives the same construction to the word "controversies," confining it to such as are of a civil nature.

In the original draft of the constitution, this clause, "controversies to which the United States shall be a party," was omitted. It was add

sonable doubt, as to the propriety of giving to the national courts jurisdiction of cases, in which the United States are a party.1 It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity, would be at the mercy of the states. They must be enforced, if at all, in the state tribunals. And there would not only not be any compulsory power over those courts to perform such functions; but there would not be any means of producing uniformity in their decisions. A sovereign without the means of enforcing civil rights, or compelling the performance, either civilly or criminally, of public duties on the part of the citizens, would be a most extraordinary anomaly. It would prostrate the Union at the feet of the states. It would compel the national government to become a supplicant for justice before the judicature of those, who were by other parts of the constitution placed in subordination to it.2

§ 1669. It is observable, that the language used does not confer upon any court cognizance of all controversies, to which the United States shall be a party, so as to justify a suit to be brought against the United States without the consent of congress. And

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ed afterwards without any apparent objection. Journal of Convention, 226, 297, 298.

1 The Federalist, No. 80; 3 Elliot's Debates, 280, 281. See also 2 Elliot's Deb. 380, 383, 384, 389, 390, 400, 404.

2 Mr. Sergeant, in his Introduction to his work on Constitutional Law, has abundantly shown the mischief of such a want of power under the confederation. See Serg. Const. Law, Introd. p. 15 to 18.

the language was doubtless thus guardedly introduced, for the purpose of avoiding any such conclusion. It is a known maxim, justified by the general sense and practice of mankind, and recognized in the law of nations, that it is inherent in the nature of sovereignty not to be amesnable to the suit of any private person, without its own consent.1 This exemption is an attribute of sovereignty, belonging to every state in the Union; and was designedly retained by the national government.2 The inconvenience of subjecting the government to perpetual suits, as a matter of right, at the will of any citizen, for any real or supposed claim or grievance, was deemed far greater, than any positive injury, that could be sustained by any citizen by the delay or refusal of justice. Indeed, it was presumed, that it never would be the interest or inclination of a wise government to withhold justice from any citizen. And the difficulties of guarding itself against fraudulent claims, and embarrassing and stale controversies, were believed far to outweigh any mere theoretical advantages, to be derived from any attempt to provide a system for the administration of universal justice.

§ 1670. It may be asked, then, whether the citizens of the United States are wholly destitute of remedy, in case the national government should invade their rights, either by private injustice and injuries, or by public oppression? To

this it may be answered, that in a general sense, there is a remedy in both cases. In

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1 The Federalist, No. 81. See Chisholm v. Georgia, 2 Dall. R. 419, 478, S. C.; 2 Peters's Cond. R. 635, 674; 1 Black. Comm. 241 to 243; Cohens v. Virginia, 6 Wheat. R. 380; Id. 411, 412.

2 Mr. Locke strenuously contends for this exemption of the sovereign from judicial amesnability; and in this, he does but follow out the doctrines of Puffendorf, and other writers on the law of nations. See Locke on Government, Pt. 2, § 205; Puffendorf's Law of Nature and Nations, B. 8, ch. 10; Vattel, B. 1, ch. 4, § 49, 50.

regard to public oppressions, the whole structure of the government is so organized, as to afford the means of redress, by enabling the people to remove public functionaries, who abuse their trust, and to substitute others more faithful, and more honest, in their stead. If the oppression be in the exercise of powers clearly constitutional, and the people refuse to interfere in this manner, then indeed, the party must submit to the wrong, as beyond the reach of all human power; for how can the people themselves, in their collective capacity, be compelled to do justice, and to vindicate the rights of those, who are subjected to their sovereign control?1 If the oppression be in the exercise of unconstitutional powers, then the functionaries, who wield them, are amesnable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.

§ 1671. As to private injustice and injuries, they may regard either the rights of property, or the rights of contract; for the national government is per se incapable of any merely personal wrong, such as an assault and battery, or other personal violence. In regard to property, the remedy for injuries lies against the immediate perpetrators, who may be sued, and cannot shelter themselves under any imagined immunity of the government from due responsibility.2 If, therefore, any agent of the government shall unjustly invade the property of a citizen under colour of a public authority, he must, like every other violator of the laws, re-

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1 See on this subject, 1 Black. Comm. 243 to 245.

2 See Hoyt v. Gelston, 3 Wheat. R. 246; Osborn v. Bank of United States, 9 Wheat. R. 738; Marbury v. Madison, 1 Cranch. 137, 164, 165; 3 Black. Comm. 255.

spond in damages. Cases, indeed, may occur, in which he may not always have an adequate redress, without some legislation by congress. As for example, in places ceded to the United States, and over which they have an exclusive jurisdiction, if his real estate is taken without, or against lawful authority. Here he must rely on the justice of congress, or of the executive department The greatest difficulty arises in regard to the contracts of the national government; for as they cannot be sued without their own consent, and as their agents are not responsible upon any such contracts, when lawfully made, the only redress, which can be obtained, must be by the instrumentality of congress, either in providing (as they may) for suits in the common courts of justice to establish such claims by a general law, or by a special act for the relief of the particular party. In each case, however, the redress depends, solely upon the legislative department, and cannot be administered, except through its favour. The remedy is by an appeal to the justice. of the nation in that forum, and not in any court of justice, as matter of right.

§ 1672. It has been sometimes thought, that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the constitution itself; but it lies, if at all, against congress, for not having provided, (as it is clearly within their constitutional authority to do,) an adequate remedy for all private grievances of this sort, in the courts of the United States. In this respect, there is a marked contrast between the actual right and practice of redress in the national government, as well as in most of the state governments, and the right and practice maintained under the British constitution. In England, if any person has, in point of

property, a just demand upon the king, he may petition him in his court of chancery (by what is called a petition of right) where the chancellor will administer right, theoretically as a matter of grace, and not upon compulsion;1 but in fact, as a matter of constitutional duty. No such judicial proceeding is recognised, as existing in any state of this Union, as matter of constitutional right, to enforce any claim, or debt against a state. In the few cases, in which it exists, it is matter of legislative enactment.2 Congress have never yet acted upon the subject, so as to give judicial redress for any non-fulfilment of contracts by the national government. Cases of the most cruel hardship, and intolerable delay have already occurred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice, which has been yielded only after the humble supplications of many years before the legislature. One can scarcely refrain from uniting in the suggestion of a learned

commentator, that in this regard the constitutions, both of the national and state governments, stand in need of some reform, to quicken the legislative action in the administration of justice; and, that

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1 1 Black. Comm. 243; Comyn's Dig. Prerogative, D. 78 to D. 85; The Banker's cue, 1 Freeman R. 331; 8. e. 5 Mod. 29; 11 Harg. State Trials, 137; Skinner's R. 601; 2 Dall. R. 437 to 445; S.C. 2 Peters's Cond. It. 642 to 646. But see Macbeath v. Haldimand, I. T. R. 172, 176, 177.

2 A suit against the state has been allowed in Virginia* and Maryland, and some other states by statute. But it is intimated, that, even when judgment has passed in favour of the claimant, he has sometimes received no substantial benefit from the judgment, from the omission of the legislature to provide suitable funds, or to make suitable appropriations to discharge the debt. 1 Tucker's Black. Comm. App. 352.

*** 1 Tucker's Black. Comm. 243, note (5); Chisholm v. Georgia, is, 2 Dall. R. 419, 434, 435.**

some mode ought to be provided, by which a pecuniary right against a state, or against the United States, might be ascertained, and established by the judicial sentence of some court; and when so ascertained and established, the payment might be enforced from the national treasury by an absolute appropriation.1 Surely, it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract, or property against the crown; and, that in a republic there is an utter denial of justice, in such cases, to any citizen through the instrumentality of any judicial process. He may complain; but he cannot compel a hearing. The republic enjoys a despotic sovereignty to act, or refuse, as it may please; and is placed beyond the reach of law. The monarch bows to the law, and is compelled to yield his prerogative at the footstool of justice.2

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1 1 Tuck. Black. Comm. App. 352.

2 Mr. Chief Justice Jay, in his opinion in the great case of Chisholm's Executors v. Georgia, 3 Dall. R. 414, 474, (S. C. 2 Peters's Cond. R. 635, 674,) takes a distinction between the case of the suability of a state, and the suability of the United States, by a citizen under the constitution, affirming the former, and denying the latter. His reason is thus stated. "In all cases of actions against states, or individual citizens, the national courts are supported in all their legal and constitutional proceedings and judgments, by the arm of the executive powers of the United States. But in cases of actions against the United States, there is no power, which the courts can call to their aid. From this distinction, important conclusions ere deducible; and they place the case of a state, and the ease of the United States, in a very different view." In the case of Macbeath v. Haldimand, (1 Term. Reports, 172.) Lord Mansfield seemed to intimate great doubts, whether, a petition of right would lie in England in any case, except of a private debt due from the crown; and not for debts contracted under the authority of parliament. Before the revolution, he said, "all the public supplies were given to the king, who, in

§ 1673. The next clause extends the judicial power "to controversies between two or more states; between a state and the citizens of another state; between citizens of different states, claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens, or subjects." Of these, we will speak in their order. And, first, "controversies between two or more states."1 This power seems to be essential to the preservation of the peace of the Union. "History" (says the Federalist,2) gives us a horrid picture of the dissensions and private wars, which distracted and desolated Germany, prior to the institution of the imperial chamber by Maximilian, towards the close of the fifteenth century; and informs us at the same time of the vast influence of that institution, in appeasing the disorders, and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body."3 But we need not go for illustrations to the history of other countries. Our own has presented, in past times, abundant proofs of the irritating effects

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his individual capacity contracted for all expenses. lie alone had the disposition of the public money. But since that time, the supplies had been appropriated by parliament to particular purposes; and now, whoever advances money for the public service, trusts to the faith of parliament." Id. 176. But see Buller J.'s opinion, in the same case. See a]so Mr. Justice Iredell's opinion in Chisholm v. Georgia, 2 Dall. R. 437 to 445.

1 In the first draft of the constitution, the words were to controversies "between two or more states, except such as shall regard territory or jurisdiction." The exception was subsequently

abandoned. Journal of Convention, p. 226.

2 The Federalist, No. 80.

3 See also 1 Kent's Comm. Lect. 14, p. 977, 278, (2d edition, p. 295, 296;) 1 Robertson's Charles V. p. 183, 395, 397.

resulting from territorial disputes, and interfering claims of boundary between the states. And there are yet controversies of this sort, which have brought on a border warfare, at once dangerous to public repose, and incompatible with the public interests.1

§ 1674. Under the confederation, authority was given to the national government, to hear and determine, (in the manner pointed out in the article,) in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever.2 Before the adoption of this instrument, as well as afterwards, very irritating and vexatious controversies existed between several of the states, in respect to soil, jurisdiction, and boundary; and threatened the most serious public mischiefs.3 Some of these controversies were heard and determined by the court of commissioners, appointed by congress. But, notwithstanding these adjudications, the conflict was maintained in some cases, until after the establishment of the present constitution.4

§ 1675. Before the revolution, controversies between the colonies, concerning. the extent of their rights of soil, territory, jurisdiction, and boundary, under their respective charters, were heard and determined before

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1 See Sergeant on Const Introduction, p. 11 to 16; 2 Elliot's Deb. 418.

2 Confederation, art. 9.

3 2 Elliot's Deb. 418; Sergeant on Const. Introduction, p. 11, 19, 13, 15, 16; 5 Journ. of Congress, 456; 7 Journ. of Congress, 364; 8 Journ. of Congress, 83; 9 Journ. of Congress, 64; 12 Journ. of Congress, 10, 52, 219, 220, 230.

4 New York v. Connecticut, 4 Dall. R. 3, Fowler v. Lindsey, 3 Dall. R. 411; 3 Elliot's Deb. 281; 2 Elliot's Deb. 418.

the king in council, who exercised original jurisdiction therein, upon the principles of Feudal sovereignty.1 This jurisdiction was often practically asserted, as in the case or the dispute between Massachusetts and New Hampshire, decided by the privy council, in 1679;2 and in the case of the dispute between New Hampshire and New York, in 1764.3 Lord Hardwicke recognised this appellate jurisdiction in the most deliberate manner, in the great case of Penn v. Lord Baltimore.4 The same necessity, which gave rise to it in our colonial state, must continue to operate through all future time. Some tribunal, exercising such authority, is essential to prevent an appeal to the sword, and a dissolution of the government. That it ought to be established under the national, rather than under the state, government; or, to speak more properly, that it can be safely established under the former only, would seem to be a position self-evident, and requiring no reasoning to support it.5 It may justly be presumed, that under the national government in all controversies of this sort, the decision will be impartially made according to the principles of justice; and all the usual and most effectual precautions are taken to secure this impartiality, by confiding it to the highest judicial tribunal.6

§ 1676. Next; "controversies between a state and "the citizens of another state." "There are other

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1 1 Back. Comm. 231.

2 Ante, Vol. 1, § 80; 1 Chalm. Annals, 489, 490; 1 Hutch. Hist. 319.

3 Sergeant on Const. in Introduction, p. 5, 61 3 Belknap's Hist. of New Hampshire, 296, App. 10.

4 1 Vesey's R. 444.

5 The Federalist, No. :19. See also the remarks of Mr. Chief Justice Jay, ante, Vol. 1, § 488, note; 2 Elliot's Debates, 418,

6 The Federalist, No. 39, 80.

sources," says the Federalist,1 "besides interfering claims of boundary, from which bickerings and animosities may spring up among the members of the Union. To some of these we have been witnesses in the course of our past experience. It will be readily conjectured, that I allude to the fraudulent laws, which have been passed in too many of the states. And though the proposed constitution establishes particular guards against the repetition of those instances, which have hitherto made their appearance; yet it is warrantable to apprehend, that the spirit, which produced them, will assume new shapes, that could not be foreseen, nor specifically provided against. Whatever practices may have a tendency to distract the harmony of the states are proper objects of federal superintendence

and control. It may be esteemed the basis of the Union, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' And if it be a just principle, that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that, in order to the inviolable maintenance of that equality of privileges and immunities, to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases, in which one state, or its citizens, are opposed to another state, or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary, that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the Union,

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1 The Federalist, No. 80.

will never be likely to feel any bias inauspicious to the principles, on which it is founded." It is added, "The reasonableness of the agency of the national courts in cases, in which the state tribunals cannot be supposed to be impartial, speaks for it. No man ought certainly to be a judge in his own cause, or in any cause, in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts, as the proper tribunals for the determination of controversies between different states and their citizens."1

§ 1677. And here a most important question of a constitutional nature was formerly litigated; and that is, whether the jurisdiction given by the constitution in cases, in which a state is a party, extended to suits brought against a state, as well as by it, or was exclusively confined to the latter. It is obvious, that, if a suit could be brought by any citizen of one state against another state upon any contract, or matter of property, the state would be constantly subjected to judicial action, to enforce private rights against it in its sovereign capacity. Accordingly at a very early period numerous suits were brought against states by their creditors to enforce the payment of debts, or other claims. The question was ,made, and most elaborately considered in the celebrated case of Chisholm v. Georgia;2 and the majority of the Supreme Court held, that the judicial power under the constitution applied equally to suits brought by, and against a state. The learned judges, on that occa-

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1 See also the remarks of Mr. Chief Justice Jay, in Chisholm v. Georgia, 2 Dall. R. 474, cited in the note, ante Vol. i. § 488.

2 2 Dall. R. 419; 8. C, 2 Peters's Cond. R. 635. See also 1 Kent's Comm, Lect. 14, p. 278, (2d edit. p. 296, 297;) Cohens v. Virginia 6 Wheat. R. 381.

sion, delivered seriatim opinions, containing the grounds of their respective opinions. It is not my intention to go over these grounds, though they are stated with great ability and legal. learning, and exhibit a very thorough mastery of the whole subject.1 The decision created general alarm among the states; and an amendment was proposed, and ratified by the states,2 by which the power was entirely taken away, so far as it regards suits brought against a state. It is in the following words: "The judicial power of the United States shall not be construed to extend to any suit in law, or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens, or subjects of any foreign state." This amendment was construed to include suits then pending, as well as suits to be commenced thereafter; and accordingly all the suits then pending were dismissed, without any further adjudication.3

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1 Although the controversy is now ended, the opinions deserve a most attentive perusal, from their very able exposition of many constitutional principles. It is remarkable, that the Federalist (No. 81,) seems to have taken the opposite ground from tire majority of the judges, holding, that the states were not suable, but might themselves sue under this clause of the constitution.* I confess it seems to me difficult to reconcile this position with the reasoning on the same subject in the preceding number, (80,) a part of which is quoted in the text, (¤ 1676.) Mr. Justice Iredell, who dissented from the other judges of the Supreme Court, in Chisholm v. Georgia, put his opinion mainly on the ground, that it was a suit for a debt, for which no action lay, at least compulsively, at the common law against the crown. but at most, only a petition of right; and in America, whoever contracts with a state trusts to the good faith of the state. 2 In 1793; 3 Dall. R. 378. 3 Hollingsworth v. Virginia,

3 Dall. R. 378. -- The history and reasons of this amendment are succinctly stated by Mr. Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. R. 406.

*** See also 9 Elliot's Deb. 390, 391,401, 405.**

§ 1678. Since this amendment has been made, a question of equal importance has arisen; and that is, whether the amendment applies to original suits only brought against a state, leaving the appellate jurisdiction of the Supreme Court in its full vigour over all constitutional questions, arising in the progress of any suit brought by a state in any state court against any private citizen or alien. But this question will more properly come under review, when we are considering the nature and extent of the appellate jurisdiction of the Supreme Court. At present, it is only necessary to state, that it has been solemnly adjudged, that the amendment.applies only to original suits against a state; and does not touch the appellate jurisdiction of the Supreme Court to re-examine, on an appeal or writ of error, a judgment or decree rendered in any state court, in a suit brought originally by a state against any private person.1

§ 1679. Another inquiry suggested by the original clause, as well as by the amendment, is, when a state is properly to be deemed a party to a suit, so as to avail itself of, or to exempt itself from, the operation of the jurisdiction conferred by the constitution. To such an inquiry, the proper answer is, that a state, in the sense of the constitution, is a party only, when it is on the record as such; and it sues, or is sued in its political capacity. It is not sufficient, that it may have an interest in a suit between other persons, or that its rights, powers, privileges, or duties, come therein incidentally in question. It must be in terms a plaintiff or defendant, so that the judgment, or decree may be binding upon it, as it is in common suits binding upon parties and privies. The point arose in

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1 Cohens v. Virginia, 6 Wheat. R. 264.

an early state of the government, In a suit between private persons, where one party asserted the land in controversy to be in Connecticut and the other in New York; and the court held, that neither state could be considered as a party.1 It has been again discussed in some late cases; and the doctrine now firmly established is, that a state is not a party in the sense of the constitution, unless it appears on the record, as such, either as plaintiff or defendant. It is. not sufficient, that it may have an interest in the cause, or that the parties before the court are sued for acts done, as agents of the state.2 In short, the very immunity of a state from

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1 Fowler v. Lindsey, 3 Dall. R. 411; 8. C. 1 Peters's Cond. R. 190, 191; State of New York v. State of Connecticut, 4 Dall. R. 1, 3 to 6; United States v. Peters, 5 Cranch's R. 115, 139; 1 Kent's Comm. Lect. 15, p. 302, (2d edit. p. 323.)

2 The reasoning of Mr. Chief Justice Marshall in Osborn v. Bank of United States, (9 Wheat. R. 846, &c.) on this point is very full and satisfactory, and deserves to be cited at large. It is only necessary to premise, that the suit wan a bill in equity brought by the Bank of the United State against Osborn and others, as state officers, for an injunction and other relief, they having levied a tax of one hundred thousand dollars on certain property of the bank, under a state law of the state of Ohio. "We proceed now," said the Chief Justice, "to the 6th point made by the appellants, which is, that if any case is made in the bill proper for the interference of court of chancery it is against the state of Ohio, in which case the circuit court could not exercise jurisdiction.

"The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise, granted by a law of tile United States, which franchise file state of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officer of the state from executing the law. It is, then, a controversy between the bank and the state of Ohio. The interest of the state is direct and immediate, not consequential. The process of the court, though not directed against the state by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form. against the late, and tile court ought not to proceed without making the suite a party. If this cannot be done, the court cannot take jurisdiction of the cause.

"The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the state in the suit, as

being made a party, constitutes, or may constitute, a solid ground, why the suit should be maintained against other parties, who act as ha agents, or claim under its title; though otherwise, as the principal, it might be fit; that the state should be made a party upon the common principles of a court of equity.1

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brought, is admitted; and, had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the state was before the court. But this was not in the power of the bank. The eleventh amendment of the constitution has exempted a state from the suits of

citizens of other states, or aliens; and the very difficult question is to be decided, whether, in such a case the court may act upon the agents employed by the state, and on the property in their hands.
"Before we try this question by the constitution, it tony not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members should the objection prevail.
"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases, where the government is in the exercise of its best established and most essential powers, as well as to those, which may be deemed questionable. It asserts, that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law of the United States. It maintains, that, if a state shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, tony all be inhibited, under ruinous penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties; and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of

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1 Osborn v. Bank of United States, 9 Wheat. R. 738, 838 to 845; Id. 846; The Governor of Georgia v. Madruzo, 1 Peters's Sup. R. 110, 111, 122.

§ 1680. The same principle applies to cases, where a state has an interest in a corporation; as when it is a stockholder in an incorporated hank, the corporation is still suable, although the state, as such, is

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attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armour, and incapable of shielding its agent, or executing its laws, otherwise than by proceedings which ere to take place alter the mischief in perpetrated and which must often be ineffectual, from the inability of the agents to make compensation.
"These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue off car for performing his duty, be more obviously wrong. than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for time performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business. But, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one, as in the other.
"The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the courts of the United States cannot rightfully protect the agents, who execute every law authorized by the constitution, from the direct action of state agents in the collection of penalties, they cannot rightfully protect those, who execute any law.
"The question, then, is, whether the constitution of time United States has provided a tribunal, which cult peacefully and rightfully protect those, who are employed in carrying, into execution the laws of the Union, from the attempts of a particular state to resist the execution of those laws.
"The state of Ohio denies tile existence of this power; and contends, that no preventive proceedings whatever, or proceedings against the very property, which may have been seized by time agent of a state, can be sustained against such agent, because they would be substantially against the state itself, in violation of the 11th amendment of the constitution.
"That the courts of the Union cannot entertain a suit brought against a state by an alien, or the citizen of another States is not to be

exempted from any action.1 The state does not, by becoming a corporator, identify itself with the corporation. The bank, in such a case, is not the state, although the state holds an interest in it. Nor will it

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controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a state, in the sense of the constitution?

"The 11th amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited. The words of the constitution, so far as they respect this question, are, 'The judicial power shall extend to controversies between two or more states, between a state end citizens of another state, and between a state and foreign states, citizens, or subjects.' A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases, in which 'a state shall be a party.' The words of the 11th amendment are, 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of a foreign state.'

"The bank of the United States contends, that in all cases, in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one, who may be interested, but is not shown by the record to be a party. The appellants admit, that. the jurisdiction of the court is not ousted by any incidental or consequential interest, which a state may have in the decision to be made, but is to be considered as a party, where the decision acts directly and immediately upon the state, through its officers.

"If this question were to be determined on the authority of English decisions, it is believed, that no case can be adduced, where any person has been considered as a party, who is not made so in the record. But the court will not review those decisions, because it is thought a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the courts of any other country.

"Do the provisions, then, of the American constitution, respecting controversies, to which a state may be a party, extend, on a fair construction of that instrument, to cases in which the state is not a party on the record? The first in the enumeration, is a controversy between two or more states. There are not many questions, in which a state would

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1 United States Bank v. Planters' Bank of Georgia, 9 Wheat R. 904; Bank of Com'th of Kentucky v. Wister, 3 Peters's Sup. R. 318.

make any difference in the case, that the state has the sole interest in the corporation, if in fact it creates other persons corporators.1 An analogous case will be found in the authority, given by an act of congress

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be supposed to take a deeper or more immediate interest, than in those, which decide on the extent of her territory. Yet the constitution, not considering. the state as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different states. If each state, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves, that tire constitution does not consider the state as a party in such a case. Jurisdiction is expressly granted, in those cases only, where citizens of the same state claim lands under grants of different states. If the claimants be citizens of different states, the court takes jurisdiction for that reason. Still, the right of the state to grant is the essential point in dispute; and in that point the state is deeply interested. If that interest converts the state into a party, there is an end of the cause; and the constitution will be construed to forbid the circuit courts to take cognizance of questions, to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same state.

"We are aware, that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the court, where its judgment does not act directly upon the property or interests of the state; but we deemed it of some importance to show, that the framers of the constitution contemplated the distinction between cases, in which a state was interested, and those, in which it was a party, and made no provision for a case of interest, without being

a party on the record. In cases, where a state is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the state, what rule has the constitution given, by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a state's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?
"The next in the enumeration is a controversy between a state and the citizens of another state. Can this case arise, if the state be not a

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1 Bank of Com'th of Kentucky v. Wister, 3 Peters's Sup. R. 318.

to the postmaster-general, to bring suits in his official capacity. In such suits the United States are not understood to be a party, although the suits solely regard their interests. The postmaster-general does

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party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New-York and New-Jersey. Suppose, while such a controversy is pending, the collecting officer of one state should seize property for taxes belonging to a man, who supposes himself to reside in the other state, and who seeks redress in the federal court of that state, in which the officer resides. The interest of the state is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the state. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the state against him, may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain, that it ought not, the judgment so pleaded would have acted directly on the revenue of the state in the hands of its officer. And yet the argument admits, that the action, in such a case, would be sustained. But, suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.
"It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive, that the same reasoning is applicable to all the other enumerated controversies, to which a state may be a party. The principle may be illustrated by a reference to those other controversies, where jurisdiction depends on the party. But, before we review them, we will notice one, where the nature of the controversy is, in some degree, blended with the character of the party.
"If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought, which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrest-

not, in such cases, sue under the clause giving jurisdiction, "in controversies, to which the United States shall be a party;" but under the clause extending the jurisdiction to cases arising under the laws of the United States.1

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ed. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts this privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different This court car. take cognizance of all cues 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to states. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons, which all comprehend, to give the national courts jurisdiction over all cases, by which they were in any manner affected. In the cue of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might

be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cues only, to which they were actual parties.

"In proceeding with the cues, in which jurisdiction depends on the character of the party, the first in the enumeration is, 'controversies to which the United Stated shall be a party.' Does 'this provision extend to the cases, where the United States are not named in the record, but claim and are actually entitled to, the whole subject in controversy? Let us examine this question. Suits brought by the postmaster-general are for money dun to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the courts of the Union, under that clause, which gives jurisdiction in all cases, to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

"The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided, that the character of the parties must be shown on the record. Does this provision depend on the character of those, whose interest is litigated, or of those, who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees or his testator are

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1 Osborn v. Bank of United States, 9 Wheat. R. 855, 856; Postmaster General v. Early, 12 Wheat R. 136, 149.

§ 1681. The reasoning, by which the general doctrine is maintained, is to the following effect. It is a sound principle, that, when a government becomes a partner in any trading company, it divests itself, so far

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the persons really concerned in interest; but it has never been suspected, that, if the executor be a resident of another state, the jurisdiction of the federal courts could be ousted by the fact, that the creditors or legatees were citizens of the same state with the opposite party. The universally received construction in this case is, that jurisdiction is neither. given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal, than in that, which has been just stated. Why, then, is it universally admitted, that this interest in no manner affects the jurisdiction of the court? The plain and obvious answer is, because the jurisdiction of the court depends, not upon this interest, but upon the actual party on the record. Were a state to be the sole legatee, it will not, we presume, be alleged, that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact, than by the fact, that any other person, not suable in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the state.

"This principle might be further illustrated by showing, that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

"But the principle seems too well established to require, that more time should be devoted to it. It may, we think, be laid down as a rule, which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against states, is, of necessity, limited to those suits, in which a state is a party on the record. The amendment has its full effect, if the constitution be construed, as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state, by the citizens of another state, or by aliens. The state not being a party on the record, and the court having jurisdiction over those, who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those, with whom it associates itself, and takes the character, which belongs to its associates, and to the business, which is transacted. Thus, many states in the Union, which have an interest in banks, are not suable even in their own courts. A state, which establishes a bank, and becomes a stockholder in it, and gives it a capacity to sue and be sued, strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely, as a corporator; and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. The United States held shares in the old bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States were not a party to suits, brought by or against the bank, in the sense of the constitution. So, with respect to the present bank, suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation; and exercises no power or privilege, which is not derived from the charter.1 The reasoning admits of further illustration. A corporation is itself, in legal contemplation, an artificial person, having a distinct

1 United States Bank v. Planters' Bank of Georgia, 9 Wheat. R. 907, 908.

and independent existence from that of the persons composing it. It is this personal, political, and artificial existence, which gives it the character of a body politic or corporate, in which may be vested peculiar powers and attributes, distinct and different from those belonging to the natural persons composing it.1 Thus, the corporation may be perpetual, although the individuals composing it may in succession die. It may have privileges, and immunities, and functions, which do not, and cannot lawfully belong to individuals. It may exercise franchises, and transact business prohibited to its members, as individuals. The capacity to sue and be sued belongs to every corporation; and, indeed, is a function incident to it, independent of any special grant, because necessary to its existence.2 It sues and is sued, however, not in the names of its members, but in its own name, as a distinct person. It acts, indeed, by and through its members, or other proper functionaries; but still the acts are its own, and not the private acts of such members or functionaries. The members are not only not parties to its suits in any legal sense, but they may sue it, or be sued by it, in any action, exactly as any stranger may sue it, or be sued by it. A state may sue a bank, in which it is a stockholder, just as any other stockholder may sue the same bank. The United States may sue the bank of the United States, and entitle themselves to a judgment for any debt due to them; and they may satisfy the execution, issuing on such a judgment, out of any property of the bank. Now it is plain, that this could not be done, if the state, or the United States, or any other stockholder

1 See 1 Black. Comm. ch. 18, p. 467, 471, 475, 477.

2 1 Black. Comm. 475, 476.

were deemed a party to the record. It would be past all legal comprehension, that a party might sue himself, and be on both sides of the controversy. So, that any attempt to deem a state a party to a suit, simply because it has an interest in a suit, or is a stockholder in a corporation on the record, would be to renounce all ordinary doctrines of law applicable to such cases. The framers of the constitution must be presumed, in treating of the judicial department, to have used language in the sense, and with the limitations belonging to it in judicial usage. They must have spoken according to known distinctions, and settled rules of interpretation, incorporated into the very elements of the jurisprudence of every state in the Union.

§ 1682. It may, then, be laid down, as a rule, which admits of no exception, that in all cases under the constitution of the United States, where jurisdiction depends upon. the party, it is the party named on the record. Consequently the amendment above referred to, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits, in which a state is a party on the record. The amendment has its full effect, if the constitution is construed, as it would have been construed, had the jurisdiction never been extended to suits brought against a state by the citizens of another state, or by aliens.1

§ 1683. It has been doubted, whether this amendment extends to cases of admiralty and maritime juris-

1 Osborn v. United States Bank, 9 Wheat. R. 857, 858; The Governor of Georgia v. Madrazo, 1 Peters's Sup. R. 110, 122. -- A state may be properly deemed a party, when it sues, or is sued by process, by or

against the governor of the state in his official capacity. The Governor of Georgia v. Madrazo, 1 Peters's Sup. R. 110, 121 to 124.

diction, where the proceeding is in rein, and not in personam, There, the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides; the language of the amendment is, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity." But a suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both.1

§ 1684. Next. "Controversies between citizens of different states." Although the necessity of this power may not stand upon grounds quite as strong, as some of the preceding, there are high motives of state policy and public justice, by which it can be clearly vindicated. There are many cases, in which such a power may be indispensable, or in the highest degree expedient, to carry into effect some of the privileges and immunities conferred, and some of the prohibitions upon states expressly declared, in the constitution. For example; it is declared, that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Suppose an attempt is made to evade, or withhold these privileges and immunities, would it not be right to allow the party aggrieved an opportunity of claiming them, in a contest with a citizen of the state, before a tribunal, at once national and impartial?2 Suppose a state should pass a tender law,

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1 See United States v. Blight, 3 Hall's Law Journal, 197, 225; "The Governor of Georgia v. Madrazo, 1 Peters's Sop. R. 124, and Id. 128, 129, 130, 131, 132, 133, the Opinion of Mr. Justice Johnson; United States v. Peters, 5 Cranch's R. 115, 139, 140.

2 The Federalist, No. 80; Id. No. 42.

or law impairing the obligation of private contracts, or should in the course of its legislation grant unconstitutional preferences to its own citizens, is it not clear, that the jurisdiction to enforce the obligations of the constitution in such cases ought to be confided to the national tribunals? These cases are not purely imaginary. They have actually occurred; and may again occur, under peculiar circumstances, in the course of state legislation.1 What was the fact under the confederation? Each state was obliged to acquiesce in the degree of justice, which another state might choose to yield to its citizens.2 There was not only danger of animosities growing up from this source; but, in point of fact, there did grow up retaliatory legislation, to meet ' such real or imagined grievances.

§ 1685. Nothing can conduce more to general harmony and confidence among all the states, than a consciousness, that controversies are not exclusively to be decided by the state tribunals; but may, at the election of the party, be brought before the national tribunals. Besides; it cannot escape observation, that the judges in different states hold their offices by a very different tenure. Some hold during good behaviour; some for a term of years; some for a single year; some are irremovable, except upon impeachment; and others may be removed upon address of the legislature. Under such circumstances it cannot but be presumed, that there may arise a course of state policy, or state legislation, exceedingly injurious to the interests of the citi-

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1 See 2 Elliot's, Debates, 391, 392, 401,406; 3 Elliot's Debates, 142, 144, 277, 282.

2 See Chisholm v. Georgia, 2 Dall. R. 474, 475, 476, per Mr. Chief Justice Jay; The Federalist, No. 80; 3 Elliot's Debates, 142, 144, 277, 282; Martin v. Hunter, 1 Wheat. R. 346, 347.

zens of other states, both as to real and personal property. It would require an uncommon exercise of candour or credulity to affirm, that in cases of this sort all the state tribunals would be wholly without state prejudice, or state feelings; or, that they would be as earnest in resisting the encroachments of state authority upon the just rights, and interests of the citizens of other states, as a tribunal differently constituted, and wholly independent of state authority. And if justice should be as fairly and as firmly administered in the former, as in the latter, still the mischiefs would be most serious, if the public opinion did not indulge such a belief. Justice, in cases of this sort, should not only be above all reproach, but above all suspicion. The sources of state irritations and state jealousies are sufficiently numerous, without leaving open one so copious and constant, as the belief, or the dread of wrong in the administration of state justice.i Besides; if the public confidence should continue to follow the state tribunals, (as in many cases it doubtless will,) the provision will become inert and harmless; for, as the party will have his election of the forum, he will not be inclined to desert the state courts, unless for some sound reason, founded either in the nature of his cause, or in the influence of state prejudices.2 On the other hand, there can be no real danger of injustice to the other side in the decisions of the national tribunals; because the cause must still be decided upon the

true principles of the local law, and not by any foreign jurisprudence.3

1 See The Federalist, No. 80; 4 Dall. 474, 475, 476, per Mr. Chief Justice Jay; l Kent's Comm. Lect. 14, p. 276, (2 edit. p. 296); 3 Elliot's Debates, 141, 142, 144.

2 See Rawle on Const. ch. 31, p. 204; 3 Elliot's Deb. 381, 382.

3 2 Elliot's Debates, 401, 402, 406.

There is another circumstance of no small importance, as a matter of policy; and that is, the tendency of such a power to increase the confidence and credit between the commercial and agricultural states. No man can be insensible to the value, in promoting credit, of the belief of there being a prompt, efficient, and impartial administration of justice in enforcing contracts.1

§ 1686. Such are some of the reasons, which are supposed to have influenced the convention in delegating jurisdiction to the courts of the United States in cases between citizens of different states. Probably no part of the judicial power of the Union has been of more practical benefit, or has given more lasting satisfaction to the people. There is not a single state, which has not at some time felt the influence of this conservative power; and the general harmony, which exists between the state courts and the national courts, in the concurrent exercise of their jurisdiction in cases between citizens of different states, demonstrates the utility, as well as the safety of the power. Indeed; it is not improbable, that the existence of the power has operated, as a silent, but irresistible check to undue state legislation; at the same time, that it has cherished a mutual respect and confidence between the state and national courts, as honourable, as it has been beneficent.

§ 1687. The next inquiry growing out of this part of the clause is, who are to be deemed citizens of different states within the meaning of it. Are all persons born within a state to be always deemed citizens of that state, notwithstanding any change of domicil; or does their citizenship change with their change of dom-

1 2 Elliot's Debates, 392, 406; 3 Elliot's Debates, 144; Id. 282.

icil? The answer to this inquiry is equally plain and satisfactory. The constitution having declared, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, every person, who is a citizen of one state, and removes into another, with the intention of taking up his residence and inhabitancy there, becomes ipso facto a citizen of the state, where he resides; and he then ceases to be a citizen of the state, from which he has removed his residence. Of course, when he gives up his new residence or domicil, and returns to his native, or other state residence or domicil, he reacquires the character of the latter. What circumstances shall constitute such a change of residence or domicil, is an inquiry, more properly belonging to a treatise upon public or municipal law, than to commentaries upon constitutional law. In general, however, it may be said, that a removal from one state into another, animo manendi, or with a design of becoming an inhabitant, constitutes a change of domicil, and of course a change of citizenship. But a person, who is a native citizen of one state, never ceases to be a citizen thereof, until he has acquired a new citizenship elsewhere. Residence in a foreign country has no operation upon his character, as a citizen, although it may, for purposes of trade and commerce, impress him with the character of the country.1 To change allegiance is one thing; to change inhabitancy is quite another thing. The right and the power are not co-extensive in each case.2 Every citizen of a state is ipso facto a citizen of the United States.3

1 See 1 Kent's Comm. Lect. 4.

2 See Rawle on Const. ch. 9, p. 87 to 100.

3 Rawle on Const. ch. 9, p. 85, 86.

§ 1688. And a person, Who is a naturalized citizen of the United States, by a like residence in any state in the Union, becomes ipso facto a citizen of that state. So a citizen of a territory of the Union by a like residence acquires the character of the state, where he resides.1 But a naturalized citizen of the United States, or a citizen of a territory, is not a citizen of a state, entitled to sue in the courts of the United States in virtue of that character, while he resides in any such territory, nor until he has acquired a residence or domicil in the particular state.2

§ 1689. A corporation, as such, is not a citizen of a state in the sense of the constitution. But, if all the members of the corporation are citizens, their character will confer jurisdiction; for then it is substantially a suit by citizens suing in their corporate name.3 And a citizen of a state is entitled to sue, as such, notwithstanding he is a trustee for others, or sues in autre droit, as it is technically called; that is, as representative of another. Thus, a citizen may sue, who is a trustee at law, for the benefit of the person entitled to the trust. And an administrator, and executor may sue

for the benefit of the estate, which they represent; for in each of these cases it is their personal suit.4 But if citizens, who are parties to a suit, are merely nominally so; as, for instance, if magistrates are officially required to

1 See Gassies v. Ballon, 6 Peters's Sup. R. 761.

2 Hepburn v. Elszey, 2 Cranch's 448; Corporation of New-Orleans, v. Winter, 1 Wheat. R. 91; 1 Kent's Comm. Lect. 17, p. 360, (2 edition, p. 384.)

3 Hope Insurance Company v. Boardman, 5 Cranch, 57; Bank of United States v. Deveaux, 5 Cranch, 61; United States v. Planters Bank, 9 Wheat. R. 410.

4 (-- this foot note unreadable --)

allow suits to be brought in their names for the use or benefit of a citizen or alien, the latter are deemed the substantial parties entitled to sue.1

§ 1690. Next. "Controversies between citizens of the same state, claiming lands under grants of different states." This clause was not in the first draft of the constitution, but was added without any known objection to its propriety.2 It is the only instance, in which the constitution directly contemplates the cognizance of disputes between citizens of the same state;3 but certainly not the only one, in which they may indirectly upon constitutional questions have the benefit of the judicial power of the Union.4 The Federalist has remarked, that the reasonableness of the agency of the national courts in cases, in which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause, in respect to which he has the least interest or bias. "This principle has no inconsiderable weight in designating the federal courts, as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between citizens of the same state. Claimsto land under grants of different states, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question; and tied the courts down to decisions in favour of the grants of the state, to which they belonged.

1 Brown v. Strode, 5 Cranch, 303.

2 Journal of Convention, 226, 300.

3 The Federalist. No. 80.

4 Cohens v. Virginia, 6 Wheat. R. 390, 391, 392.

And where this has not been done, it would be natural, that the judges, as men, should feel a strong predilection for the claims of their own government.1 And, at all events, the providing of a tribunal, having no possible interest on the one side, more than the other, would have a most salutary tendency in quieting the jealousies, and disarming the resentments of the state, whose grant should be held invalid. This jurisdiction attaches not only to grants made by different states, which were never united; but also to grants made by different states, which were originally united under one jurisdiction, if made since the separation, although the origin of the title may be traced back to an antecedent period.2

§ 1691. Next. "Controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects." The Federalist3 has vindicated this provision in the following brief, but powerful manner: "The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts is with reason classed among the just causes of war, it will follow, that the federal judiciary ought to have cognizance of all causes, in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the

1 The Federalist, No. 80. See also Mr.Chief Justice Jay's Remarks, 4 Dall. 476, and ante vol. 3, § 1632.

2 Town of Pawlet v. Clarke, 9 Cranch, 292; Colson v. Lewis, 2 Wheat. R. 377.

3 The Federalist, No. 80. See also 3 Elliot's Debates, 283; 2 Elliot's Debates, 391.

security of the public tranquillity. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations, and those, which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction; the latter for tim of the states. But it is at least problematical, whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the lex loci, would not, if unredressed, be an aggression upon his sovereign as well as one, which violated the stipulations of a

treaty, or the general law of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion, and those of the other. So great a proportion of the controversies, in which foreigners are parties, involve national questions, that it is by far the most safe, and most expedient, to refer all those, in which they are concerned, to the national tribunals."
§ 1692. In addition to these suggestions, it may be remarked, that it is of great national importance to advance public, as well as private credit, in our intercourse with foreign nations and their subjects. Nothing can be more beneficial in this respect, than to create an impartial. tribunal, to which they may have resort upon all occasions, when it may be necessary to ascertain, or enforce their rights.1 Besides; it is not

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1 3 Elliot's Debates, 149, 143, 144, 282, 283. -- It is notorious, that this jurisdiction has been very satisfactory to foreign nations and their subjects. Nor have the dangers of state prejudice, and state attachment to local interests, to the injury of foreigners, been wholly imaginary. It has been already stated in another place, that the debts due to British subjects before the revolution, were never recovered, until after the adop-

wholly immaterial, that the law to be administered in cases of foreigners is often very distinct from the mere municipal code of a state, and dependent upon the law merchant, or the more enlarged consideration of international rights and duties, in a case of conflict of the foreign and domestic laws.1 And it may fairly be presumed, that the national tribunals will, from the nature of their ordinary functions, become better acquainted with the general principles, which regulate subjects of this nature, than other, courts, however enlightened, which are rarely required to discuss them.
§ 1693. In regard to controversies between an American and a foreign state, it is obvious, that the suit must, on one side at least, be wholly voluntary. No foreign state can be compelled to become a party, plaintiff or defendant, in any of our tribunals.2 If, therefore, it chooses to consent to the institution of any suit, it is its consent alone, which car give effect to the jurisdiction of the court. It is certainly desirable to furnish some peaceable mode of appeal in cases, where any controversy may exist between an American and a foreign state, sufficiently important to require the grievance to be redressed by any other mode, than through the instrumentality of negotiations.3
§ 1694. The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States. The general answer is, any person, who is not a citizen of the United States. A foreigner, who is naturalized, is no longer entitled to the character

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tion of the constitution, by suits brought in the national courts. See Ware v. Hylton, 3 Dall. R. 199.
1 See 1 Tucker's Black. Comm. App. 421; 3 Elliot's Deb. 282, 283
2 See 2 Elliot's Deb. 391, 407; Foster v. Nelson, 2 Peters's R. 254, 307.
3 See 3 Elliot's Debates, 282, 283.

of an alien.1 And when an alien is the substantial party, it matters not, whether he is a suitor in his own right; or whether he acts, as a trustee, or personal representative; or whether he is compellable by the local law to sue through some official organ.2 A foreign corporation, established in a foreign country, all of whose members are aliens, is entitled to sue in the same manner, that an alien may personally sue in the courts of the Union.3 It is not sufficient to vest the jurisdiction, that an alien is a party. to the suit, unless the other party be a citizen.4 British subjects, born before the American revolution, are to be deemed aliens; and may sue American citizens, born before the revolution, as well as those born, since that period. The revolution severed the ties of allegiance; and made the inhabitants of each country aliens to each other.5 In relation to aliens, however, it should be stated, that they have a right to sue only, while peace exists between their country and our own. For if a war breaks out, and they thereby become alien enemies, their right to sue is suspended, until the return of peace.6

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1 Mr. Tucker supposes, that the several states still retain the power of admitting aliens to become denizens of the state; but that they do not thereby become citizens. (1 Tuck. Black. Comm. App. 365.) What he means by denizens, he has not explained. If be means, that the states may naturalize, so far as to make an alien a citizen of the state, that may be well questioned. If he means only, that they may enable aliens to hold lands, and enjoy certain other qualified privileges within the state, that will not be denied.
2 Chappedelaine v. De Chenaux, 4 Cranch, 306; Brown v. Strode, 5 Cranch, E. 303.
3 Society for Propagating the Gospel v. Town of New-Haven, 8 Wheat. R. 464. 4 Jackson v. Twentyman, 2 Peters's Sup. R. 136.

5 Dawson's Lessee v. Godfrey, 4 Cranch, 321; Blight's Lessee v. Rochester, 7 Wheat. R. 535; IagIis v. Trustees of Sailors Snug Harbour, 3 Peters's Sup. R. 126.

6 1 Kent's Comm. Lect. 3, p. 64, 65, (2 edition, p. 68, 69.)

§ 1695. We have now finished our review of the classes of cases, to which the judicial power of the United States extends. The next inquiry naturally presented is, in what mode it is to be exercised, and in what courts it is to be vested. The succeeding clause of the constitution answers this inquiry. It is in the following words. "In all cases affecting ambassadors, other public ministers, and consuls, and those, in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations, as the congress shall make."1

§ 1696. The first remark arising out of this clause is, that, as the judicial power of the United States extends to all the cases enumerated in the constitution, it may extend to .all such cases in any form, in which judicial power may be exercised. It may, therefore, extend to them in the shape of original, or appellate jurisdiction, or both; for there is nothing in the nature of the cases, which binds to the exercise of the one in

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1 In the first draft of the constitution, the words stood thus. "In cases of impeachment, eases affecting ambassadors, other public ministers, and consuls, and those, in which a state shall be a party, this jurisdiction (of the Supreme Court) shall be original. In all other cases before mentioned, it shall be appellate, with such exceptions and under such regulations, as the legislature may make. The legislature may assign any part of the jurisdiction above mentioned, (except the trial of the president of the United States) in the manner and under the limitations, which it shall think proper, to such inferior courts, as it shall constitute from time to time." It was varied to its present form by successive votes, in which there was some difference of opinion. Journal of Convention, p. 226, 227, 299, 300, 301.

preference to the other.1 But it is clear, from the language of the constitution, that, in one form or the other, it is absolutely obligatory upon congress, to vest all the jurisdiction in the national courts, in that class of cases at least, where it has declared, that it shall extend to "all cases."2

§ 1697. In the next place, the jurisdiction, which is by the constitution to be exercised by the Supreme Court in an original form, is very limited, and extends only to cases affecting ambassadors, and other public ministers, and consuls, and cases, where a state is a party. And congress cannot constitutionally confer on it any other, or further original jurisdiction. This is one of the appropriate illustrations of the rule, that the affirmation of a power in particular cases, excludes it in all others. the clause itself would otherwise be wholly inoperative and nugatory. If it had been intended to leave it to the discretion of congress, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would have been useless to have proceeded further, than to define the judicial power, and the tribunals, in which it should be vested. Affirmative words often, in their operation, imply a negative of other objects, than those affirmed; and in this case a negative, or exclusive sense, must be given to the words, or they have no operation at all. If the solicitude of the convention, respecting our peace with foreign powers, might induce a provision to be made, that the Supreme Court should have original jurisdiction in cases, which might

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1 Martin v. Hunter, 1 Wheat. R. 333, 337, 338; Osborn v. Bank of United, States, 9 Wheat. R. 820, 821.

2 Id. p. 328, 330, 3:16. -- Upon this subject them is considerable discussion, in the case of Martin v. Hunter, (1 Wheat. R. 304, 313.)

be supposed to affect them; yet the clause would have proceeded no further, than to provide for such cases, unless some further restriction upon the powers of congress had been intended. The direction, that the Supreme Court shall have appellate jurisdiction in all cases, with such exceptions, as congress shall make, will be no restriction, unless the words are to be deem ed exclusive of original jurisdiction.1 And accordingly, the doctrine is firmly established, that the Supreme Court cannot constitutionally exercise any original jurisdiction, except in the enumerated cases. If congress should confer it, it would be a mere nullity.2

§ 1698. But although the Supreme Court cannot exercise original jurisdiction in any cases, except those 'specially enumerated, it is certainly competent for congress to vest in any inferior courts of the United States original jurisdiction of all other cases, not thus specially assigned to the Supreme Court; for there is nothing in the constitution, which excludes such inferior courts from the exercise of such original jurisdiction. Original

jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power; and except, so far as the constitution has made any distribution of it among the courts of the United States, it remains

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1 Marbury v. Madison, 1 Cranch, R. 174, 175; Wiscart v. Dauchy, 3 Dall R. 321; Cohens v. Virginia, 6 Wheat. R. 392 to 395; Id. 400, 401; Osborn v. Bank of United States, 9 Wheat. R. 820, 821.

2 Id. ibid. 1 Kent. Comm. Lect. 15, p. 294, 301, (2d edition, 314, 322;) Wiscart v. Dauchy, 3 Dall. R. 321. -- Congress, by the judiciary act of 1789, ch. 29, § 13, did confer on the Supreme Court the authority to issue writs of mandamus, in cases warranted by the principles and usages of law to persons holding office under the authority of the United States. But the Supreme Court, in. 1801, held the delegation of power to be a mere nullity. Marbury v. Madison, 1 Cranch, R. 137, 173 to 180.

to be exercised in an original, or appellate form, or both, as congress may in their wisdom deem fit. Now, the constitution has made no distribution, except of the original and appellate jurisdiction of the Supreme Court. It has no where insinuated, that the inferior tribunals shall have no original jurisdiction. It has no where affirmed, that they shall have appellate jurisdiction. Both are left unrestricted and undefined. Of course, as the judicial power is to be vested in the supreme and inferior courts of the Union, both are under the entire control and regulation of congress.1

§ 1699. Indeed, it has been a matter of much question, whether the grant of original jurisdiction to the Supreme Court, in the enumerated cases, ought to be construed to give to that court exclusive original jurisdiction, even of those cases. And it has been contended, that there is nothing in the constitution, which warrants the conclusion, that it was intended to exclude the inferior courts of the Union from a concurrent original jurisdiction.2 The judiciary act of 1789, (ch. 20, ¤ 11, 13,) has manifestly proceeded upon the supposition, that the jurisdiction was not exclusive; but, that concurrent original jurisdiction in those cases might be vested by congress in inferior courts.3 It has been strongly intimated, indeed, by the highest tribunal, on more than one occasion, that the original jurisdiction of the Supreme Court in those cases is exclusive;4 but

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1 Martin v. Hunter, 1 Wheat R. 337, 338; Osborn v. Bank of Untied States, 9 Wheat. R. 820, 821; Cohens v. Virginia, 6 Wheat R. 395, 396.

2 United States v. Rayart, 2 Dall. R. 297; Chisholm v. Georgia, 2 Dall. R. 419, 431, 436, per Iredell J. Sergeant on Const. ch. 2.

3 1 Kent. Comm. Lect 15, p. 294, 295, (2d edition, p. 314, 315.)

4 See Marbury v. Madison, 1 Cranch, R. 137; Martin v. Hunter

the question remains to this hour Without any authoritative decision.1

§ 1700. Another question of a very different nature is, whether the Supreme Court can exercise appellate jurisdiction in the class of cases, of which original jurisdiction is delegated to it by the constitution; in other words, whether the original jurisdiction excludes the appellate; and so, e converso, the latter implies a negative of the former. It has been said, that the very distinction taken in the constitution, between original and appellate jurisdiction, presupposes, that where the one can be exercised, the other cannot. For example, since the original jurisdiction extends to cases, where a state is a party, this is the proper form, in which such cases are to be brought before the Supreme Court; and, therefore, a case, where a state is a party, cannot be brought before the court, in the exercise of its appellate jurisdiction; for the affirmative here, as well as in the cases of original jurisdiction, includes a negative of the cases not enumerated.

§ 1701. If the correctness of this reasoning were admitted, it would establish no more, than that the Supreme Court could not exercise appellate jurisdiction in cases, where a state is a party. But it would by no means establish the doctrine, that the judicial power of the United States did not extend, in an appellate form, to such cases. The exercise of appellate jurisdiction is far from being limited, by the terms of the constitution, to the Supreme Court. There can be no

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1 Wheat. R. 337, 338; Osborn v. Bank of United States, 9 Wheat. R. 820, 821; I Kent's Comm. Lect. 15, p. 294, 235, (2d edition, p. 314, 315;) Cohens v. Virginia, 6 Wheat. R. 395, 396, 397.

1 United Stales v. Ortega, II Wheat. R. 467; Cohens v. Virginia, 6 Wheat R. 396, 397.

doubt, that congress may create a succession of inferior tribunals, in each of which it may vest appellate, as well as original jurisdiction. This results from the very nature of the delegation of the judicial power in the constitution. It is delegated in the most general terms; and may, therefore, be exercised under the authority of congress, under every

variety of form of original and appellate jurisdiction. There is nothing in the instrument, which restrains, or limits the power; and it must, consequently, subsist in the utmost latitude, of which it is in its nature susceptible.1 The result then would be, that, if the appellate jurisdiction over cases, to which a state is a party, could not, according to the terms of the constitution, be exercised by the Supreme Court, it might be exercised exclusively by an inferior tribunal. The soundness of any reasoning, which would lead us to such a conclusion, may well be questioned.2

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1 Martin v. Hunter, l Wheat. R. 337, 318; Osborn v. Bank of United States, 9 Wheat. R. 820, 821; Cohens v. Virginia, 6 Wheat. R. 392 to 396.

2 The Federalist, No. 82, has spoken of the right of congress to vest appellate jurisdiction in the inferior courts of the United States from state courts, (for it had before expressly affirmed that of the Supreme Court in such cases) in the following terms. "But could an appeal be made to lie from the state courts to the subordinate federal judicatories? This is another of the questions, which have been raised, and of greater difficulty, than the former. The following considerations countenance the affirmative. The plan of the convention, in the first place, authorizes the, national legislature to constitute tribunals, inferior to the Supreme Court. It declares, in the next place, that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as congress shall ordain and establish;' and it then proceeds to enumerate the cases, to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are, that they shall

§ 1702. But the reasoning itself is not well founded. It proceeds upon the ground, that, because the character of the party alone, in some instances, entitles the Supreme Court to maintain original jurisdiction, without any reference to the nature of the case, therefore, the character of the case, which in other instances is made the very foundation of appellate jurisdiction, cannot attach. Now, that is the very point of controversy. It is not only not admitted, but it is solemnly denied. The argument might just as well, and with quite as much force, be pressed in the opposite direction. It might be said, that the appellate jurisdiction is expressly extended by the constitution to all cases in law and equity, arising under the constitution, laws, and treaties of the United States, and, therefore, in no such cases could the Supreme Court exercise original jurisdiction, even though a state were a party.

§ 1703. But this subject has been expounded in so masterly a manner by Mr. Chief Justice Marshall, in delivering the opinion of the Supreme Court in a very celebrated case,1 that it will be more satisfactory to

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be 'inferior to the Supreme Court,' and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original, or appellate, or both, is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals; and many advantages, attending the power of doing it, may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements, calculated to contract the appellate jurisdiction of the Supreme Court. The state tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases, in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the state courts to district.courts of the Union."

1 Cohens v. Virginia, 6 Wheat. R. 264, 392, et seq.

give the whole argument in his own language. "The constitution" (says he,) "gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those, in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under the constitution, or a law, the jurisdiction is appellate. But a case, to which a state is a party, may arise under the constitution, or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavour so to construe them, as to preserve the true intent and meaning of the instrument.

§ 1704. "In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character

of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing. When, then, the constitution declares the jurisdiction in cases, where a state shall be a party, to be original, and in all cases arising under the constitution, or a law, to be appellate, the

conclusion seems irresistible, that its framers designed to include in the first class those cases, in which jurisdiction is given, because a state is a party; and to include in the second those, in which jurisdiction is given, because the case arises under the constitution, or a law. This reasonable construction is rendered necessary by other considerations. That the constitution, or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified, only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

§ 1705. "It is observable, that in this distributive clause no negative words are introduced. This observation is not made for the purpose of contending, that the legislature may 'apportion the judicial power between the supreme and inferior courts, according to its will.' That would be, as was said b.y this court in the case of Marbury v. Madison, to render the distributive clause 'mere surplusage,' to make it 'form without substance.' This cannot, therefore, be the true construction of the article. But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound

construction of the whole article, so as to give every part its intended effect. It is admitted, that 'affirmative words are often, in their operation, negative of other objects, than those affirmed;' and that where 'a negative or exclusive sense, must be given to them, or they have no operation at all,' they must receive that negative, or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects, for which the power was created; then, we think, affirmative words ought not to be construed negatively.

§ 1706. "The constitution declares, that in cases, where a state is a party, the Supreme Court shall have original jurisdiction; but does not say, that its appellate jurisdiction shall not be exercised in cases, where, from their nature, appellate jurisdiction is given, whether a state be, or be not a party.1 It may be conceded, that where the case is of such a nature, as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed, as to require it. There are many cases, in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised, where one of the parties might sue, or be sued in this court. The constitution defines the jurisdiction of the Supreme Court, but does not define that of the inferior courts. Can it be affirmed, that a state might not sue the citizen of another state in a Circuit Court? Should the Circuit Court decide for, or against its jurisdiction, should it dismiss the suit, or give judgment

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1 See 9 Wheat. R. 820, 821.

against the state, might not its decision be revised in the Supreme Court? The argument is, that it could not; and thevery clause, which is urged to prove, that the Circuit Court could give no judgment in the case, is also urged to prove, that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction, if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

§ 1707. "So, too, in the same clause, the jurisdiction of the court is declared to be original, 'in cases affecting ambassadors, other public ministers, and consuls.' There is, perhaps, no part of the article under consideration so much required by national policy, as this; unless it be that part, which extends the judicial power 'to all cases arising under the constitution, laws, and treaties of the United States.' It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts in cases, to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the third article. If the words, 'to all cases,' give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of congress, in cases arising under the constitution, laws, and treaties of the United States. Now, suppose an

individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could

it be contended, that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts, than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument, which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

§ 1708. "Foreign consuls frequently assert, in our prize courts, the claims of their fellow subjects. These suits are maintained by them, as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that, where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court. It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules, which, from time immemorial, have guided courts in their construction of instru-

ments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted, which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats, the intention.

§ 1709. "If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this; the original jurisdiction of the Supreme Court in cases, where a state is a party, refers to those cases, in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases, in which an original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and, perhaps, every case, in which a state is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case, to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case, cognizable under the third article of the constitution in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their

true meaning to the words, which define its extent. The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of Marbury v. Madison.1

§ 1710. "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connexion with the case, in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. In the case of Marbury v. Madison, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case, in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used, which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument, that the reasoning of the court is directed. They say, that, if such had been the intention of the article, 'it would certainly have been useless to

1 1 Cranch, R. 174, 175, 176.

proceed farther, than to define the judicial power, and the tribunals, in which it should be vested.' The court says, that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that 'affirmative words are often, in their operation, negative of other objects, than those which are affirmed; and, in this case, (in the case of Marbury v. Madison,) a negative or exclusive sense must be given to them, or they have no operation at all.' 'It cannot be presumed,' adds the court, 'that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.'

§ 1711. "The whole reasoning of the court proceeds upon the idea, that the affirmative words of the clause, giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative; and this reasoning is advanced in a case, to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle, which is generally correct, in terms much broader, than the decision, and not only much broader, than the reasoning, with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation, was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion, to which the court was conducted by that reasoning in the particular case, to one, in which the words have their

full operation, when understood affirmatively, and in which the negative, or exclusive sense is to be so used, as to defeat some of the great objects of the article. To this construction the court cannot give its assent. The general expressions in the case or Marbury v. Madison must be understood with the limitations, which are given to them in this opinion; limitations, which in no degree affect the decision in that case, or the tenor of its reasoning. The counsel, who closed the argument, put several cases for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the court. Were a state to lay a duty on exports, to collect the money and place it in her treasury, could the citizen, who paid it, he asks, maintain a suit in this court against such state, to recover back the money? Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration.

§ 1712. "The citizen, who had paid his money to his state, under a law that is void, is in the same situation with every other person, who has paid money by mistake. The law raises an assumpsit to return the money, and it is upon that assumpsit, that the action is to be maintained. To refuse to comply with this assumpsit may be no more a violation of the constitution, than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case, as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United. States in bar of the action, notwithstanding which the

court gives judgment against him. This would be a case arising under the constitution, and would be the very case now before the court.

§ 1713. "We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property? If the property confiscated be debts, our own experience informs us, that the remedy of the creditor against his debtor remains. If it be land, which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume, that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that, which the treaty secures to him; not against the state for money, which is not secured to him.

§ 1714. "The case of a state, which pays off its own debts with paper money, no more resembles this, than do those, to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be, that the act discharging the debt is a mere nullity, and that it is still due. Yet. the federal courts have no cognizance of the case. But suppose a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit: suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and, unless the.jurisdiction of this court might be exercised over it, the constitution would be violated, and the injured party be unable to bring his case before that tribunal, to which the people of the United States

have assigned all such cases. It is most true, that this court will not take jurisdiction, if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that, which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases, arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

§ 1715. "To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances, in which the constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited, and controlled in their construction by circumstances. One of these instances is, the grant by a state of a patent of nobility. The court, he says, cannot annul this grant. This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution, which may possibly take place; but to 'a case in law or equity,' in which a right, under such law, is asserted

in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances, with which the counsel, who opened the cause, has illustrated this argument. Although they show, that there may be violations of the constitution, of which the courts can take no cognizance, they do not show, that an interpretation more restrictive, than the words themselves import, ought to be given to this article. They do not show, that there can be 'a case in law or equity,' arising under the constitution, to which the judicial power does not extend. We think, then, that, as the constitution originally stood, the appellate jurisdiction of this court, in all eases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance, that a state was a party."1

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1 Much reliance has occasionally been laid upon particular expressions of the Supreme Court, used incidentally in argument, to support the reasoning, which is here so ably answered. The reasoning in Marbury v. Madison, (1 Cranch, R. 174, 175, 176,) has been cited, as especially in point. But the Supreme Court, in Cohens v. Virginia, (6 Wheat. R. 399 to 402) explained it in a satisfactory manner. So, in other cases, it is said by the Supreme Court, that "appellate jurisdiction is given to the Supreme Court in all cues, where it has not original jurisdiction;" and that "it may be exercised (by the Supreme Court) in all other cases, than those, of which it has original cognizance."* And again, "in those cases, in which the original jurisdiction is given to the Supreme Courts the judicial power of the United States cannot be exercised in

*** Martin v. Hunter, 1 Wheaton's R. 337, 338.**

§ 1716. The next inquiry is, whether the eleventh amendment to the constitution has effected any change of the jurisdiction, thus confided to the, judicial power of the United States. And here again the most satisfactory answer, which can be given, will be found in the language of the same opinion.1 After quoting the words of the amendment, which are, "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the states by citizens of another state, or by citizens or subjects of any foreign state," the opinion proceeds: "It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension, that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the appre-

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its appellate form,'* Now, these expression, if taken in connexion with the context, and the general scope of the argument, in which they are to be found, are perfectly accurate. It is only by detaching them from this connexion, that they are supposed to speak a language, inconsistent with that in Cohen, v. Virginia, (6 Wheat. R. 392 to 399.) The court, in each of the cases, where the language above cited is used, were referring to those classes of cases, in which original jurisdiction is given solely by the character of the party, i. e. a state, a foreign ambassador, or other public minister, or a consul. In such cases, if there

would be no jurisdiction at all, founded upon any other part of the constitutional delegation of judicial power, except that applicable to parties, the court held, that the appellate jurisdiction would not attach. Why? Plainly, because original jurisdiction only was given in such cases. But where the constitution extended the appellate jurisdiction to a class of cases, embracing the particular suit, without any reference to the point, who were parties, there the same reasoning would not apply.

1 Cohen, v. Virginia, 6 Wheat. R. 406 to 412.

*** Osborn v. Bank of United States, 9 Wheaton's R. 820.**

hensions, that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation, supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause, than the dignity of a state. There is no difficulty in finding this cause. Those, who were inhibited from commencing a suit against a state, or from prosecuting one, which might be commenced before the adoption of the amendment, were persons, who might probably be its creditors. There was not much reason to fear, that foreign or sister states would be creditors to any considerable amount; and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced, or prosecuted by individuals, but not to those brought by states.

§ 1717. "The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes, to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of

other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

§ 1718. "The words of the amendment appear to the court to justify and require this construction. The judicial power is not 'to extend to any suit in law or equity, commenced, or prosecuted against one of the United States by citizens of another state, &c.'

§ 1719. "What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments, whereby this remedy is obtained, are a diversity of suits and actions, which are defined by the Mirror to be "the lawful demand of one's right;" or, as Braeton and Fleta express it, in the words of Justinian, jus prosequendi in judicio, quod alicui debetur. Blackstone then proceeds to describe every species of remedy by suit; and they are all cases, where the party suing claims to obtain something, to which he has a right.

§ 1720. "To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of

a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the Supreme Court against some of the states before this amendment was introduced into Congress, and others might be commenced, before it should be adopted by the state legislatures, and might be depending at the time of its adoption. The object of the amendment was, not only to prevent the commencement of future suits, but to arrest the prosecution of those, which might be commenced, when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit, which may be commenced, or which, if already commenced, may be prosecuted against a state by the citizen of another state. If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a state. It is clearly in its commencement the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but 'for the purpose of asserting a constitutional defence against a claim made by a state.

§ 1794. "A writ of error is defined to be a commission, by which the judges of one court are authorized to examine a record, upon which a judgment was given in another court, and, on such examination, to affirm, or reverse the same according to law. If, says my Lord Coke, by the writ of error the plaintiff may recover, or be restored to any thing, it may be released by the name of an action. In Bacon's

Abridgment, tit. Error, L. it is laid down, that 'where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea. And when land is to be recovered, or restored in a writ of error, a release of actions real is a good bar. But where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar.' And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action, when it is to restore the party, who obtains it to the possession of any thing, which is withheld from him, not when its operation is entirely defensive. This rule will apply to writs of error from the Courts of the United States, as well as to those writs in England.

§ 1722. "Under the judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defence, set up under the constitution, or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring, whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced, or prosecuted against the state, whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it,

of any description, is asserted or prosecuted. The party is not to be restored to the possession of any thing. Essentially, it is an appeal on a single point; and the defendant, who appeals from a judgment rendered against him, is never said to commence, or prosecute a suit against the plaintiff, who has obtained the judgment. The writ of error is given, rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper, where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated, as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error, or appeal, no claim is asserted, no demand is made by the original defendant. He only asserts the constitutional right, to have his defence examined by that tribunal, whose province it is to construe the constitution and laws of the Union.

§ 1723. "The only part of the proceeding, which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party, that the record is transferred into another court, where he may appear, or decline to appear, as his judgment, or inclination may determine. As the party, who has obtained a judgment is out of court, and may, therefore, not know, that his cause is removed, common justice requires, that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance; but the judgment is to be re-examined, and reversed, or affirmed, in like

manner, as if the party had appeared, and argued his cause.

§ 1724. "The point of view, in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced, or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favour of the United States into a superior court, where they have, like those in favour of an individual, been re-examined, and affirmed, or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court. It is, then, the opinion of the court, that the defendant, who removes a judgment, rendered against him by a state court, into this court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution and laws of the United States, does not commence, or prosecute a suit against the state, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing, which he demands."1

§ 1725. Another inquiry, touching the appellate jurisdiction of the Supreme Court, of a still more general character, is, whether it extends only to the inferior courts of the Union, constituted by congress, or reaches to cases decided in

the state courts. This question

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1 See also Governor of Georgia v. Madrazo, 1 Peters's Sup. R. 128 to 131, per Johnson J.

has been made on several occasions; and has been most deliberately weighed, and solemnly decided in the Supreme Court. The reasoning of the court in Martin v. Hunter,1 (which was the first time, in which the question was directly presented for judgment,) will be here given, as it has been affirmed on more recent discussions.2

§ 1726. "This leads us," says the court "to the consideration of the great question, as to the nature and extent of the appellate jurisdiction of the United States. We have already seen, that appellate jurisdiction is given by the constitution to the Supreme Court in all cases, where it has not original jurisdiction; subject, however, to such exceptions and regulations, as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the Supreme Court. There can be no doubt, that congress may create a succession of inferior tribunals, in each of which it may vest appellate, as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress, under every variety of form of appellate, or original jurisdiction. And as there is nothing in the constitution, which restrains, or limits this power, it must, therefore, in all these cases, subsist in the utmost latitude, of which, in its own nature, it is susceptible.

§ 1797. "As, then, by the terms of the constitution,

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1 1 Wheat. R. 304.

2 Cohens v. Virginia, 6 Wheat R. 413 to 423.

the appellate jurisdiction is not limited, as to the Supreme Court, and as to this court it may be exercised in all other cases, than those, of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, 'the judicial power (which includes appellate power,) shall extend to all cases,' &c., and ' in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction.' It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification, as to the tribunal, where it depends. It is incumbent, then, upon those, who assert such a qualification, to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

§ 1728. "If the constitution meant to limit the appellate jurisdiction to eases pending in the courts of the United States, it would necessarily follow, that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How, otherwise, could the jurisdiction extend to all cases, arising under the constitution, laws, and treaties of the United States, or, to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction, as to them, should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all, or some of the other

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classes of cases in the constitution, without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this, not only when the casus faederis should arise directly, but when it should arise incidentally in cases pending in state courts. This construction would abridge the jurisdiction of such courts far more, than has been ever contemplated in any act of congress.

§ 1729. "On the other hand, if, as has been contended, a discretion be vested in congress to establish, or not to establish, inferior courts at their own pleasure, and congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held, that the appellate power would extend to state courts; for the constitution is peremptory, that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power, vested in congress, and which they might rightfully omit to exercise, Would defeat the absolute injunctions of the constitution in relation to the whole appellate power.

§ 1730. "But it is plain, that the framers of the constitution did contemplate, that cases within the judicial cognizance of the United States, not only might, but would arise in the state courts in the exercise of their ordinary jurisdiction. With this view, the sixth article declares, 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 the judges, in every state, shall be bound thereby, any thing, in the constitution or laws of any state, to the contrary notwithstanding.' It is obvious, that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law, applicable to the case in judgment. They were not. to decide, merely according to the laws, or constitution of the state, but according to the constitution, laws, and treaties of the United States, -- 'the supreme law of the land.'

§ 1731. "A moment's consideration will show us the necessity and propriety of this provision in cases, where the jurisdiction of the state courts is unquestionable. Suppose a contract, for the payment of money, is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt, that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial, the defendant sets up, in his defence, a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared, that no state shall make any thing but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law, providing for the removal of such a suit

to the courts of the United States, must not the state court proceed to hear, and determine it? Can a mere plea in defence be, of itself, a bar to further proceedings, so as to prohibit an inquiry into its truth, or legal propriety, when no other tribunal exists, to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence, thatthe crime was created by an ex post facto act of the state, must not the state court, in the exercise of a jurisdiction, which has already rightfully attached, have a right to pronounce on the validity, and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect; and public mischiefs, of a most enormous magnitude, would inevitably ensue.

§ 1732. "It must, therefore, be conceded, that the constitution, not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen, that, in the exercise of their ordinary jurisdiction; state courts would, incidentally, take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction, if that has already rightfully and exclusively attached in the state courts, which (as has been already shown)

may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow, that the appellate power of the United States must, in such cases, extend to state tribunals; and, if in such cases, there is no reason, why it should not equally attach upon all others within the purview of the constitution. It has been argued, that such an appellate jurisdiction overstate courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people; and that, if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles, which we cannot admit, and draws conclusions, to which we do not yield our assent.

§ 1733. "It is a mistake, that the constitution was not designed to operate upon states in their corporate capacities. It is crowded with provisions, which restrain, or annul the sovereignty of the states, in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted, that the constitution does not act upon the states. The language of the constitution is also imperative upon the states, as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well

as some other cases, congress have a right to revise, amend, or supercede the laws, which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of congress, and, in every case, are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument, that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states; and, if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher, or more dangerous act of sovereign power.

§ 1734. "Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert, that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and, if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty. The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful

course to argue against the use, or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction, which is not to be found in the terms, in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere. Wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

§ 1735. "It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights, and state jealousies, a power was given to congress, to establish 'courts for revising and determining, finally, appeals in all cases of captures.' It is remarkable, that no power was given to entertain original jurisdiction in such cases; and, consequently, the appellate power, (although not so expressed in terms,) was altogether to be exercised in revising the decisions of state tribunals. This was, undoubtedly, so far a surrender of state sovereignty. But it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensable to the public safety, inasmuch as our national rights might otherwise be compromitted, and our national peace be endangered. Under the present constitution, the prize jurisdiction is confined to the courts of the United States; and a power to

revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less important, or less useful, than it was under the confederation. In this connexion, we are led again to the construction of the words of the constitution, 'the judicial power shall extend,' &c. If, as has been contended at the bar, the term 'extend' have a relative signification, and mean to widen an existing power, it will then follow, that, as the confederation gave an appellate power over state tribunals, the constitution enlarged, or widened that appellate power to all the other cases, in which jurisdiction is given to the courts of the United States. It is not presumed, that the learned counsel would choose to adopt such a conclusion.

§ 1736. "It is further argued, that no great public mischief can result from a construction, which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath, to support the constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases, within the scope of the judicial power, from the state courts, to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason, -- admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest, that the constitution has proceeded upon a theory of its own, and given, and withheld powers according to the judgment of the

American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy, or principles, which induced the grant of them. The constitution has presumed (whether rightly or wrongly, we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct, or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens, claiming grants under different states; between a state

and its citizens, or foreigners; and between citizens and foreigners; it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason, than that, which has been stated, can be assigned, why some, at least, of these cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases, the cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors and other public ministers; and cases of admiralty and maritime jurisdiction, -- reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

§ 1737. "This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different

states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonies them into uniformity, the laws, the treaties, and the constitution of the United States, would be different in different states; and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs, which would attend such a state of things, would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention, which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

§ 1738. "There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties, who might be plaintiffs, and would elect the national forum; but also for the protection of defendants, who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that, as the plaintiff may always elect the state courts, the defendant may be deprived of all the security, which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered, as giving equal rights. To obviate this difficulty, we are referred to the power, which it is admitted, congress

possess to remove suits from state courts, to the national courts; and this forms the second ground, upon which the argument, we are considering, has been attempted to be sustained.

§ 1739. "This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts, acting according to the course of the common law, in criminal, as well as in civil cases; and it is exercised before, as well as after judgment. But this is always deemed, in both cases, an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only, because it is one mode of exercising that power; and as congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal, either before, or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. A writ of error is, indeed, but a process, which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment, as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process, which forbids it from being applied by the legislature to interlocutory, as well as final judgments. And if the right of removal from state courts exist before judgment, because it is includ-

ed in the appellate power, it must, for the same reason, exist after judgment. And if the appellate power, by the constitution, does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them. Precisely the same objections, therefore, exist as to the right of removal before judgment, as after; and both must stand, or fall together. Nor, indeed, would the force of the arguments on either side materially vary, if the right of removal were an exercise of original jurisdiction. It would equally trench upon the jurisdiction, and independence of state tribunals.

§ 1740. "The remedy, too, of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems

admitted to be insurmountable; and in respect to civil suits, there would, in many cases, be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control; and the state decisions would be paramount to the constitution. And though, in civil suits, the courts of the United States might act upon the parties; yet the state courts might act in the same way; and this conflict of jurisdictions would not only jeopard private rights, but bring into imminent peril the public interests. On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this Jurisdiction in the

specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument, which limits this power; and we dare not interpose a limitation, where the people have not been disposed to create one.

§ 1741. "Strong as this conclusion stands upon the general language of the constitution, it may still derive support fromother sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact, that, at the time, when the judiciary act was submitted to the deliberations of the first congress, composed, as it was, not only of men of great learning and ability, but of men, who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared, and admitted by the friends, and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of, many of the most important states in the Union; and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court, through so long a period, do, as we think, place the doctrine upon a foundation of authority, which cannot be shaken, with-

out delivering over the subject to perpetual, and irremediable doubts."1

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1 The came subject is most elaborately considered in Cohens v. Virginia, (6 Wheat. R. 413 to 493,) from which the following extract is taken. After adverting to the nature of the national government, and its powers and capacities, Mr. Chief Justice Marshall proceeds as follows. "In a government so constituted, is it unreasonable, that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution, or law of a state, if it be repugnant to the constitution, or to a law of the United States. Is it unreasonable, that it should also be empowered to decide on the judgment of a state tribunal, enforcing such unconstitutional law? Is it so very unreasonable, as to furnish a justification for controlling the words of the constitution?

"We think it is not. We think that in a government, acknowledgedly supreme with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power, ever these judgments of the state tribunals, which may contravene the constitution, or laws of the United States, is, we believe, essential to the attainment of those objects.

"The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and, if a case of this description, brought in a state court, cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States, is not. confided particularly to their judicial department; but is confided equally to that department, and to the state courts, however they may be constituted. 'Thirteen independent courts,' says a very celebrated statesman. (and we have now, more than twenty such courts,) 'of final jurisdiction

over the same causes, arising upon the same laws, is a hydra in government, from which, nothing but contradiction and confusion can proceed.'

"Dismissing the unpleasant suggestion, that any motives, which may not be fairly avowed, or which ought not to exist, can ever influence a state, or its courts, the necessity of uniformity, as well as correctness, in expounding the constitution and laws of the United States, would itself

§ 1742. Another inquiry is, whether the judicial power of the United States in any cases, and if in any, in

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suggest the propriety of vesting in some single tribunal the power of deciding. in the last resort, all cases, in which they are involved.

"We are not restrained, then, by the political relation between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

"They give to the Supreme Court appellate jurisdiction in all cases, arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those considerations, to which courts have always allowed great weight in the exposition of laws.

"The framers of the constitution would naturally examine the state of things, existing at the time; and their work sufficiently attests, that they did so. All acknowledge, that they were convened for the purpose of strengthening the confederation, by enlarging the powers of the government, and by giving efficacy to those, which it before possessed, but could not exercise. They inform us, themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect Union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

"Previous to the adoption of the confederation, congress established courts, which received appeals in prize causes, decided in the courts of the respective states. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate jurisdiction over those cases, decided in the state courts, to which the judicial power of the federal government extended.

"The confederation gave to congress, the power 'of establishing courts, for receiving and determining, finally, appeals in all cases of captures.'

"This power was uniformity construed to authorize those courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause, in the confederation, necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation, than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent.

"The convention, which framed the constitution, on turning their

what cases, is exclusive in the courts of the United States, or may be made exclusive at the election of

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attention to the judicial power, found it .limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all eases arising under the constitution, laws, and treaties of the United States; and in a subsequent clause declare, that in such cases the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given, which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen, to which this principle applies more unequivocally, than to that now under consideration.

"The opinion of the Federalist has always been considered, as of ' great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions, to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part, two of its authors performed in framing the constitution, put it very much in their power to explain the views, with which it was framed. These essays having been published, while the constitution was before the nation, for

adoption or rejection, and having been written in answer to objections, founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration, where they frankly avow, that the power objected to is given, and defend it.

"In discussing the extent of the judicial power, the Federalist* says, 'Here another question occurs: what relation would subsist between the national and state courts, in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the letter, to the Supreme Court of the United States. The constitution in direct terms gives an appellate jurisdiction to the Supreme Court, in all the enumerated cases of federal cognizance, in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals, from which it is to be made, are alone to he contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be

*** The Federalist, No. 82.**

Congress. This subject was much discussed in the case of Martin v. Hunter.1 On that occasion the court said2 "It will be observed, that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affect-

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eluded at the pleasure of every plaintiff, or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter, will of course be natural auxiliaries to the execution of the laws of the Union; and an appeal from them will as naturally lie to that tribunal, which is destined to unite, and assimilate the principles of natural justice, and the rules of national decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions, which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.'

"A contemporaneous exposition of the constitution, certainly of not less authority, than that, which has been just cited, is the judiciary act itself. We know that in the congress, which passed that act, were many eminent members of the convention, which formed the constitution. Not a single individual, so far as is known, supposed that part of the act, which gives the Supreme Court appellate jurisdiction over the judgments of the state courts, in the cases therein specified, to be unauthorized by the constitution." The 25th section of the judiciary act, of 1789, ch. 20, here alluded to, as contemporaneous construction of the constitution, is wholly founded upon the doctrine, that the appellate jurisdiction of the Supreme Court may constitutionally extend over causes in state courts. See also 1 Kent's Comm. Lect. 15; Rawle on Const. ch. 28; Sergeant on Const. ch. 7.

1 1 Wheat. R. 304, 333.

2 Ibid. See also Ex parte Cabrera, 1 Wash. Cir. R. 232.

ing ambassadors, other public ministers, and consuls; and cases of admiralty and maritime jurisdiction. In this class the expression is, that the judicial power shall extend to all cases. But in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped, seemingly ex industria. Here, the judicial authority is to extend to controversies, (not to all controversies) to which the United States shall be a party, &c. From this difference of phraseology, perhaps a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed, that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason, sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the constitution imperatively to extend the judicial power, either in an original, or

appellate form, to all cases; and, in the latter class, to leave it to congress to qualify the jurisdiction, original or appellate, in such manner, as public policy might dictate.

§ 1743. "The vital importance of all the cases, enumerated in the first class, to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution. And it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial power to be vested in courts

ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations. And as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then; enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained; but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever.

§ 1744. "A different policy might well be adopted in reference to the second class of cases; for although it might be fit, that the judicial power should extend to all controversies, to which the United States should be a party; yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suitsbrought against the United States, as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights,

or to prevent wrongs. And as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations, which congress might, in their wisdom, choose to apply. It is also worthy of remark, that congress seem, in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases, the jurisdiction is not limited, except by the subject-matter; in the second, it is made materially to depend upon the value in controversy.

§ 1745. "We do not, however, profess to place any implicit reliance upon the distinction, which has here been stated, and endeavoured to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced, this distinction. But there is, certainly, vast weight in the argument, which has been urged, that the constitution is imperative upon Congress to vest all the judicial power of the United States in the shape of original jurisdiction in the supreme and inferior courts, created under its own authority. At all events, whether the one construction or the other prevail, it is manifest, that the judicial power of the United States is unavoidably, in some cases, exclusive of all state authority, and in all others, may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases, where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutional-

ly exercise a concurrent jurisdiction. Congress, throughout the judicial act, and particularly in the 9th, 11th, and 13th sections, have legislated upon the supposition, that in all the cases, to which the Judicial power of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts."

§ 1746. The Federalist has spoken upon the same subject in the following terms. "The only thing in the proposed constitution, which wears the appearance of confining the causes of federal cognizance to the federal courts, is contained in this passage; 'The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress shall from time to time ordain and establish.' This might either be construed to signify, that the supreme and subordinate courts of the union should alone have the power of deciding those causes, to which their authority is to extend; or simply to denote, that the organs of the national judiciary should be one supreme court, and as many subordinate courts, as congress should think proper to appoint; in other words, that the United States should exercise the judicial power, with which they are to be invested, through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent

jurisdiction of the state tribunals; and as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction.

§ 1747. "But this doctrine of concurrent jurisdiction, is only clearly applicable to those descriptions of causes, of which the state courts had previous cognizance. It is not equally evident in relation to cases,

which may grow out of, and be peculiar to, the constitution to be established: for not to allow the state courts a right of jurisdiction in such cases, can hardly be considered as the abridgement of apre-existing authority. I mean not, therefore, to contend, that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold, that the state courts will fie divested of no part of their primitive jurisdiction further than may relate to an appeal. And I am even of opinion, that in every case, in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes, to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and, in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not jess than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the state governments, and the national governments, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all eases arising under the laws of the union, where it was not expressly prohibited."1

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1 See The Federalist, No. 82. Id. 81.

§ 1748. it would be difficult, and perhaps not desirable, to lay down any general rules in relation to the cases, in which the judicial power of the courts of tim United States is exclusive of the state courts, or in which it may be made so by congress, until they shall be settled by some positive adjudication of the Supreme Court. That there are some cases, in which that power is exclusive, cannot well be doubted; that there are others, in which it may be made so by congress, admits of as little doubt; and that in other cases it is concurrent in the state courts, at least until congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied.1 It seems to be admitted, that the jurisdiction of the courts of the United States is, or at least may be, made exclusive in all cases arising under the constitution, laws, and treaties of the United States;2 in all cases affecting ambassadors, other public ministers and consuls;3 in all cases (in their character exclusive) of admiralty and maritime jurisdiction;4 in controversies, to which the United States shall be a party; in controversies between two or more states; in

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1 See Cohens v. Virginia, 6 Wheat. R. 396, 397; 2 Elliot's Deb. 380, 381. See 11 Wheat. R. 472, note; Rawle on Const. ch. 21; l Kent's Comm. Lect 18, p. 370, &c. (2 edition, 395, &c.); l Tucker's Black. Comm. App. 181, 182 183; Governor of Georgia v. Madraza, l Peters's Sup. R. 128, 129, Per Johnson J.

2 Cohens v. Virginia, 6 Wheat. R. 396, 397; Houston v. Moore, 5 Wheat R. 25 to 28; Id. 69, 71; Slocum v. Maybury; 2 Wheat R. l; Hoyt v. Gelston, 3 Wheat. R. 246, 311.

3 The Federalist, No. 82; Martin v. Hunter, 1 Wheat. R. 336, 337.

4 See 2 Elliot's Deb. 380; Cohens v. Virginia, 6 Wheat. R. 396, 397; Martin v. Hunter, 1 Wheat. R. 337, 373; Houston v. More. 5 Wheat. R. 49; United States v. Bevans, 3 Wheat. R. 387; Ante, Vol. III., § 1665; Ogden v. Saunders, 12 Wheat R. 278, Johnson J.; Janney v. Co1umbian Ins. Co., 10 Wheat R. 418.

controversies between a state and citizens of another state; and in controversies between a state and foreign states, citizens, or subjects.1 And it is only in those cases, where, previous to the constitution, state tribunals possessed jurisdiction, independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction.2 Congress, indeed, in the Judiciary Act of 1789, (ch. 20, § 9, 11, 13,) have manifestly legislated upon the supposition, that; in all cases, to which the judicial power of the United States extends, they might rightfully vest exclusive jurisdiction in their own courts.3

§ 1749. It is a far more difficult point, to affirm the right of congress to vest in any state court any part of the judicial power confided by the constitution to the national government. Congress may, indeed, permit the state courts to exercise a concurrent jurisdiction in many cases; but those courts then derive no authority from congress over the subject matter, but are simply left to the exercise of such jurisdiction, as is conferred on them by the state

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1 See 1 Tucker's Black. Comm. App. 181, 182, 183; 1 Kent's Comm. Lect. 18, p. 370, &c. (2 edit. p. 395 to 404.}

2 Martin v. Hunter, 1 Wheat. R. 336, 337; The Federalist, No. 27, No. 82; Houston v. Moore, 5 Wheat. R. 49.

3 Ibid. See I Peters's Sup. Ct. R. 128, 129, 130, per Johnson J.; Ex parte Cabrera, 1 Wash. Cir. R. 232. -- It would seem, upon the common principles of the laws of nations, as ships of war of a government are deemed to be under the exclusive dominion and sovereignty of their own government, wherever they may be, and thus enjoy an extra territorial immunity, that crimes committed on board of ships of war of the United States, in port, as well as at sea, are exclusively cognizable, and punishable by the United States. The very point arose in United States v. Beans, (3 Wheat. R. 336, 388); but it was not decided. The result of that trial, however, showed the general opinion, that the state courts had no jurisdiction; as the law of officers of the state declined to interfere, after the decision in the Supreme Court of the United States.

tion and laws. There are, indeed, many acts of congress, which permit jurisdiction over the offences therein described, to be exercised by state magistrates and courts; but this (it has been said by a learned judge,1) is not, because such permission was considered to be necessary, under the constitution, to vest a concurrent jurisdiction in those tribunals; but because the jurisdiction was exclusively vested in the national courts by the judiciary act; and consequently could not be otherwise executed by the state courts. But, he has added, "for I hold it to be perfectly clear, that congress cannot confer jurisdiction upon any courts, but such as exist under the constitution and laws of the United States; although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts." This latter doctrine was positively affirmed by the Supreme Court in Martin v. Hunter;2 and indeed seems, upon general principles, indisputable. In that case, the court said, "congress cannot vest any portion of the judicial power of the United States, except in courts, ordained and established by itself."3

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1 Mr. Justice Washington in Houston v. Moore, 5 Wheat. R. 27, 28; The Federalist, No. 27; Id. No. 82.

2 1 Wheaton's R. 330. See 1 Kent's Comm. Lect. 18, p. 375, (2 edit. p. 400.)

3 Ibid. See also Houston v. Moore, 5 Wheat. R. 68, 69. See 1 Kent's Comm. Lect. 18, p. 375, &c. (2 edit. p. 400 to 404.)-- The Federalist (No. 81) seems faintly to contend, that congress might vest the jurisdiction in the state courts, "to confer upon the existing courts of the several states the power of determining such causes, would, perhaps, be as much to 'constitute tribunals,' as to create new courts with the like power." But, how is this reconcileable with the context of the constitution? "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as congress may,

§ 1750. In regard to jurisdiction over crimes committed against the authority of the United States, it has been held, that no partof this jurisdiction can, consistently with the constitution, be delegated to state tribunals.1 It is true, that congress has, in various acts, conferred the right to prosecute for offences, penalties, and forfeitures, in the state courts. But the latter have, in many instances, declined the jurisdiction, and asserted its unconstitutionality. And Certainly there is, at the present time, a decided preponderance of judicial authority in the state, courts against the authority of congress to confer the power.2

§ 1751. In the exercise of the jurisdiction confided respectively to the state courts; and those courts of the United States, (where the latter have not appellate jurisdiction,) it is plain, that neither can have any right to interfere with, or control, the operations of the other. It has accordingly been settled, that no state court can issue an injunction upon any judgment in a court of the United States; the latter having an exclusive au-

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from time to time, ordain and establish. The judges both of the Supreme and inferior courts, shall hold their offices during good behaviour," &c. Are not these judges of the inferior courts the same, in whom the jurisdiction is to be vested? Who are to appoint them? Who are to pay their salaries? Can their compensation be diminished? All these questions must be answered with reference to the same judges, that is, with reference to judges of the Supreme and inferior courts of the United States, and not of state courts. See also The Federalist, No. 45.

1 Martin v. Hunter, 1 Wheat. R. 337; Houston v. Moore, 5 Wheat.R. 35, 69, 71, 74, 75.

2 See Sergeant on Const. Law, ch. 27, (ch. 28;) United States, v. Campbell, 6 Hall's Law Jour.

113; United States v. Lathrop, 17 John. R. 5; Corulh v. Freely, Virginia Cases, 321; Ely v. Peck, 7 Connecticut R. 239; 1 Kent's Comm. Lect. 18, p. 370, &c. (2 edit. p. 395 to 404.) But see 1 Tucker's Black. Comm. App. 181, 182; Rawle on Const. ch. 21.

thority over its own judgments and proceedings.1 Nor can any state court, or any state legislature, annul the judgments of the courts of the United States, or destroy the rights acquired under them;2 nor in any manner deprive the Supreme Court of its appellate jurisdiction;3 nor in any manner interfere with, or control the process (whether mesne or final) of the courts of the United States;4 nor prescribe the rules or forms of proceeding, nor effect of process, in the courts of the United States;5 nor issue a mandamus to an officer of the United states, to compel him to perform duties, devolved on him by the laws of the United States.6 And although writs of habeas corpus have been issued by state judges, and state courts, in cases, where the party has been in custody under the authority of process of the courts of the United States, there has been considerable diversity of opinion, whether such an exercise of authority is constitutional; and it yet remains to be decided, whether it can be maintained.7

§ 1752. Indeed, in all cases, where the judicial power of the United States is to be exercised, it is for congress alone to furnish the rules of proceeding, to

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1 McKim v. Voorhis, 7 Cranch's R. 279; 1 Kent's Comm. Lect 19, p. 382 to 387, (2 edit. 409 to 412.)

2 United States v. Peters, 5 Cranch, 115; 8. C. 2 Peters's Cond. R. 202; 1 Kent's Comm. Lect 19, p. 382, &c. (2 edit. p. 409, &c.)

3 Wilson v. Mason, 1 Cranch, 94; 8. C. 1 Peters's Cond. R. 242; 1 Kent's Comm. Lect 19, p. 382, (2 edit 409.)

4 United States v. Wilson, 8 Wheat. R. 253.

5 Wayman v. Southard, 10 Wheat. R. 1. 21, 22; Bank of the United States v. Halsted, 10 Wheat R. 51.

6 McClung v. Silliman, 6 Wheat R. 598.

7 See Sergeant on Const Law, ch. 27, (ch. 28;) 1 Kent's Comm. Lect. 18, p. 375, (2 edit p. 400.) See 1 Tucker's Black. Comm. App.. 291, 292.

direct the process, to declare the nature and effect of the process, and the mode, in which the judgments, consequentthereon, shall be executed. No state legislature, or state court, can have the slightest right to interfere; and congress are not even capable of delegating the right to them. They may authorize national courts. to make general rules and orders, for the purpose of a more convenient exercise of their jurisdiction; but they cannot delegate to any state authority any control over the national courts.1

§ 1753. On the other hand the national courts have no authority (in cases not within the appellate jurisdiction of the United States) to issue injunctions to judgments in the state courts;2 or in any other manner to interfere with their jurisdiction or proceedings.3

§ 1754. Having disposed of these points, we may again recur to the language of the constitution for the purpose of some farther illustrations. The language is, that "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

§ 1755. In the first place, it may not be without use to ascertain, what is here meant by appellate jurisdiction; and what is the mode, in which it may be exercised. The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that

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1 Wayman v. Southard, 10 Wheat. R. 1; Palmer v. Allen, 7 Cranch, R. 550; Gibbons v. Ogden, 9 Wheat. R. 267, 208; Bank of the United States v. Halstead, 10 Wheat. R. 51.

2 Diggs v. Wolcott, 4 Cranch, 178. See 1 Kent's Comm. Lect. 15, p. 301, (2 edit. 321.)

3 Ex parte Cabrera, 1 Wash. Cir. R. 232; 1 Kent's Comm. Lect. 19, p. 386, (2 edit. p. 411, 412.)

cause.1 In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies, that the subject matter has been already instituted in, and acted upon, by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form, which the legislature may choose to prescribe;2 but, still, the substance must exist, before the form can be applied to it. To operate at all, then, under the constitution of the United States, it is not sufficient, that there has been a decision by some officer, or department of the United states; it might be by one clothed with judicial authority, and acting in a judicial capacity. A power, therefore, conferred by congress on the Supreme Court, to issue a mandamus to public officers of the United States generally, is not warranted by the constitution; for it is, in effect, under such

circumstances, an exercise of original jurisdiction.3 But where the object is to revise a judicial proceeding, the mode is wholly immaterial; and a writ of habeas corpus, or mandamus, a writ of error, or an appeal, may be used, as the legislature may prescribe.4

§ 1756. The most usual modes of exercising appellate jurisdiction, at least those, which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin, and removes a cause, entirely subjecting

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1 Marbury v. Madison, 1 Cranch, R. 175, 176; 8. C. 1 Peters's Cond. R. 267, 282; The Federalist, No. 81; Weston v. City Council of Charleston, 2 Peters's Sup. R. 449.

2 Ibid.

3 Ibid.

4 Ibid; United States v. Hamilton, 3 Dall. 17; Ex parte Bollman, 4 Cranch, R. 75; Ex parte Kearney, 7 Wheat. R. 38; Ex parte Crane, 5 Peters's Sup. R. 190.

the fact, as well as the law, to a review and a re-trial. A writ of error is a process of common law origin; and it removes nothing for re-examination, but the law.1 The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter, in suits at common law tried by a jury.

§ 1757. It is observable, that the language of the constitution is, that "the Supreme Court shall have appellate jurisdiction, both as to law and fact." This provision was a subject of no small alarm and misconstruction at the time of the adoption of the constitution, as it was supposed to confer on the Supreme Court, in the exercise of its appellate jurisdiction, the power to review the decision of a jury in mere matters of fact; and thus, in effect, to destroy the validity of their verdict, and to reduce to a mere form the right of a trial by jury in civil cases. The objection was at once seized hold of by the enemies of the constitution; and it was pressed with an urgency and zeal, which were well nigh preventing its ratification.2 There is certainly some foundation, in the ambiguity of the language, to justify an interpretation, that such a review might constitutionally be within the reach of the appellate power, if congress should choose to carry it to that extreme latitude.3 But, practically speaking, there was not the slightest danger, that congress would ever adopt such a course, even if it were within their

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1 Wiscart v. Dauchy, 3 Dall. R. 321; 8. C. 1 Peters's Cond. R. 144; Cohens v. Virginia, 6 Wheat. R. 409 to 412.

2 See l Elliot's Debates, 121, 122; 2 Elliot's Debates, 346, 380 to 410; Id. 413 to 427; 3 Elliot's Debates, 139 to 157; 2 Amer. Museum, 425; Id. 534; Id. 540, 548, 553; 3 Amer. Museum, 419, 420; 1 Tuck. Black. Comm. App. 351.

3 2 Elliot's Debates, 318, 347, 419; 3 Elliot's Debates, 140, 149; Rawle on Const. ch. 10, p. 135.

constitutional authority; since it would be at variance with all the habits, feelings, and institutions of the whole country. At least it might be affirmed, that congress would scarcely take such a step, until the people were prepared to surrender all the great securities of their civil, as well as of their political rights and liberties; and in such an event the retaining of the trial by jury would be a mere mockery. The real object of the provision was to retain the power of reviewing the fact, as well as the law, in cases of admiralty and maritime jurisdiction.1 And the manner, in which it is expressed, was probably occasioned by the desire to avoid the introduction of the subject of a trial by jury in civil cases, upon which the convention were greatly divided in opinion.

§ 1758. The Federalist met the objection, pressed with much earnestness and zeal, in the following manner: "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamours have been loud against it, as applied to matters of fact. Some well intentioned men in this state, deriving their notions from the language and forms, which obtain in our courts, have been induced to consider it, as an implied supersedure of the trial by jury, in favour of the civil law mode of trial, which prevails in our courts of admiralty, probates, and chancery. A technical sense has been affixed to the term 'appellate,' which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But, if I am not misinformed, the same meaning would not be given to it in any part of New-England. There, an appeal from one jury to another is familiar

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1 3 Elliot's Debates, 283.

both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word 'appellate,' therefore, will not be understood in the same sense in New-England, as in New-York, which shows the impropriety of a technical interpretation, derived from the jurisprudence of a particular state. The expression, taken in the abstract, denotes nothing more, than the power of one tribunal to review the proceedings of another, either as to the law, or fact, or both. The mode of doing it may depend on ancient custom, or legislative provision; in a new government it must depend on the latter, and may be with, or without, the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated, as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

§ 1759. "But it does not follow, that the re-examination of a fact, once ascertained by a jury, will be permitted in the Supreme Court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this state, that the latter has jurisdiction of the fact, as well as the law? It is true, it cannot institute a new inquiry concerning the fact, but it takes cognizance of it, as it appears upon the record, and pronounces the law arising upon it. This is jurisdiction of both fact and law; nor is it even possible to separate them. Though the common law courts of this state ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly,

when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend, therefore, on this ground, that the expressions, 'appellate jurisdiction, both as to law and fact,' do not necessarily imply a re-examination in the Supreme Court of facts decided by juries in the inferior courts.

§ 1760. "The following train of ideas may well be imagined to have influenced the convention, in relation to this particular provision. The appellate jurisdiction of the Supreme Court, it may have been argued, will. extend to causes determinable in different modes, some in the course of the common law, others in the course of the civil law. In the former, the revision of the law only will be, generally speaking, the proper province of the Supreme Court; in the latter, the re-examination of the fact is agreeable to usage; and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary, that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases, which shall have been originally tried by a jury, because in the courts of some of the states all causes are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction, both as to law and fact, and that this jurisdiction shall be subject to such exceptions and regulations, as the national legislature may prescribe. This will enable the government to modify it in such a manner, as will best answer the ends of public justice and security.

§ 1761. "This view of the matter, at any rate, puts it out of all doubt, that the supposed abolition of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no reexamination of facts, where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason already intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only, as are determinable at common law in that mode of trial."1

§ 1762. These views, however reasonable they may seem to considerate minds, did not wholly satisfy the popular opinion; and as the objection had a vast influence upon public opinion, and amendments were proposed by various state conventions on this subject, congress at its first session, under the guidance of the friends of the constitution, proposed an amendment, which was ratified by the people, and is nowincorporated into the constitution. It is in these words. "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved. And no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This amendment completely struck down the objection; and has secured the right of a trial by jury, in civil cases, in the fullest latitude of the common law.2 Like the other amendments, proposed by the same congress, it was coldly received by the enemies of the

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1 The Federalist, No. 81. See also The Federalist, No. 83.

2 See 1 Tuck. Black. Comm. App. 351; Rawle on Const. ch. 10, p. 135; Bank of Hamilton v. Dudley, 2 Peters's R. 492, 525.

constitution, and was either disapproved by them, or drew from them a reluctant acquiescence.1 It weakened the opposition by taking away one of the strongest points of attack upon the constitution. Still it is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty.2

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1 5 Marshall's Life of Washington, ch. 3, p. 209, 210.

2 It is due to the excellent statesmen, who framed the constitution, to give their reasons for the omission of any provision in the constitution, securing the trial by jury in civil cases. They were not insensible to its value; but the diversity of the institutions of different states on this subject compelled them to acquiesce in leaving it entirely to the sound discretion of congress. The Federalist, No. 83, has given an elaborate paper to the subject, which is transcribed at large, as a monument of admirable reasoning and exalted patriotism.

"The objection to the plan of the convention, which has met with most success in this state, is relative to the want of a constitutional provision for the trial by jury in civil cases. The disingenuous form, in which this objection is usually stated, has been repeatedly adverted to and exposed; but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the constitution in regard to civil causes, is represented, as an abolition of the trial. by jury; and the declamations, to which it has afforded a pretext, are artfully calculated to induce a persuasion, that this pretended abolition is complete and. universal; extending not only to every species of civil, but even to criminal causes. To argue with respect to the latter, would be as vain and fruitless, as to attempt to demonstrate any of those propositions, which, by their own internal evidence, force conviction, when expressed in language adapted to convey their meaning.

"With regard to civil causes, subtleties almost too contemptible for refutation have been employed to countenance the surmise, that a thing, which is only not provided for, is entirely abolished Every man of discernment must at once perceive the wide difference between silence and abolition. But, as the inventors of this fallacy have attempted to support it by certain legal maxims of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

"The maxims, on which they rely, are of this nature: 'A specifics-

§ 1763. Upon a very recent occasion the true interpretation and extent of this amendment came before the Supreme Court for decision, in a case from

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tion of particulars is an exclusion of generals;' or, 'The expression of one thing is the exclusion of another.' Hence, say they, as the constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury, in regard to the latter.

"The rules of legal interpretation are rules of common sense, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them, is its conformity to the source, from which they are derived. This being the case, let me ask, if it is consistent with common sense to suppose, that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize, or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain, that an injunction of the trial by jury, in certain cases, is an interdiction of it in others.

"A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the constitution on the subject of juries, the legislature would be at liberty, either to adopt that institution, or to let it alone. This discretion, in regard to criminal causes, is abridged by an express injunction; but it is left at large in relation to civil causes, for the very reason, that there is a total silence on the subject. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation of employing the same mode in civil causes, but does not abridge the power of the legislature to appoint that mode, if it should be thought proper. The pretence, therefore, that the national legislature would not be at liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretence destitute of all foundation.

"From these observations this conclusion results, that the trial by jury in civil cases would not be abolished; and that the use attempted to be made of the maxims, which have been quoted, is contrary to reason, and therefore inadmissible. Even if these maxims had a precise technical sense, corresponding with the ideas of those, who employ them upon the present occasion, which, however, is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction.

Louisiana, where the question was, whether the Supreme Court could entertain a motion for a new trial, and re-examine the facts tried by a jury, that being

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"Having now seen, that the maxims relied upon will not bear the use made of them, let us endeavour to ascertain their proper application. This will be best done by examples. The plan of the convention declares, that the power of congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.

"In like manner, the authority of the federal judicatures is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority.

"These examples are sufficient to elucidate the maxims, which have been mentioned, and to designate the manner, in which they should be used.

"From what has been said, it must appear unquestionably true, that trial by jury is in no case abolished by the proposed constitution; and it is equally true, that in those controversies between individuals, in which the great body of the people are likely to be interested, that institution will remain precisely in the situation, in which it is placed by the grate constitutions. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will remain determinable, as heretofore, by the state courts only, and in the manner, which the state constitutions and laws prescribe. All land causes, except where claims under the grants of different staten come into question, and all other controversies between the citizens of the same state, unless where they depend upon positive violations of the articles of union, by acts of the state legislatures, will belong exclusively to the jurisdiction of the state tribunals. Add to this, that admiralty causes, and almost all those, which are of equity jurisdiction, are determinable under our own government, without the intervention of a jury; and the inference from the whole will be, that this institution, as it exists with us at present, cannot possibly be affected, to any great extent, by the proposed alteration in our system of government.

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or, if there is any difference between them, it consists in this: the former regard it, as a valuable safeguard to liberty; the latter

the practice under the local law, and there being an act of congress, authorizing the courts of the United States in Louisiana to adopt the local practice, with

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represent it, as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would he altogether superfluous to examine, to what extent it deserves to be esteemed useful, or essential in a representative republic, or how much if. ore merit it may be entitled to, as a defence against the oppressions of an hereditary monarch, than as a harrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious, than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge, that I cannot readily discern the inseparable connexion between the existence of liberty, and the trial by jury in civil easel. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings. The trial by jury in criminal

cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention.

"It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

"It is evident, that it can have no influence upon the legislature, in regard to the amount of the taxes to be laid, to the objects, upon which they ere to be imposed, or to the rule, by which 'they are to be apportioned. If it can have any influence, therefore, it must be upon the mode of collection, and the conduct of the officers entrusted with the execution of the revenue laws.

"As to the mode of collection in this state. under our own constitution, the trial by jury is in must cases out of use. The taxes are usually levied by the more summary proceeding of distress and sale, as in cases of rent. And it is acknowledged on all hands, that this is essential to the efficacy of the revenue laws. The dilatory course of a trial at law to recover the taxes imposed on individuals, would neither suit the exigencies or the public, nor promote the convenience of the citizens. It would often occasion an accumulation of costs moreburthensome, than the original sum of the tax to be levied.

"And, as to the conduct of the officers of the revenue, the provision in favour of trial by jury in criminal cases, will afford the desired security. Wilful abuses of a public authority, to the oppression of the subject, and every species of official extortion, are offences against the

certain limitations. The Supreme Court held, that no authority was given by the act to re-examine the facts; and if it had been, an opinion was intimated of

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government; for which the persons, who commit them, may be indicted and punished according to the circumstance of the case.

"The excellence of the trial by jury in civil cases appears to depend on circumstances, foreign to the preservation of liberty. The strongest argument in its favour is, that it is a security against corruption. As there is always more time, and better opportunity, to tamper with a standing body of magistrates, than with a jury summoned for the occasion, there is room to suppose, that a corrupt influence would more easily. find its way to the former, than to the latter. The force of this consideration is, however, diminished by others. The sheriff, who is the summoner of ordinary juries, and the clerks of courts, who have the nomination of special juries, are themselves standing officers, and, acting individually, may be supposed more accessible to the touch of corruption, than the judges, who are a collective body. It is not difficult to see, that it would be in the power of those officers to select jurors, who would serve the purpose of the party, as well as a corrupted bench. In the next place, it may fairly be supposed, that there would be less difficulty in gaining some of the jurors promiscuously taken from the public mass, than in gaining men, who had been chosen by the government for their probity and good character. But making every deduction for these considerations, the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here, then, is a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer, while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.

"Notwithstanding, therefore, the doubts I have expressed, as to the essentiality of trial by jury in civil suits to liberty, I admit, that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favour, if it were possible to fix with accuracy the limits, within which it ought to be comprehended. This, however, is in its own nature an affair of much difficulty; and

the most serious doubts of its constitutionality. On that occasion the court said: "The trial by jury is justly dear to the American people. It has always

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men, not blinded by enthusiasm, must be sensible, that in a federal government, which is a composition of societies, whose ideas and institutions in relation to the matter materially vary from each other, the

difficulty must be not a little augmented. For my own part, at every near view I take of the subject I become more convinced of the reality of the obstacles, which we are authoritatively informed, prevented the insertion of a provision on thishead in the plan of the convention.

"The great difference between the limits of the jury trial, in different states, is not generally understood. And, as it must have considerable influence on the sentence, we ought to pass upon the omission complained of, in regard to this point, an explanation of it is necessary. In this state, our judicial establishments resemble more nearly, than in any other, those of Great Britain. We have courts of common law, courts of probates, (analogous in certain matters to the spiritual courts in England,) a court of admiralty, and a court of chancery. In the courts of common law only the trial by jury prevails, and this with some exceptions. In all the others, a single judge presides, and proceeds in general, either according to the course of the canon, or civil law, without the aid of a jury. In New-Jersey there is a court of chancery, which proceeds like ours, but neither courts of admiralty, nor of probates, in the sense; in which these last are established with us. In that state, the courts of common law have the cognizance of those causes, which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New-Jersey, than in New-York. In Pennsylvania this is perhaps still more the case; for there is no court of chancery in that state, and its common law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New-York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those states, which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia there are none but common law courts, and art appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts, either of chancery, or of admiralty, and their courts of probates have no jurisdiction of causes. Their common law courts have admiralty, and, to a certain extent, equity jurisdiction. In cases of importance, their gens-

been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is be-

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ral assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in practice further, than in any other state yet mentioned. Rhode-Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New-Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four eastern states, the trial by jury not only stands upon a broader foundation, than in the other states, but it is attended with a peculiarity unknown, in its Full extent, to any of them. There is an appeal of course From one jury to another, till there have been two verdicts out of three on one side.

"From this sketch it appears, that there is a material diversity, u well in the modification, u in the extent of the institution of' trial by jury in civil cases, in the several states; and from this fact, these obvious reflections flow; first, that no general rule could have been fixed upon by the convention, which would have corresponded with the circumstances of all the states; and, secondly, that more, or at least u much might have been hazarded, by taking the system of any one state For a standard, as by omitting a provision altogether, and leaving the matter. as has been done, to legislative regulation.

"The propositions, which have been made for supplying the omission, have rather served to illustrate, than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for the purpose, 'Trial by jury shall be as heretofore;' and this, I maintain, would be inapplicable and indeterminate. The United States, in their collective capacity, are the object, to which all general provisions in the constitution must be understood to refer. Now, it is evident, that though trial by jury, with various limitations, is known in each state individually, yet in the United States, as such, it is, strictly speaking, unknown; because the present federal. government has no judiciary power whatever; end consequently there is no antecedent establishment, to which the term 'heretofore' could properly relate. It would, therefore, be destitute of precise meaning, and inoperative from its uncertainty.

"As, on the one hand, the form of the provision would not fulfil the intent of its proposers; so, on the ether, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in tile federal courts should be tried by jury, if in the state where the courts sat, that mode of trial would

obtain in a similar case in the state courts; that is to say, admiralty causes should be tried in Connecticut by a jury, in New-York without one. The capricious operation of so

lieved, incorporated into, and secured in every state constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objec-

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dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well-regulated judgment towards it. Whether the cause should be tried with, or without a jury, would depend, in a great number of cases, on the accidental situation of the court and parties.

"But this is not, in my estimation, the greatest objection. I feel a deep and deliberate conviction, that there are many cases, in which the trial by jury is an ineligible one. I think it so particularly in suits, which concern the public peace with foreign nations; that is, in most cases, where the question turns wholly on the laws of nations. Of this nature, among others, are all prize causes. Juries cannot be supposed competent to investigations, that require n thorough knowledge of the laws and usages of nations; and they will sometimes be under the influence of impressions, which will not suffer them to pay sufficient regard to those considerations of public policy, which ought to guide their inquiries. There would of course be always danger, that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the true province of juries be to determine matters of fact, yet, in most cases, legal consequences are complicated with fact in such a manner, as to render a separation impracticable.

"It will add great weight to this remark, in relation to prize causes, to mention, that the method of determining them has been thought worthy of particular regulation, in various treaties between different powers of Europe, and that, pursuant to such treaties, they arc determinable in Great Britain, in the last resort, before the king himself in his privy council, where the lect, as well as the law, undergoes a reexamination. This alone demonstrates the impolicy of inserting a fundamental provision in the constitution, which would make the state systems a standard for the national government in the article under consideration, and the danger of encumbering the government with any constitutional provisions, the propriety of which is not indisputable.

"My convictions are equally strong, that, great advantages result from the separation of the equity from the law jurisdiction; and that the causes, which belong to the former, would be improperly committed to juries. The great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a special determination; while a separation between the

tions, originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As

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jurisdictions has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances, that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide, before they were permitted to return to them. The simplicity and expedition, which form the distinguishing characters of this mode of trial, require, that the matter to be decided should be reduced to some single and obvious point; while the litigations, usual in chancery, frequently comprehend long train of minute and independent particulars.

"It is true, that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence; the model, which has been followed in several of the states. But it is equally true, that the trial by jury has been unknown in every instance, in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law; but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages, which may be derived from courts of chancery on the plan, upon which they are established in this state; but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

"These appear to be conclusive reasons against incorporating the systems of all the states, in the formation of the national judiciary, according to what may be conjectured to have been the intent of the Pennsylvania minority. Let us now examine, how far the proposition of Massachusetts is calculated to remedy the supposed defect.

"It is in this form: 'In civil actions between citizens of different states, every issue of fact, arising in actions at common law, may be tried by a jury, if the parties, or either of them, request it.'

"This, at best, is a proposition confined to one description of ceases; and the inference is fair, either that the Massachusetts convention considered that, as the only class of federal causes, in which the trial by jury would be proper; or, that, if desirous of a more extensive provision, they found it impracticable to devise one, which would properly answer the end. If the first, the omission of a regulation, respecting so partial an object, can never be considered. as a material imperfection in the

soon as the constitution Was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; which received an as-

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system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

"But this is not all. If we advert to the observations already made respecting the courts, that subsist in the several states of the Unions and the different powers exercised by them it will appear, that there ere no expressions more vague and indeterminate, than those which have been employed to characterize that species of causes, which it is intended shall be entitled to a trial by jury. In this state, the boundaries between actions at common law, and actions of equitable jurisdiction, are ascertained in conformity to the rules, which prevail in England upon that subject. In many of the other states, the boundaries are less precise. In some of them every cause is to be tried in a court of common law; and upon that foundation every action may be considered, as an action at common law, to be determined by a jury, if the parties, or either of them, choose it. Hence, the same irregularity and confusion would be introduced by a compliance with this proposition, that I have already noticed, as resulting from the regulation proposed by the Pennsylvania minority. In one state a cause would receive its determination from a jury, if the parties, or either of them, requested it; but in another state, a cause exactly similar to the other must be decided without the intervention of a jury, because the state tribunals varied, as to common law jurisdiction.

"It is obvious, therefore, that the Massachusetts proposition cannot operate, as a general regulation, until some uniform plan, with respect to the limits of common law and equitable jurisdictions, shall be adopted by the different states. To devise a plan of that kind is a task arduous in itself, and which it would require much time and reflection to mature. It would be extremely difficult, if not impossible, to suggest any general regulation, that would, be acceptable to all the states in the Union, or that would perfectly quadrate with the several state institutions.

"It may be asked, why could not a reference have been made to the constitution of this state, taking that, which is allowed by me to be a good one, as a standard for the United States? I answer, that it is not very probable the other states should entertain the same opinion of our institutions, which we do ourselves. It is natural to suppose, that they are more attached to their own, and that each would struggle for tim preference. If the plan of taking one state, as a model for the whole, had been thought of in the convention, it is to be presumed, that the adoption of it in that body would have been rendered difficult by the predilection of each representation in favour of its own government; and it must be uncertain, which of the states would have been taken,

sent of the people so general, as to establish its importance, as a fundamental guarantee of the rights and liberties of the people. This amendment de-

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as the model. It has been shown, that many of them would be improper ones. And I leave it to conjecture, whether, under all circumstances, it is most likely, that New York, or some other state, would have been preferred. But admit, that a judicious selection could have been effected in the convention, still there would have been great danger of jealousy and disgust in the other states, at the partiality, which had been shown to the institutions of one. The enemies of the plan would have been furnished with a fine pretext for raising a host of local prejudices against it, which perhaps might have hazarded, in no inconsiderable degree, its final establishment.

"To avoid tile embarrassments of a definition of the cases, which the trial by jury ought to embrace, it is sometimes suggested by men of enthusiastic tempers, that a provision might have been inserted for establishing it in all cases whatsoever. For this, I believe, no precedent is to be found in any member of the Union; and the considerations, which have been stated in discussing the proposition of the minority of Pennsylvania, must satisfy every sober mind, that the establishment of the trial by jury in all eases would have been an unpardonable error in the plan.

"In short, the more it is considered, the more arduous will appear the task of fashioning a provision in such a form, as not to express too little to answer the purpose, or too much to be advisable; or which might not have opened other sources of opposition to the great and essential object of introducing a firm national government.

"I cannot but persuade myself, on the other hand, that the different lights, in which the subject has been placed in the course of these observations, will go far towards removing in candid minds the apprehensions they may have entertained on the point. They have tended to show, that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in tile plan of the convention; that, even in far the greatest proportion of civil cases, those, in which the great body of the community is interested, that mode of trial will remain in full force, as established in the state constitutions, untouched and unaffected by the plan of the convention; that it is in no case abolished by that plan; and that there are great, if not insurmountable difficulties in the way of making any precise and proper provision for it, in the constitution for the United States.

"The heat judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit, that the changes, which are continually hap-

clares, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, once tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the

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pening in the affairs of society, may render a different mode of determining questions of property preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced, that even in this state it might be advantageously extended to some cases, to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men, that it ought not to obtain in all cases. The examples of innovations, which contract its ancient limits, as well in these states, as in Great Britain, afford a strong presumption, that its former extent has been found inconvenient; and give room to suppose, that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point, at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.

"This is now clearly understood to be the case in Great Britain, and it is equally so in the state of Connecticut. And yet it may be safely affirmed, that more numerous encroachments have been made upon the trial by jury in this state since the revolution, though provided for by a positive article of our constitution, than has happened in the same time either in Connecticut, or Great Britain. It may be added, that these encroachments have generally originated with the men, who endeavour to persuade the people, they are the warmest defenders of popular liberty, but who have rarely suffered constitutional obstacles to arrest them in a favourite career. The truth is, that the general genius of a government is all, that can be substantially relied upon for permanent effects. Particular provisions, though not altogether useless, have far less virtue and efficacy, than are commonly ascribed to them; and the want of them will never be with men of sound discernment a decisive objection to any plan, which exhibits the leading characters of a good government.

"It certainly sounds not a little harsh and extraordinary to affirm, that there is no security for liberty in a constitution, which expressly establishes a trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact, that Connecticut, which has been always regarded, as the most popular state in the Union, can boast of no constitutional provision for either."

The Federalist, No. 83.

See also 2 Elliot's Debates, 346, 380 to 410; Id. 413 to 427; 3 Elliot's Debates, 131, 132, 137, 141, 153; Id. 283, 284, 301, 302.

rules of the common law." At this time there were no states in the Union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase, 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority,' &c., and 'to all cases of admiralty and maritime jurisdiction.' It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene; and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find, that the amendment requires, that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law they meant, what the constitution denominated in the third article 'law;' not merely suits, which the common law recognized among its old and settled proceedings, but suits, in which legal rights were to be ascertained and determined, in contradistinction to those, in which equitable rights alone were recognized, and equitable remedies were administered; or in which, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. Probably there were few, if any, states in the Union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the

trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited, as examples variously adopted, and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form, which they may assume to settle legal rights. And congress seem to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, (which was contemporaneous with the proposal of this amendment;) for in the ninth section it is provided, that 'the trial of issues in fact in the district courts in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury;' and in the twelfth section it is provided, that 'the trial of issues in fact in the circuit courts shall in all suits, except those of equity, and of admiralty and maritime jurisdiction, be by jury.' And again, in the thirteenth section, it is provided, that 'the trial of issues in fact in the supreme court, in all actions at law against citizens of the United States, shall be by jury.'

§ 1764. "But the other clause of the amendment is still more important; and we read it, as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes, known to the common law, to re-examine such facts, are the granting of a new trial by the court, where the issue was tried, or to which the record was properly returnable; or the

award of a venire facias de nove by an appellate court, for some error of law, which intervened in the proceedings. The judiciary act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases, where there has been a trial by jury, for reasons, for which new trials have usually been granted in the courts of law.' Andthe appellate jurisdiction has also been amply given by the same act (sec. 22, 24) to this court, to redress errors of law; and for such errors to award a new trial 'in suits at law, which have been tried by a jury.

§ 1765. "Was it the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury? to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts, sitting in all the other states in the Union? We think not. No general words, purporting only to regulate the practice of a particular court, to conform its modes of proceeding to those prescribed by the state to its own courts, ought, in our judgment, to receive an interpretation, which would create so important an alteration in the laws of the United States, securing the trial by jury. Especially ought it not to receive such an interpretation, when there is a power given to the inferior court itself to prevent any discrepancy between the state laws, and the laws of the United States; so that it would be left to its sole discretion to supersede, or to give conclusive effect in the appellate court to the verdict of the jury.

§ 1766. "If, indeed, the construction contended for at the bar were to be given to the act of congress, we

entertain the most serious doubts, whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it, which should involve a violation, however unintentional, of the constitution. The terms of the present act may well be satisfied by limiting its operation to modes of practice and

proceeding in the court below, without changing the effect or conclusiveness of the verdict of the jury upon the facts litigated at the trial. Nor is there any inconvenience from this construction; for the party has still his remedy, by bill of exceptions, to bring the facts in review before the appellate court, l so far as those facts bear upon any question of law arising at the trial; and if there be any mistake of the facts, the court below is competent to redress it, by granting a new trial."1

§ 1767. The appellate jurisdiction is to be "with such exceptions, and under such regulations, as the congress shall prescribe." But, here, a question is presented upon the construction of the constitution, whether the appellate jurisdiction attaches to the Supreme Court, subject to be withdrawn and modified by congress; or, whether an act of congress is necessary to confer the jurisdiction upon the court. If the former be the true construction, then the entire appellate jurisdiction, if congress should make no exceptions or regulations, would attach proprio vigore to the Supreme Court. If the latter, then, notwithstanding the imperative language of the constitution, the Supreme Court is lifeless, until congress have conferred power on it. And if congress may confer power, they may repeal it. So that the whole efficiency of the judicial power is left by the constitution wholly unprotected and inert, if congress shall refrain to act. There is certainly very

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1 Parsons v. Bedford, 3 Peters's R. 446 to 449.

strong grounds to maintain, that the language of the constitution meant to confer the appellate jurisdiction absolutely on the Supreme Court, independent of any action by congress; and to require this action to divest or regulate it. The language, as to the original jurisdiction of the Supreme Court, admits of no doubt. It confers it without any action of congress. Why should not the same language, as to the appellate jurisdiction, have the same interpretation? It leaves the power of congress complete to make exceptions and regulations; but it leaves nothing to their inaction. This construction was asserted in argument at an earlier period 'of the constitution.1 It was at that time denied; and it was held by the Supreme Court, that, if congress should provide no rule to regulate the proceedings of the Supreme Court, it could not exercise any appellate jurisdiction.2 That doctrine, however, has, upon more mature deliberation, been since overturned; and it has been asserted by the Supreme Court, that, if the judicial act (of 1789) had created the Supreme Court, without defining, or limiting its jurisdiction, it must have been considered, as possessing all the jurisdiction, which the constitution assigns to it. The legislature could have exercised the power possessed by it of creating a Supreme Court, as ordained by the constitution; and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those constitutional powers undiminished. The appellate powers of the Supreme Court are not given by the judicial act (of 1789). They are given by

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1 Chisholm v. Georgia, 2 Dall. 419, and Iredell J.'s Opinion, p. 432; S. C. 2 Peters's Cond. R. 635, 638.

2 Wiscast v. Dauchy, 3 Dall. 321, 326; S.C. 1 Peters's Cond. R. 144, 146.

the constitution. But they are limited, and regulated by that act, and other acts on the same subject.1 And where a rule is provided, all persons will agree, that it cannot be departed from.

§ 1768. It should be added, that, while the jurisdiction of the courts of the United States is almost wholly under the control of the regulating power of congress, there are certain incidental powers, which are supposed to attach to them, in common with all other courts, when duly organized, without any positive enactment of the legislature. Such are the power of the courts over their own officers, and the power to protect them and their members from being disturbed in the exercise of their functions.2

§ 1769. Although the judicial department under the constitution would, from the exposition, which has thus been made of its general powers and functions, seem above all reasonable objections, it was assailed with uncommon ardour and pertinacity in the state conventions, as dangerous to the liberties of the people, and the rights of the states; as unlimited in its extent, and undefined in its objects; as in some portions of its jurisdiction wholly unnecessary, and in others vitally defective. In short, the objections were of the most opposite characters; and, if yielded to, would have left it without a shadow of power, or efficiency.3

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1 Durousseau v. United States, 6 Cranch, 307, 313, 314; United States v. Moore, 3 Cranch, 159, 170, 172.

2 Ex parte Bollman, 4 Cranch, 75; Ex parte Kearney, 7 Wheat. R. 38, 44; Anderson v. Dunn, 6 Wheat. R. 204.

3 See 2 Elliot's Debates, 380 to 427; 1 Elliot's Debates, 119 to 122; 3 Elliot's Debates, 125 to 145; 2 Amer. Museum, 422, 429, 435; 3 Amer. Museum, 62, 72; Id. 419, 420; Id. 534, 540, 540.

§ 1770. The Federalist has concluded its remarks on the judicial department in the following manner: "The amount of the observations hitherto made on the authority of the judicial department is this:-That it has been carefully restricted to those causes, which are manifestly proper for the cognizance of the national judicature; that, in the partition of this authority, a very small portion of original jurisdiction has been reserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, but subject to any exceptions and regulations, which may be thought advisable; that this appellate jurisdiction does, in no case, abolish the trial by jury; and that an ordinary degree of prudence and integrity in the national councils, will ensure us solid advantages from the establishment of the proposed judiciary, without exposing us to any of the inconveniences, which have been predicted from that source.1

§ 1771. The functions of the judges of the courts of the United States are strictly and exclusively judicial. They cannot, therefore, be called upon to advise the president in any executive measures; or to give extrajudicial interpretations of law; or to act, as commissioners in cases of pensions, or other like proceedings.2

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1 The Federalist, No. 81. See on the Judiciary the Journal of Convention, p. 98, 99, 100, 188, 189, 295, 301.

2 5 Marshall's Life of Washington, ch. 6, p. 433, 441; Sergeant on Const. ch. 29, p. 363, (2 edit. ch. 31, p. 375); Marbury v. Madison, 1 Cranch, 171; Dewhurst v. Coulthart, 3 Dall. R. 409; Hayburn's Case, 2 Dall. It. 409, 410, and note Ibid., and p. 411; Sergeant on Const. ch. 33 p. 391, (ch. 34, p. 401, 2d edition.)

§ 1772. The next clause of the first section of the third article is: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state, where such crimes shall have been committed. But when not committed within any state, the trial shall be at such place or places, as the congress may by law have directed."

§ 1773. It seems hardly necessary in this place to expatiate upon the antiquity, or importance of the trial by jury in criminal cases. It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes the fundamental articles of Magna Charta,1 in which it is declared, "nullus homo capiatur, nee imprtsonetur, aut exulet, aut aliquo modo destruatur, &c.; nisi per legale judicium parium suorum, vel per legera terrce;" no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, &c. but by the judgment of his peers, or by the law of the land. The judgment of his peers here alluded to, and commonly called in the quaint language of former times a trial per pais, or trial by the country, is the trial by a jury, who are called the peers of the party accused, being of the like condition and equality in the state. When our more immediate ancestors removed to America, they brought this great privilege with them, as their birth-right and inheritance, as a part of that admirable common law, which had fenced round, and interposed barriers on every side against the ap-

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1 Magna Charta, ch. 29, (9 Henry 3d); 2 Inst. 45; 3 Black. Comm. 349; 4 Black. Comm. 349.

proaches of arbitrary power.1 It is now incorporated into all our state constitutions, as a fundamental right; and the constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognised, and confirmed it in the most solemn terms.

§ 1774. The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter, than the former. The sympathies of all mankind are enlisted against the revenge and fury of a single despot; and every attempt will be made to screen his victims. But how difficult is it to escape from the vengeance of an indignant people, roused into hatred by unfounded calumnies, or stimulated to cruelty by bitter political enmities, or unmeasured jealousies? The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner, than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty. In such a course there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy. So long, indeed, as this palladium remains sacred and inviolable, the liberties of a free government cannot wholly fall.2 But to give it real efficiency, it must be

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1 2 Kent's Comm. Lect. 24, p. 1 to 9, (2d edition, p. l to 12); 3 Elliot's Debates, 331, 399.

2 4 Black. Comm 349, 350.

preserved in its purity and dignity; and not, with a view to slight inconveniences, or imaginary burthens, be put into the hands of those, who are incapable of estimating its worth, or are too inert, or too ignorant, or too imbecile, to wield its potent armour. Mr. Justice Blackstone, with the warmth and pride becoming an Englishman living under its blessed protection, has said: A celebrated French writer, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected, that Rome, Sparta, and Carthage, at the time, when their liberties were lost, were strangers to the trial by jury."1

§ 1775. It is observable, that the trial of all crimes is not only to be by jury, but to be held in the state, where they are committed. The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood; and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence. There is little danger, indeed, that con-

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1 3 Black. Comm. 379. See also Id. 381. -- I commend to the diligent perusal of every scholar, and every legislator, the noble eulogium of Mr. Justice Blackstone on the trial by jury. It is one of the most beautiful, as well as most forcible, expositions of that classical jurist. See 3 Black. Comm. 879, 380, 381; 4 Black. Comm. 349, 350. See also De Lolme, B. 1, ch. 13, B. 2, ch. 16. Dr. Paley's chapter on the administration of justice is not the least valuable part of his work on Moral philosophy. See B. 6, ch. 8. See also a Wilson's Law Lect. P. 2, ch. 6, p. 305, &c.

gress would ever exert their power in such an oppressive, and unjustifiable a manner.1 But upon a subject, so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion. By the common law, the trial of all crimes is required to be in the county, where they are committed. Nay, it originally carried its jealousy still farther, and required, that the jury itself should come from the vicinage of the place, where the crime was alleged to be committed.2 This was certainly a precaution, which, however justifiable in an early and barbarous state of society, is little commendable in its more advanced stages. It has been justly remarked, that in such cases to summon a jury, labouring under local prejudices, is laying a snare for their consciences; and though they should have virtue and vigour of mind sufficient to keep them upright, the parties will grow suspicious, and indulge other doubts of the impartiality of the trial.3 It was doubtless by analogy to this rule of the common law, that all criminal trials are required to be in the state, where committed. But as crimes may be committed on the high seas, and elsewere, out of the territorial jurisdiction of a state, it was indispensable, that, in such cases, congress should be enabled to provide the place of trial.

§ 1776. But, although this provision of a trial by jury in criminal cases is thus constitutionally preserved to all citizens, the jealousies and alarms of the opponents of the constitution were not quieted. They insisted, that a bill of rights was indispensable upon other subjects, and that upon this, farther auxiliary

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1 See 2 Elliot's Debates, 399, 400, 407, 420.

2 2 Hale, P.C. ch. 24, p. 260, 264; Hawk, P.C., B. 2, ch. 25, § 34; 4 Black. Comm. 305.

3 3 Black. Comm. 383.

rights ought to have been secured.1 These objections found their way into the state conventions, end were urged with great zeal against the constitution. They did not, however, prevent the adoption of that instrument. But they produced such a strong effect upon the public mind, that congress, immediately after their first meeting, proposed certain amendments, embracing all the suggestions, which appeared of most force; and these amendments were ratified by the several states, and are now become a part of the constitution. They are contained in the fifth and sixth articles of the amendments, and are as follows:

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

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district, wherein the crime shall have been committed; which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining wit-

1 See 2 Elliot's Debates, 331, 380 to 427; 1 Elliot's Debates, 119, 120, 121, 122; 3 Elliot's Debates, 139, 140, 149, 153, 300.

nesses in his favour; and to have the assistance of counsel for his defence."

§ 1777. Upon the main provisions of these articles a few remarks only will be made, since they are almost self-evident, and can require few illustrations to establish their utility and importance.

§ 1778. The first clause requires the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital and infamous crime, charged against him. And this is regularly true at the common law of all offences, above the grade of common misdemeanors. A grand jury, it is well known, are selected in the manner prescribed by law, and duly sworn to make inquiry, and present all offences committed against the authority of the state government, within the body of the county, for which they are impannelled. In the national courts, they are sworn to inquire, and present all offences committed against the authority of the national government within the state or district, for which they are impannelled, or elsewhere within the jurisdiction of the national government. The grand jury may consist of any number, not less than twelve, nor more than twenty-three; and twelve at least must concur in every accusation.1 They sit in secret, and examine the evidence laid before them by themselves. A presentment, properly speaking, is an accusation made ex mero motu by a grand jury of an offence upon their own observation and knowledge, or upon evidence before them, and without any bill of indictment laid before them at the suit of the government. An indictment is a written accusation of an offence

1 4 Black. Comm. 302, 306.

preferred to, and presented, upon oath, as true, by a grand jury at the suit of the government. Upon a presentment the proper officer of the court must frame an indictment, before the party accused can be put to answer it.1 But an indictment is usually in the first instance framed by the officers of the government, and laid before the grand jury. When the grand jury have heard the evidence, if they are of opinion, that the indictment is groundless, or not supported by evidence, they used formerly to endorse on the back of the bill, "ignoramus," or we know nothing of it, Whence the bill was said to be ignored. But now they assert in plain English, "not a true bill," or which is a better way, "not found;" and then the party is entitled to be discharged, if in custody, without farther answer. But a fresh bill may be preferred against him by another grand jury. If the grand jury are satisfied of the truth of the accusation, then they write on the back. of the bill, "a true bill," (or anciently, "billa vera.") The bill is then said to be found, and is publicly returned into court; the party stands indicted, and may then be required to answer the matters charged against him.2

§ 1779. From this summary statement it is obvious, that the grand jury perform most important public functions; and are a great security to the citizens against vindictive prosecutions, either by the government, or by political partisans, or by private enemies. Nor is this all;3 the indictment must charge the time, and place, and nature, and circumstances, of the offence, with clearness and certainty; so that the party

1 4 Black. Comm, 301,302.

2 4 Black. Comm. 305, 306.

3 See 1 Tuck. Black. Comm. App. 304, 305; Rawle on Const. ch. 10, p. 132.

may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability.

§ 1780. There is another mode of prosecution, which exists by the common law in regard to misdemeanors; though these also are ordinarily prosecuted upon indictments found by a grand jury. The mode, here spoken of, is by an information, usually at the suit of the government or its officers. An information generally differs in nothing from an indictment in its form and substance, except that it is filed at the mere. discretion of the proper law officer of the government ex officio, without the intervention or approval of a grand jury.1 This process is rarely recurred to in America; and it has never yet been formally put into operation by any positive authority of congress, under the

national government, in mere cases of misdemeanor; though common enough in civil prosecutions for penalties and forfeitures.

§ 1781. Another clause declares, that no person shall be subject, "for the same offence, to be twice put "in jeopardy of life and limb." This, again, is another great privilege secured by the common law.2 The meaning of it is, that a party shall not be tried a second time for the same offence, after he has once been convicted, or acquitted of the offence charged, by the verdict of a jury, and judgment has passed thereon for or against him. But it does not mean, that he shall not be tried for the offence a second time, if the jury have been discharged without giving any verdict; or, if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favour;

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1 4 Black. Comm. 308, 309.

2 Hawk. P.C., B. 2, ch. 35; 4 Black. Comm. 335.

for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy.1

§ 1782. The next clause prohibits any person from being compelled, in any criminal case, to be a witness against himself, or being deprived of life, liberty, or property, without due process of law. This also is but an affirmance of a common law privilege. But it is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt. And what is worse, it has been (as if in mockery or scorn) attempted to excuse, or justify it, upon the score of mercy and humanity to the accused. It has been contrived, (it is pretended,) that innocence should manifest itself by a stout resistance, or guilt by a plain confession; as if a man's innocence were to be tried by the hardness of his constitution, and his guilt by the sensibility of his nerves.2 Cicero, many ages ago,3 though he lived in a state, wherein it was usual to put slaves to the torture, in order to furnish evidence, has denounced the absurdity and wickedness of the measure in terms of glowing eloquence, as striking, as they are brief. They are conceived in the spirit of Tacitus, and breathe all his pregnant and indignant sarcasm.4 Ulpian, also, at a still later period in Roman jurisprudence, stamped the practice with severe reproof.5

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1 See United States v. Haskell, 4 Wash. Cir. R. 402, 410; United States v. Perez, 9 Wheat. R. 579; Hawk. P.C., B. 2, ch. 35, § 8; 1 Tuck. Black. Comm. App. 305; Rawle on the Constitution, ch. 10,p. 132, 133.

2 4 Black. Comm. 326; 3 Wilson's Law Lect. 154 to 159.

3 Cicero, Pro Sulla, 28.

4 Mr. Justice Blackstone quotes them in 4 Black. Comm. 326; 1 Tuck. Black. Comm. App. 304, 305; Ratherforth, Inst. B. 1, ch. 18, § 5.

5 See 3 Wilson's Law Lect. 158; 1 Gilb. Hist. 249.

§ 1783. The other part of the clause is but an enlargement of the language of magna charta, "nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vet per legem terrae," neither will we pass upon him, or condemn him,but by the lawful judgment of his peers, or by the law of the land. Lord Coke says, that these latter words, per legem terrae (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law.1 So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.2

§ 1784. The concluding clause is, that private property shall not be taken for public use without just compensation. This is an affirmance of a great doctrine established by the common law for the protection of private property.3 It is founded in natural equity, and is laid down by jurists as a principle of universal law.4 Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.5

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1 2 Inst. 50, 51; 2 Kent's Comm. Lect. 24, p. 10, (2d edit. p. 13); Cave's English Liberties, p. 19; 1 Tucker's Black. Comm. App. 304, 305.

2 Ibid.

3 1 Black. Comm. 138. 139.

4 2 Kent's Comm. Lect. 24, p. 275, 276, (2d. edit. p. 339, 340); 3 Wilson's Law Lect. 203; Ware v. Hylton, 3 Dall. R. 194, 235; S.C. 1 Peters's Cond. R. 99, 111; 1 Black. Comm. 138,139, 140.

5 See I Tuck. Black. Comm. App. 305, 306; Rawle on Const. ch. 10,p. 133. See also Van Horne v. Dorrance, 2 Dall. 384.

§ 1785. The other article, in declaring, that the accused shall enjoy the right to a speedy and public trial by an impartial jury or the state or district, wherein the crime shall have been committed, (which district shall be previously ascertained by law,) and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes. The trial is always public; the witnesses are sworn, and give in their testimony (at least in capital cases) in the presence of the accused; the nature and cause of the accusation is accurately laid down in the indictment; and the trial is at once speedy, impartial, and in the district of the offence.1 Without in any measure impug ning the propriety of these provisions, it may be suggested, that there seems to have been an undue solicitude to introduce into the constitution some of the general guards and proceedings of the common law in criminal trials, (truly admirable in themselves) without sufficiently adverting to the consideration, that unless the whole system is incorporated, and especially the law of evidence, a corrupt legislature, or a debased and servile people, may render the whole little more, than a solemn pageantry. If, on the other hand, the people are enlightened, and honest; and zealous in defence of their rights and liberties, it will be impossible to surprise them into a surrender of a single valuable appendage of the trial by jury.2

§ 1786. The remaining clauses are of more direct significance, and necessity. The accused is entitled to

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1 See 4 Black. Comm. ch. 23 to ch. 28; Hawkins, P.C., B. 2, ch. 46, § 1; 1 Tuck. Black. Comm. App. 304, 305.

2 See Rawle on Const. ch. 10, p. 228, 129.

have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel. A very short review of the state of the common law, on these points, will put their propriety beyond question. In the first place, it was an anciently and commonly received practice, derived from the civil law, and which Mr. Justice Blackstone says,1 in his day, still obtained in France, though since the revolution it has been swept away, not to suffer the party accused in capital cases to exculpate himself by the testimony of any witnesses. Of this practice the courts grew so heartily ashamed from its unreasonable and oppressive character, that another practice was gradually introduced, of examining witnesses for the accused, but not Upon oath; the consequence of which was, that the jury gave less credit to this latter evidence, than to that produced by the government. Sir Edward Coke denounced the practice as tyrannical and unjust; and denied, that, in criminal cases, the party accused was not to have witnesses sworn for him. The house of commons, soon after the accession of the house of Stuart to the throne of England, insisted, in a particular bill then pending, and, against the efforts both of the crown and the house of lords, caused a clause affirming the right, in cases tried under that act, of witnesses being sworn for, as well as against, the accused. By the statute of 7 Will. 3, ch. 3, the same measure of justice was established throughout the realm, in cases of treason; and afterwards, in the reign of Queen Anne, the like rule was extended to all cases of treason and felony.2 The right seems never to have been doubted, or denied, in cases of mere mis-

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1 4 Black. Comm. 359; Rawle on Const. ch. 10, p. 128, 129.

2 4 Black. Comm. 359, 360; 3 Wilson's Law Lect. 170, 171; Hawk. P.C. ch. 46, § 160; 2 Hale P. C.283.

demeanors.1 For what causes, and upon what grounds this distinction was maintained, or even excused, it is impossible to assign any satisfactory, or even plausible reasoning.2 Surely, a man's life must be of infinitely more value, than any subordinate punishment; and if he might protect himself against the latter by proofs of his innocence, there would seem to be irresistible reasons for permitting him to do the same in capital offences.3 The common suggestion has been, that in capital cases no man could, or rather ought, to be convicted, unless upon evidence so conclusive and satisfactory, as to be above contradiction or doubt. But who can say, whether it be in any case so high, until all the proofs in favour, as well as against, the party have been heard? Witnesses for the government may swear falsely, and directly to the matter in charge; and, until opposing testimony is heard, there may not be the slightest ground to doubt its truth; and yet, when such is heard, it may be incontestible, that it is wholly unworthy of belief. The real fact seems. to be, that the pract ice was early adopted into the criminal law in capital cases, in which the crown was supposed to take a peculiar interest, in base subserviency to the wishes of the latter. It is a reproach to the criminal jurisprudence of England, which the state trials, antecedently to the revolution of 1688, but too strongly sustain. They are crimsoned with the blood of persons, who were condemned to death, not

only against law, but against the clearest rules of evidence.

1 Hawk. P.C. ch. 46, § 159; 2 Hale P.C. 283; 1 Tuck. Black. Comm. App. 305.
2 2 Hale P.C. 283.
3 Rawle on Const. ch. 10, p. 129, 139.

§ 1787. Another anomaly in the common law is, that in capital cases the prisoner is not, upon his trial upon the general issue, entitled to have counsel, unless some matter of law shall arise, proper to be debated. That is, in other words, that he shall not have the benefit of the talents and assistance of counsel in examining the witnesses, or making his defence before the jury. Mr. Justice Blackstone, with all his habitual reverence for the institutions of English jurisprudence, as they actually exist, speaks out upon this subject with the free spirit of a patriot and a jurist. This, he says, is "a rule, which, however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner, that is, shall see, that the proceedings against him are legal, and strictly regular, seems to be not all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass."1 The defect has indeed been cured in England in cases of treason;2 but it still remains unprovided for in all other cases, to, what one can hardly help deeming, the discredit of the free genius of the English constitution.

§ 1788. The wisdom of both of these provisions is, therefore, manifest, since they make matter of constitutional right, what the common law had left in a most imperfect and questionable state.3 The right to have

1 4 Black. Comm. 355.-- Mr. Christian in his note on the passage has vindicated the importance of allowing counsel in a strain of manly reasoning. 4 Black. Comm. 356, note 9.
2 4 Black. Comm. 356; 1 Tuck. Black. Comm. App. 305.
3 3 Wilson's Law Lect. 170, 171; 1 Tuck. Black. Comm. App. 305; Rawle on Const. ch. 10, p. 128, 129.

witnesses sworn, and counsel employed for the prisoner, are scarcely less important privileges, than the right of a trial by jury. The omission of them in the constitution is a matter of surprise; and their present incorporation is matter of honest congratulation among all the friends of rational liberty.

§ 1789. There yet remain one or two subjects connected With the judiciary, which, however, grow out of other amendments made to the constitution; and will naturally find their place in our review of that part of these Commentaries, which embraces a review of the remaining amendments.

CHAPTER XXXIX.
DEFINITION AND EVIDENCE OF TREASON.

§ 1790. THE third section of the third article is as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

§ 1791. Treason is generally deemed the highest crime, which can be committed in civil society, since its aim is an overthrow of the government, and a public resistance by force of its powers. Its tendency is to create universal danger and alarm; and on this account it is peculiarly odious, and often visited with the deepest public resentment. Even a charge of this nature, made against an individual, is deemed so opprobrious, that, whether just or unjust, it subjects him to suspicion and hatred; and, in times of high political excitement, acts of a very subordinate nature are often, by popular prejudices, as well as by royal resentment, magnified into this ruinous importance.1 It is, therefore, of very great importance, that its true nature and limits should be exactly ascertained; and Montesquieu was so sensible of it, that he has not scrupled to declare, that if the crime of treason be indeterminate, that alone is sufficient to make any government degenerate into arbitrary

1 3 Wilson's Law Lect. ch. 5, p. 95, &c.

power.1 The history of England itself is full of melancholy instruction on this subject. By the ancient common law it was left very much to discretion to determine, what acts were, and were not, treason; and the judges of those times, holding office at the pleasure of the crown, became but too often instruments in its hands of foul injustice. At the

instance of tyrannical princes they had abundant opportunities to create constructive treasons; that is, by forced and arbitrary constructions, to raise offences into the guilt and punishment of treason, which were not suspected to be such.2 The grievance of these constructive treasons was so enormous, and so often weighed down the innocent, and the patriotic, that it was found necessary, as early as the reign of Edward the Third,3 for parliament to interfere, and arrest it, by declaring and defining all the different branches of treason. This statute has ever since remained the pole star of English jurisprudence upon this subject. And although, upon temporary emergencies, and in arbitrary reigns, since that period, other treasons have been created, the sober sense of the nation has generally abrogated them, or reduced their power within narrow limits.4

§ 1792. Nor have republics been exempt from violence and tyranny of a similar character. The Federalist has justly remarked, that newfangled and artificial treasons have been the great engines, by

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1 Montesq. Spirit of Laws, B. 12, ch. 7; 4 Black. Comm. 75.

2 4 Black. Comm. 75; 3 Wilson's Law Lect. 96; 1 Tucker's Black. Comm. App. 275, 276.

3 Star. 25, Edw. 3, ch. 2; 1 Hale P.C. 259.

4 See 4 Black. Comm. 85 to 92; 3 Wilson's Law Lect. 96, 97, 98, 99; l Tuck. Black. Comm. App. 275.

which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other.1

§ 1793. It was under the influence of these admonitions furnished by history and human experience, that the convention deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts, or by congress, upon the crime of treason. It confines it to two species; first, the levying of war against the United States; and secondly, adhering to their enemies, giving them aid and comfort.2 In so doing, they have adopted the very words of the Statute of Treason of Edward the Third; and thus by implication, in order to cut off at once all chances of arbitrary constructions, they have recognized the well-settled interpretation of these phrases in the administration of criminal law, which has prevailed for ages.3

§ 1794. Fortunately, hitherto but few cases have occurred in the United States, in which it has been necessary for the courts of justice to act upon this important subject. But whenever they have arisen, the judges have uniformly adhered to the established doctrines, even when executive influence has exerted itself with no small zeal to procure convictions.4 On one occasion only has the consideration of the question come before the Supreme Court; and we shall conclude what we have to say on this subject, with a short extract from the opinion delivered upon that

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1 The Federalist, No. 43; 3 Wilson's Law Lect. 96.

2 See also Journ. of Convention, 221, 269, 270, 271.

3 See 4 Black. Comm. 81 to 84; Foster, Cr. Law, Discourse I. But see 4 Tuck. Black. Comm. App. Note B.

4 See 4 Jefferson's Corresp. 72, 75, 78, 83, 85, 86, 87, 88, 90, 101, 102, 103. See Burr's Trial in 1807; 3 Wilson's Law Lect. 100 to 106.

occasion. "To constitute that specific crime, for which the prisoners, now before the court, have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined, that the actual enlistment of men to serve against the government does not amount to levying war. It is true, that in that case the soldiers enlisted were to serve without the realm; but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied."

§ 1795. "It is not the intention .of the court to say, that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those, who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.1

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1 Ex parte Bollman, 4 Cranch, 126. See also United States v. Burr, 4 Cranch, 469 to 505, &c.; Serg. on Const. ch. 30, (2 edit. ch. 32;) People v. Lynch, 1 John. R. 553.

§ 1796. The other part of the clause, requiring the testimony of two witnesses to the same overt act, or a confession in open court,1 to justify a conviction is founded upon the same reasoning. A like provision exists in British jurisprudence, founded upon the same great policy of protecting men against false testimony, and unguarded confessions, to their utter ruin. It has been well remarked, that confessions are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence.2 To which it may be added, that it is easy to be forged, and the most difficult to guard against. An unprincipled demagogue, or a corrupt courtier, might otherwise hold the lives of the purest patriots in his hands, without the means of proving the falsity of the charge, if a secret confession, uncorroborated by other evidence, would furnish a sufficient foundation and proof of guilt. And wisely, also, has the constitution declined to suffer the testimony of a single witness, however high, to be sufficient to establish such a crime, which rouses against the victim at once private honour and public hostility.3 There must, as there should, be a concurrence of two witnesses to the same overt, that is, open act of treason, who are above all reasonable exception.4

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1 See United States v. Fries, Pamph. p. 171.

2 4 Black. Comm. 356, 357.

3 See 4 Black. Comm. 357, 358.

4 United States v. Burr, 4 Cranch, 469, 496, 503, 506, 507.

§ 1797. The subject of the power of congress to declare the punishment of treason, and the consequent disabilities, have been already commented on in another place.1

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1 See ante, VoL III. § 1291 to 1296.

CHAPTER XL.

PRIVILEGES OF CITIZENS--FUGITIVES--SLAVES.

§ 1798. THE fourth article of the constitution contains several important provisions, some of which have been already considered. Among these are, the faith and credit to be given to state acts, records, and judgments, and the mode of proving them, and the effect thereof; the admission of new states into the Union; and the regulation and disposal of the territory, and other property of the United States.1 We shall now proceed to those, which still remain for examination.

§ 1799. The first is, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." There was an article upon the same subject2 in the confederation, which declared, "that the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall, in every other, enjoy all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively," &c.3 It was remarked by the Federalist, that there is a strange confusion in this language. Why the terms, free inhabitants, are used in one part of the article, free citizens ,in another, and people in another; or what is meant by superadding

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1 See ante, Vol. III. § 1211 to 1230, § 1308 to 1315, and § 1316 to 1324.

2 See 1 Tucker's Black. Comm. App. 365.

3 Confederation, Art. 4.

to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined. It seems to be a construction, however, scarcely avoidable, that those, who come under the denomination of free inhabitants of a state, although not citizens of such state, are entitled, in every other state, to all the privileges of free citizens of the latter; that is to greater privileges, than they may be entitled to in their own state. So that it was in the power of a particular state, (to which every other state was bound to submit,) not only to confer the rights of citizenship in other states upon any persons, whom it might admit to such rights within itself, but upon any .persons, whom it might allow to become inhabitants within its jurisdiction. But even if an exposition could be given to the term, inhabitants, which would confine the stipulated. privileges to citizens alone, the

difficulty would be diminished only; and not removed. The very improper power was, under the confederation, still retained in each state of naturalizing aliens in every other state.1

§ 1800. The provision in the constitution avoids all this ambiguity.2 It is plain and simple in its language; and its object is not easily to be mistaken. Connected with the exclusive power of naturalization in the national government, it puts at rest many of the difficulties, which affected the construction of the article of the confederation.3 It is obvious, that. if the citizens of each state were to be deemed aliens to each other, they could not take, or hold real estate, or other privileges,

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1 The Federalist, No. 42. See also Id. No. 80; ante, Vol. III. § 1098.

2 See Journ. of Convention, 222, 302.

3 But see 1 Tuck. Black. Comm. App. 365.

except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.1

§ 1801. The next clause is as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state, from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." A provision, substantially the same, existed under the confederation.2

§ 1802. It has been often made a question, how far any nation is, by the law of nations, and independent of any treaty stipulations, bound to surrender upon demand fugitives from justice, who, having committed crimes in another country, have fled thither for shelter. Mr. Chancellor Kent considers it clear upon. principle, as well as authority, that every state is bound to deny an asylum to criminals, and, upon application and due examination of the case, to surrender the fugitive to the foreign state, where the crime has been committed.3 Other distinguished judges and jurists have entertained a different opinion.4 It is not uncommon for treaties to contain mutual stipulations for the surrender of

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1 Carfied v. Coryell, 4 Wash. Cir. R. 371; Sergeant on Coast. ch. 31, p. 384, (ch. 33, p. 393, 2 edit.); Livingston v. Van Ingen, 9 John. R. 507.

2 Confederation, Art. 4.

3 1 Kent's Comm. Lect. 2, p. 36, (2 edit. p. 36, 37); Matter of Washburn, 4 John. Ch. R. 106; Rex v. Ball, 1 Amer. Jurist, 297; Vattel, B. 2, § 76, 77; Rutherforth, Inst. B. 2, ch. 9, § 12.

4 Com'th. v. Deacon, 10 Sergeant & Rawle, R. 125; 1 American Jurist. 297.

criminals; and the United States have sometimes been a party to such an arrangement.1

§ 1803. But, however the point may be, as to foreign nations, it cannot be questioned, that it is of vital importance to the public administration of criminal justice, and the security of the respective states, that criminals, who have committed crimes therein, should not find an asylum in other states; but should be surrendered up for trial and punishment. It is a power most salutary in its general operation, by discouraging crimes, and cutting off the chances of escape from punishment. It will promote harmony and good feelings among the states; and it will increase the general sense of the. blessings of the national government. It will, moreover, give strength to a great moral duty, which neighbouring states especially owe to each other, by elevating the policy of the mutual suppression of crimes into a legal obligation. Hitherto it has proved as useful in practice, as it is unexceptionable in its character.2

§ 1804. The next clause is, "No person held to service or labor in one state under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labour; but shall be delivered up on the claim of the party, to whom such service or labour may be due."3

§ 1805. This clause was introduced into the constitution solely for the benefit of the slave-holding states,

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1 See Treaty with Great Britain of 1794, art. 27; United States v. Nash, Bees, Adm. R. 266.

2 See 1 Kent's Comm. Lect. 2, p. 36, (2 edit. p. 36.) See Journ. of Convention, 222, 304.

3 This clause in its substance was unanimously adopted by the Convention. Journ. of Convention, 307.

to enable them to reclaim their fugitive slaves, who should have escaped into other states, where slavery was not tolerated. The want of such a provision under the confederation was felt, as a grievous inconvenience, by the slave-holding states,1 since in many states no aid whatsoever would be allowed to the owners; and

sometimes indeed they met with open resistance. In fact, it cannot escape the attention of every intelligent reader, that many sacrifices of opinion and feeling are to be found made by the Eastern and Middle states to the peculiar interests of the south. This forms no just subject of complaint; but it should for ever repress the delusive and mischievous notion, that the south has not at all times had its full share of benefits from the Union.

§ 1806. It is obvious, that these provisions for the arrest and removal of fugitives of both classes contemplate summary ministerial proceedings, and not the ordinary course of judicial investigations, to ascertain, whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy. In cases of suspected crimes the guilt or innocence of the party is to be made out at his trial; and not upon the preliminary inquiry, whether he shall be delivered up. All, that would seem in such cases to be necessary, is, that there should be prima facie evidence before the executive authority to satisfy its judgment, that there is probable cause to believe the party guilty, such as upon an ordinary warrant would justify his commitment for trial.2 And in the cases of fugitive slaves there would seem to be the same necessity of requir-

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1 1 Tuck, Black. Comm. App. 366. See also Serg. on Const. ch. 31 p. 385, (ch. 33, p. 394 to 398, 2d edit.) Glen v. Hodges, 9 John. R. 67; Commonwealth v. Halloway, 2 Serg. & Rawle R. 306.

2 See Serg. on Const. ch. 31 p. 385, 2d edit. ch. 33, p. 394.)

ing only prima facie proofs of ownership, without putting the party to a formal assertion of his rights by a suit at the common law. Congress appear to have acted upon this opinion; and, accordingly, in the statute upon this subject have authorized summary proceedings before a magistrate, upon which he may grant a warrant for a removal.1

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1 Act of 12 Feb. 1793, ch. 51, (ch. 7); Serg. on Const. ch. 31, p. 387, (2d edit ch. 33, p. 397, 398); Glen v. Hodges, 9 John. R. 62; Wright v. Deacon, 5 Serg. & R. 62; Commonwealth v. Griffin, 2 Pick. R. 11.

CHAPTER XLI.

GUARANTY OF REPUBLICAN GOVERNMENT--MODE OF MAKING AMENDMENTS.

§ 1807. The fourth section of the fourth article is as follows: "The United States shall guaranty to every state in this Union a republican form of government; and shall protect each of them against invasion; and on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence."

§ 1808. The want of a provision of this nature was felt, as a capital defect in the plan of the confederation, as it might in its consequences endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers, which might threaten the existence of the state constitutions, could not be demanded, as a right, from the national government. Usurpation might raise its standard, and trample upon the liberties of the people, while the national government could legally do nothing more, than behold the encroachments with indignation and regret. A successful faction might erect a tyranny on the ruins of order and law; while no succour could be constitutionally afforded by the Union to the friends and supporters of the government.1 But this is not all. The destruction of the national government itself, or of neighbouring states, might result from a successful rebellion in a single state. Who can determine, what would have been the issue, if

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1 The Federalist, No. 21.

the insurrection in Massachusetts, in 1787, had been successful, and the malcontents had been headed by a Caesar or a Cromwell?1 If a despotic or monarchical government were established in one state, it would bring on the ruin of the whole republic. Montesquieu has acutely remarked, that confederated governments should be formed only between states, whose form of government is not only similar, but also republican.2

§ 1809. The Federalist has spoken with so much force and propriety upon this subject, that it supersedes all further reasoning.3 "In a confederacy," says that work, "founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government, under which the compact was entered into, should be substantially maintained.

§ 1810. "But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the constitution? Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. 'As the confederate republic of Germany,' says Montesquieu, 'consists of free cities and petty states, subject to different princes, experience shows us, that it is more imperfect, than that of

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1 The Federalist, No. 91.

2 Montesq. B. 9, ch. 1, 2; 1 Tuck. Black. Comm. App. 366, 367.-This clause of guaranty was unanimously adopted in the convention. Journ. of Convention, 113, 189.

3 The Federalist, No. 21.

Holland and Switzerland.' ' Greece was undone,' he adds, ' as soon as the king of Macedon obtained a seat among the Amphyctions.' In the latter case, no doubt, the disproportionate forge, as well as the monarchical form of the new confederate, had its share of influence on the events.

§ 1811. "It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the state governments, without the concurrence of the states themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the constitution. But who can say, what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question, it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to. pursue the authority. But the authority extends no further than to a guaranty of a republican form of government, which supposes a pro-existing government of the form, which is to be guaranteed. As long therefore as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction, which, it is presumed, will hardly be considered as a grievance.

§ 1812. "A protection against invasion is due from every society, to the parts composing it. The latitude of the expression here used, seems to secure each state not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbours. The history both of ancient and modern confederacies proves, that the weaker members of the union ought not to be insensible, to the policy of this article.

§ 1813. "Protection against domestic violence is added with equal propriety. It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us, that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

§ 1814. "At first view, it might seem not to square with the republican theory, to suppose, either that a majority have not the right, or that a minority will have the force, to subvert a government; and consequently, that the federal interposition can never be required, but when it would be improper: But theoretic reasoning in this, as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations for purposes of violence, be formed, as well by a majority of a state, especially a small state, as by a majority of a county, or a district of the same state; and if the authority of the state ought in the latter case to protect the local magistracy, ought not the federal authority in the former to support the state authority? Besides; there are certain parts of the state constitutions, which

are so interwoven with the federal constitution, that a violent blow cannot be given to the one without communicating the wound to the other. Insurrections in a state will rarely induce a federal interposition, unless the number concerned in them bear some proportion to the friends of government. It will be much better, that the violence in such cases should be repressed by the superintending power, than that the majority should be left to maintain their cause by a bloody and obstinate contest. The existence of a fight to interpose will generally prevent the necessity of exerting it.

§ 1815. "Is it true, that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succours from foreign powers, as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side, against a superior number so situated, as to be less

capable of a prompt and collected exertion of its strength? Nothing can be more chimerical than to imagine, that, in a trial of actual force, victory may be calculated by the rules, which prevail in a census of the inhabitants, or which determine the event of an election! May it not happen, in fine, that the minority of citizens may become a majority of persons, by the accession of alien residents, of a casual concourse of adventurers, or of those, whom the constitution of the state has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the states, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character,

and give a superiority of strength to any party, with which they may associate themselves.

§ 1816. "In cases where it may be doubtful, on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing the state to pieces, than the representatives of confederate states, not heated by the local flame? To the impartiality of judges they would unite the affection of friends. Happy would it be, if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual could be established for the universal peace of mankind!

§ 1817. "Should it, be asked, what is to be the redress for an insurrection pervading all the states, and comprising a superiority of the entire force, though not a constitutional right? The answer must be, that such a case, as it would be without the compass of human remedies, so it is fortunately not within the compass of human probability; and that it is a sufficient recommendation of the federal constitution, that it diminishes the risk of a calamity, for which no possible constitution can provide a cure.

§ 1818. "Among the advantages of a confederate republic, enumerated by Montesquieu, an important one is, 'that should a popular insurrection happen in one of the states, the others are able to quell it. Should abuses creep into one part, they are reformed by those, that remain sound.' "1

§ 1819. It may not be amiss further to observe, (in the language of another commentator,) that every pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic

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1 The Federalist, No. 43.

violence, is taken away by that part of the provision, which renders an application from the legislature, or executive authority of the state endangered necessary to be made to the general government, before its interference can be at all proper. On the other hand, this article becomes an immense acquisition of strength, and additional force to the aid of any state government, in case of an internal rebellion, or insurrection against its authority. The southern states, being more peculiarly open to danger from this quarter, ought (he adds) to be particularly tenacious of a constitution. from which they may derive such assistance in the most critical periods.1

§ 1820. The fifth article of the constitution respects the mode of making amendments to it. It is in these words: "The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress; provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."2

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1 1 Tuck. Black. Comm. App. 367. See also Rawle on Const. ch. 32; 2 Elliot's Deb. 118, 119, 120; Journ. of Convention, p. 229, 311, 312.

2 See Journ. of Convent. 113; Id. 229, 313, 347, 318, 366, 386, 387, 388.

§ 1821. Upon this subject, little need be said to persuade us, at once, of its utility and importance. It is obvious, that no human government can ever be perfect; and that it is impossible to foresee, or guard against all the exigencies, which may, in different ages, require different adaptations and modifications of powers to suit the various necessities of the people. A government, forever changing and changeable, is, indeed, in a state bordering upon anarchy and confusion. A government, which, in its own organization, provides no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution. It is wise, therefore, in every government, and especially in a republic, to provide means for altering, and improving the fabric of

government, as time and experience, or the new phases of human affairs, may render proper, to promote the happiness and safety of the people. The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

§ 1822. In regard to the constitution of the United States, it is confessedly a new experiment in the history of nations. Its framers were not bold or rash enough to believe, or, to pronounce it to be perfect. They made use of the best lights, which they possessed, to form and adjust its parts, and mould its materials. But they knew, that time might develope many defects in its arrangements, and many deficiencies in its powers. They desired, that it might be open to

improvement; and under the guidance of the sober judgment and enlightened skill of the country, to be perpetually approaching nearer and nearer to perfection.1 It was obvious, too, that the means of amendment might avert, or at least have a tendency to avert, the most serious perils, to which confederated republics are liable, and by which all have hitherto been shipwrecked. They knew, that the besetting sin of republics is a restlessness of temperament, and a spirit of discontent at slight evils. They knew the pride and jealousy of state power in confederacies; and they wished to disarm them of their potency, by providing a safe means to break the force, if not wholly to ward off the blows, which would, from time to time, under the garb of patriotism, or a love of the people, be aimed at the constitution. They believed, that the power of amendment was, if one may so say, the safety valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction.

§ 1823. Upon the propriety of the power, in some form, there will probably be little controversy. The only question is, whether it is so arranged, as to accomplish its objects in the safest mode; safest for the stability of the government; and safest for the rights and liberties of the people.

§ 1824. Two modes are pointed out, the one at the instance of the government itself, through the instrumentality of congress; the other, at the instance of the states, through the instrumentality of a convention. Congress, whenever two thirds of each house shall

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1 The Federalist, No. 43.

concur in the expediency of an amendment, may propose it for adoption.1 The legislatures of two thirds of the states may require a convention to be called, for the purpose of proposing amendments. In each case, three fourths of the states, either through their legislatures, or conventions, called for the purpose, must concur in every amendment, before it becomes a part of the constitution. That this mode of obtaining amendments is practicable, is abundantly demonstrated by our past experience in the only mode hitherto found necessary, that of amendments proposed by congress. In this mode twelve amendments have already been incorporated into the constitution. The guards, too, against the too hasty exercise of the power, under temporary discontents or excitements, are apparently sufficient. Two thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring amendments to be proposed; and three fourths of the states must ratify them. Time is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action. An amendment, which has the deliberate judgment of two-thirds of congress, and of three fourths of the states, can scarcely be deemed unsuited to file prosperity, or security of the republic. It must combine as much wisdom and experience in its favour, as ordinarily can belong to the management of any

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1 It has been held, that the approval of the president is not necessary to any amendment proposed by congress. Hollingsworth v. Virginia, 3 Dall. 378.

human concerns.1 In England the supreme power of the nation resides in parliament; and, in a legal sense, it is so omnipotent, that it has authority to change the whole structure of the constitution, without resort to any confirmation of the people. There is, indeed, little danger, that it will so do, as long as the people are fairly represented in it. But still it does, theoretically speaking, possess the power; and it has actually exercised it so far, as to change the succession to the crown, and mould to its will some portions of the internal structure of the constitution.2

§ 1895. Upon the subject of the national constitution, we may adopt without hesitation the language of a learned commentator. "Nor," says he, "can we too much applaud a constitution, which thus provides a safe and peaceable remedy for its own defects, as they may, from time to time, be discovered. A change of government in other

countries is almost always attended with convulsions, which threaten its entire dis-

1 The Federalist disposes of this article in the following brief, but decisive, manner: "That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general, and the state governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or the other. The exception, in favour of the equality of suffrage in the senate, was probably meant as a palladium to the residuary sovereignty of the states, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the states particularly attached to that equality. The other exception must have been admitted on the same considerations. which produced the privilege defended by it." The Federalist, No. 43.

2 See 1 Black. Comm. 90, 91, 146, 147, 151, 152, 160, 161, 162, 210 to 218.

solution; and with scenes of horror, which deter mankind from ever attempt to correct abuses, or remove oppressions, until they have become altogether intolerable. In America we may reasonably hope, that neither of these evils need be apprehended. Nor is there any reason to fear, that this provision in the constitution will produce any instability in the government. The mode, both of originating and ratifying amendments, (in either mode, which the constitution directs,) must necessarily be attended with such obstacles and delays, as must prove a sufficient bar against light or frequent innovations. And, as a further security against them, the same article further provides, that no amendment, which may be made prior to the year 1808, shall, in any manner affect those clauses of the ninth section of the first article, which relate to the migration or importation of such persons, as the states may think proper to allow; and to the manner, in which direct taxes shall be laid; and that no state shall, without its consent, be deprived of its equal suffrage in the senate."1

1 1 Tuck. Black. Comm. App. 371, 372.

CHAPTER XLII.
PUBLIC DEBTS--SUPREMACY OF CONSTITUTION AND LAWS.

§ 1826. THE first clause of the sixth article of the constitution is: "All debts contracted, and engagements entered into before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation."1

§ 1827. This can be considered in no other light, than as a declaratory proposition, resulting from the law of nations, and the moral obligations of society. Nothing is more clear upon reason or general law, than the doctrine, that revolutions in government have, or rather ought to have, no effect whatsoever upon private rights, and contracts, or upon the public obligations of nations.2 It results from the first principles of moral duty, and responsibility, deducible from the law of nature, and applied to the intercourse and social relations of nations.3 A change in the political form of a society ought to have no power to produce a dissolution of any of its moral obligations.4

§ 1828. This declaration was probably inserted in the constitution, not only as a solemn recognition of the obligations of the government resulting from na-

1 See Journ. of Convention, 291.

2 See Jackson v. Luun, 3 John. Cas. 109; Kelly v. Harrison, 2 John. Cas. 29; Terrett v. Taylor, 9 Cranch, 50.

3 See Rutherforth, Inst. B. 2, ch. 9, § 1, 2; Id. ch. 10, § 14; Vattel, Prelim. Dis. § 2, 9; B. 2, ch. 1, § 1, ch. 5, § 64, ch. 14,§ 214, 215, 216.

4 The Federalist, No. 43; Rutherforth, Inst. B. 2, ch. 10, § 14, 15; Grotius, B. 2, ch. 9, § 8, 9.

tional law; but for the more complete satisfaction and security of the public creditors, foreign as well as domestic. The articles of confederation contained a similar stipulation in respect to the bills of credit emitted, monies borrowed, and debts contracted, by or under the authority of congress, before the ratification of the confederation.1

§ 1829. Reasonable as this provision seems to be, it did not wholly escape the animadversions of that critical spirit, which was perpetually on the search to detect defects, and to disparage the merits of the constitution. It was said, that the validity of all engagements made to, as well as made by, the United States, ought to have been expressly asserted. It is surprising, that the authors of such an objection should have overlooked the obvious consideration, that, as all engagements are in their nature reciprocal, an assertion of their validity on one side, necessarily involves their validity on the other; and that, as this article is but declaratory, the establishment of it in debts entered into by the government, unavoidably included a recognition of it in engagements with the government.2 The shorter and plainer answer is that pronounced by the law of nations, that states neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government.3 More was scarcely necessary, than to have declared, that all future contracts by and with the United States should be valid, and binding upon the parties.

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1 1 Tuck Black. Comm. App. 368; Confederation, Art. 12.

2 The Federalist, No. 43, No. 84.

3 The Federalist, No. 84; Rutherforth, B. 2, ch. 10, § 14, 15; Grotius, B. 2, ch. 9, § 8, 9.

§ 1830. The next clause is, "This constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. And the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."1

§ 1831. The propriety of this clause would seem to result from the very nature of the constitution. If it was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. It would be a perfect solecism to affirm, that a national government should exist with certain powers; and yet, that in the exercise of those powers it should not be supreme. What other inference could have been drawn, than of their supremacy, if the constitution had been totally silent? And surely a positive affirmance of that, which is necessarily implied, cannot in a case of such vital importance be deemed unimportant. The very circumstance, that a question might be made, would irresistibly lead to the conclusion, that it ought not to be left to inference. A law, by the very, meaning of the term, includes supremacy. It is a rule, which those, to whom it is prescribed, are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws, which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those

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1 See Journal of Convention, p. 222, 282, 293.

societies, and the individuals, of whom they are composed. It would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another name for political power and supremacy. But it will not follow that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. They will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive, that the above clause only declares a truth, which flows immediately, and necessarily from the .institution of a national government.1 It will be observed, that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution; a caution very proper in itself, but in fact the limitation would have arisen by irresistible implication, if it had not been expressed.2

§ 1832. In regard to treaties, there is equal reason, why they should be held, when made, to be the supreme law of the land. It is to be considered, that treaties Constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed, and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals, or war.3 It is, therefore, indispensable, that they should have the obli-

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1 The Federalist, No. 33. See Gibbons v. Ogden, 9 Wheat. R. 210, 211; McCulloch v. Maryland, 4 Wheat. R. 405, 406.--This passage from the Federalist (No. 33) has been, for another purpose, already cited in Vol. I. § 340; but it is necessary to be here repeated to give due effect to the subsequent passages.

2 Ibid. See also 1 Tuck. Black. Comm. App. 369, 370.

3 See The Federalist, No. 64.

gation and force of a law, that they may be executed by .the judicial power, and be obeyed like other laws. This will not prevent them from being cancelled or abrogated by the nation upon grave and suitable occasions; for it will not be disputed, that they are subject to the legislative power, and may be repealed, like other laws, at its pleasure;1 or they may be varied by new treaties. Still, while they do subsist, they ought to have a positive binding efficacy as laws upon all the states, and all the citizens of the states. The peace of the nation, and its good faith, and moral dignity, indispensably require, that all state laws should be subjected to their supremacy. The difference between considering them as laws, and considering them as executory, or executed contracts, is exceedingly important in the actual administration of public justice. If they are supreme laws, courts of justice will enforce them directly in all cases, to which they can be judicially applied, in opposition to all state laws, as we all know was done in the case of the British debts secured by the treaty of 1783, after the constitution was adopted.2 If they are deemed but solemn compacts, promissory in their nature and obligation, courts of justice may be embarrassed in enforcing them, and may be compelled to leave the redress to be administered through other departments of the government.3 It is

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1 See Act of Congress, 7th July, 1798, ch. 84; Talbot v. Seaman, I Cranch, 1; Ware v. Hylton, 3 Dall. 362, Per Iredell J.

2 Ware v. HyIton, 3 Dall. R. 199. See also Gibbons v. Ogden, 9 Wheat. R. 210, 211; Letter of Congress of 13th April, 1787; 12 Journ. of Congress, 39.

3 See Iredell J.'s reasoning in Ware v. Hylton, 3 Dall. R. 270 to 127; 5 Marshall's Life of Washington, ch. 8, p. 652, 656; 1 Wait's State Papers, 45, 47, 71, 81, 145; Serg. on Const. ch. 21, p. 217,218, ch. 33, p. 396, 397, (2d edit. ch. 21, p. 218, 219, ch. 34, p. 406, 407.)--"A.

notorious, that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the states under the confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution. Congress, indeed, remonstrated against this construction, as unfounded in principle and justice.1 But their voice was not heard. Power and right were separated; the argument was all on one side; but the power was on the other.2 It was probably to obviate this very difficulty, that this clause was inserted in the. constitution;3 and it would redound to the immortal honour of its authors, if it had done no more, than thus to bring treaties within the sanctuary of justice, as laws of supreme obligation.4 There are, indeed, still cases, in which courts of justice can administer no effectual redress; as when the terms

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treaty," said the Supreme Court, in Foster v. Neilson, 2 Peters's R. 314, "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 infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is consequently to be regarded by courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of. any legislative provision."

1 Circular Letter of Congress, 13th April, 1787; 12 Journ. of Congress, 32 to 36.

2 See the opinion of Iredell J. in Ware v. Hylton 3 Dall. 270 to 277.

3 Id. 276, 277. See Journal of Convention, p. 222, 282, 283, 293.

4 The importance of this power has been practically illustrated by the redress afforded by courts of law in cases pending before them upon treaty stipulations. See United States v. The Peggy, 1 Cranch, 103; Ware v. Hylton; 3 Dall. R. 199, 244, 261; United States v. Arradondo, 6 Peters's R. 691; Soulard v. Smith, 4 Peters's Sup. R. 511; Cue of Jonathan Robbins, 1 Hall's Journ. of Jurisp. 25; Bees Adm'rs Rap. 263; 5 Wheat. Rap. App.

of a stipulation import a contract, when either of the parties engages to perform a particular act the treaty addresses itself to the political, and not to the judicial, department; and the legislature must execute the contract, before it can become a rule for the courts.1

§ 1833. It is melancholy to reflect, that, conclusive as this view of the subject is in favour of the supremacy clause, it was assailed with great vehemence and zeal by the adversaries of the constitution; and especially the concluding clause, which declared the supremacy, "any thing in the constitution or laws of any state to the contrary notwithstanding."2 And yet this very clause was but an expression of the necessary meaning of the former clause,

introduced from abundant caution, to make its obligation more strongly felt by the state judges. The very circumstance, that any objection was made, demonstrated the utility, nay the necessity of the clause, since it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution.

§ 1834. To be fully sensible of the value of the whole clause, we need only suppose for a moment, that the supremacy of the state constitutions had been left complete by a saving clause in their favour. "In the first place, as these constitutions invest the state legislatures with absolute sovereignty, in all cases not excepted by the existing articles of confederation, all the authorities contained in the proposed constitution, so far as they exceed those enumerated. in the confederation, would have been annulled, and the new

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1 Foster v. Neilson, 2 Peters's Sup. R. 254, 314. See also the Bello Corunnes, 6 Wheat. R. 171; Serg. on Const. ch. 33, p. 397, 398, 399, (ch. 34, p. 407, 408, 409, 410, 2d edit.)

2 See The Federalist, No. 44, 64.

congress would have been reduced to the same impotent condition with their predecessors. In the next place, as the constitutions of some of the states do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such states, have brought into question every power contained in the proposed constitution. In the third place, as the constitutions of the states differ much from each other, it might happen, that a treaty or national law, of great and equal importance to the states, would interfere with some, and not with other constitutions, and would consequently be valid in some of the states, at the same time, that it would have no effect in others. In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."1

§ 1835. At an early period of the government a question arose, how far a treaty could embrace commercial regulations, so as to be obligatory, upon the nation, and upon congress. It was debated with great zeal and ability in the house of representatives.2 On the one hand it was contended, that a treaty might be made respecting commerce, as well as upon any other subject; that it was a contract between the two nations, which, when made by the president, by and with the consent of the senate, was binding

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1 The Federalist, No. 44.

2 The question arose in the debate for carrying into effect the British Treaty of 1794.

upon the nation; and that a refusal of the house of representatives to carry it into effect was breaking the treaty, and violating the faith of the nation. On the other hand, it was contended, that the power to make treaties, if applicable to every object, conflicted with powers, which were vested exclusively in congress; that either the treaty making power must be limited in its operation, so as not to touch objects committed by the constitution to congress;or the assent and co-operation of the house of representatives must be required to give validity to any compact, so far as it might comprehend these objects: that congress was invested with the exclusive power to regulate commerce; that therefore, a treaty of commerce required the assent and co-operation of the house of representatives; that in every case, where a treaty required an appropriation of money, or an act of congress to carry it into effect, it was not in this respect obligatory, till congress had agreed to carry it into effect; and, that they were at free liberty to make, or withhold such appropriation, or act, without being chargeable with violating the treaty, or breaking the faith of the nation. In the result, the house of representatives adopted a resolution declaring, that the house of representatives do not claim any agency in making treaties; but when a treaty stipulates regulations on any of the subjects submitted to the power of congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by congress; and that it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon, as in their judgment may be most condu-

cive to the public good. It is well known, that the president and the senate, on that occasion, adopted a different doctrine, maintaining, that a treaty once ratified became the law of the land, and congress were constitutionally bound to carry it into effect.1 At the distance of twenty years, the same question was again presented for the consideration of both houses, upon a bill to carry into effect a clause in the treaty of 1815 with Great Britain, abolishing discriminating duties; and, upon that occasion, it was most ably debated. The result was, that a

declaratory clause was adopted, instead of a mere enacting clause, so

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1 See Journal of House of Representatives, 6th April, 1796; 5 Marshall's Life of Washington, ch. 6, p. 650 to 659; Serg. on Const. ch. 33, p. 401, (2d edit. ch. 34, p. 410, 411); 1 Debates on British Treaty, by F. Bache, 1796, p. 374 to 386; 4 Elliot's Deb. 244 to 246. -- President Washington, on this occasion, refused to deliver the papers respecting the British Treaty of 1794, called for by the house of representatives; and asserted the obligatory force of the treaty upon congress in the most emphatic terms. He added, that be knew, that this was understood in the convention to be the intended interpretation, and he referred to the Journal of the Convention* to show, that a proposition was made, "that no treaty should be binding on the United States, which Was not ratified by a law;" and that it was explicitly rejected. (5 Marshall's Life of Washington, ch. 8, p. 654 to 658.) At a much earlier period, viz. in 1790, the same point came before the cabinet of President Washington in a treaty proposed with the Creek Indians. Upon that occasion, there seems to have been no doubt in the minds of any of his cabinet of the conclusiveness of a treaty containing commercial stipulations. Mr. Jefferson, on that occasion, firmly maintained it. A treaty, (said he,) made by the president with the concurrence of two thirds of the senate is the law of the land, and a law of a superior order, because it not only repeals past laws, but cannot itself be repealed by future ones. The treaty then will legally control the duty acta and the act for securing traders in thin particular instance. Yet Mr. Jefferson afterwards, (in Nov. 1793,) seems to have fluctuated in opinion, and to have been unsettled, as to the nature and extent of the treaty-making power. 4 Jefferson's Corresp. 497, 498.

*** See Journal of Convention, p. 284, 325, 326, 333, 342, 343.**

that the binding obligation of treaties was affirmatively settled.1

§ 1836. From this supremacy of the constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by congress or by a state legislature void. So, in like manner, the same duty arises, whenever any other department of the national or state governments exceeds its constitutional functions.2 But the judiciary of the United States has no general jurisdiction to declare acts of the several states void, unless they are repugnant to the constitution Of the United States, notwithstanding they are repugnant to the state constitution.3 Such a power belongs to it only, when it sits to administer the local law of a state, and acts exactly, as a state tribunal is bound to act.4 But upon this subject it seems unnecessary to dwell, since the right of all courts, state as well as national, to declare unconstitutional laws void, seems settled beyond the reach of judicial controversy.5

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1 Serg. on Const. ch. 33, p. 402, (2d edit.ch. 34, p. 411; 2 Elliot's Deb. 273 to 279. -- Upon this occasion, a most admirable speech was delivered by the late William Pinkney, in which his great powers of reasoning and juridical learning had an ample scope. See Wheaton's Life of Pinkney, p. 517.

2 Marbury v. Madison, 1 Cranch, 137, 176.

3 Calder V. Bull, 3 Dall. R. 386; S.C. 1 Peters's Cond. R. 172, 177.

4 Satterlee v. Matthewson, 2 Peters's Sup. R. 380, 413.

5 See Serg. on Const. ch. 33, p. 391, (2d edit. ch. 34, p. 401); 1 Kent's Comm. Lect. 20, p. 420, 421, (2d edit. p. 448, 449, 450.)

CHAPTER XLIII.
OATHS OF OFFICE--RELIGIOUS TEST--RATIFICATION OF CONSTITUTION.

§ 1837. The next clause is, "The senators and representatives before mentioned, and the members of the several state legislatures and all executive and judicial officers, both of the United States and of the-several states, shall be bound by oath or affirmation to support the constitution.1 But no religious test shall ever be required as a qualification to any office or public trust under the United States."

§ 1838. That all those, who are entrusted with the execution of the powers of the national government, should be bound by some solemn obligation to the due execution of the trusts reposed in them, and to support the constitution, would seem to be a proposition too clear to render any reasoning necessary m support of it. It results from the plain right of society to require some guaranty from every officer, that he will be conscientious in the. discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those, who feel a

deep sense of accountability to a Supreme being. If, in the ordinary administration of justice in cases of

1 This clause, requiring an oath. of the state and national functionaries to support the constitution, was at first carried by a vote of six states against five; but it was afterwards unanimously approved. Journ. of Convention, p. 114, 197. On the final vote, it was adopted by a vote of eight states against one, two being divided. Id. 313. The clause respecting a religious test was unanimously adopted. Id. 313.

private rights, or personal claims, oaths are required of those, who try, as well as of those, who give testimony, to guard against malice, falsehood, and evasion, surely like guards ought to be interposed in the administration of high public trusts, and especially in such, as may concern the welfare and safety of the whole community. But there are known denominations of men, who are conscientiously scrupulous of taking oaths (among which is that pure and distinguished sect of Christians, commonly called Friends, or Quakers,) and therefore, to prevent any unjustifiable exclusion from office, the constitution has permitted a solemn affirmation to be made instead of an oath, and as its equivalent.

§ 1839. But it may not appear to all persons quite so clear, why the officers of the state governments should be equally bound to take a like oath, or affirmation; and it has been even suggested, that there is no more reason to require that, than to require, that all of the United States officers should take an oath or affirmation to support the state constitutions. A moment's reflection will show sufficient reasons for the requisition of it in the one case, and the omission of it in the other. The members and officers of the national government have no agency in carrying into effect the state constitutions. The members and officers of the state governments have an essential agency in giving effect to the national constitution. The election of the president and the senate will depend, in all cases, upon the legislatures of the several states; and, in many cases, the election of the house of representatives may be affected by their agency. The judges of the state courts will frequently be called upon to decide upon the constitution, and laws, and

treaties of the United States; and upon rights and claims growing out of them. Decisions ought to be, as far as possible, uniform; and uniformity of obligation will greatly tend to such a result. The executive authority of the several states may be often called upon to exert powers, or allow rights, given by the constitution, as in filling vacancies in the senate; during the recess of the legislature; in issuing writs of election to fill vacancies in the house of representatives; in officering the militia: and giving effect to laws for calling them; and in the surrender of fugitives from justice. These, and many other functions, devolving on the state authorities, render it highly important, that they should be under a solemn obligation to obey the constitution. In common sense, there can be no well-founded objection to it. There may be serious evils growing out of an opposite course.1 One of the objections, taken to the articles of confederation, by an enlightened state, (New-Jersey,) was, that no oath was required of members of congress, previous to their admission to their seats in congress. The laws and usages of all civilized nations, (said that state,) evince the propriety of an oath on such occasions; and the more solemn and important the deposit, the m. ore strong and explicit ought the obligation to be.2

§ 1840. As soon as the constitution went into operation, congress passed an act,3 prescribing the time and manner of taking the oath, or affirmation, thus required, as well by officers of the several states, as of the United States. On that occasion, some

1 The Federalist, No. 44; 1 Tuck. Black. Comm. App. 370, 371; Rawle on Constitution, ch. 19, p. 191, 192.

2 2. Pitk. Hist. 22; 1 Secret Journ. of Congress, June 25, 1778, p. 374.

3 Act of 1st June, 1789, ch. 1.

scruple seems to have been entertained, by a few members, of the constitutional authority of congress to pass such an act.1 But it was approved without much opposition. At this day, the point would be generally deemed beyond the reach of any reasonable doubt.2

§ 1841. The remaining part of the clause declares, that "no religious test shall ever be required, as a qualification to any office or public trust, under the United States." This clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher object; to cut off for ever every pretence of any alliance between church and state in the national government. The framers of the constitution were fully sensible of the dangers from this source, marked out in the history of other ages and countries; and not wholly unknown to our own. They knew, that bigotry was

unceasingly vigilant in its stratagems, to secure to itself an exclusive ascendancy over the human mind; and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those, who doubted its dogmas, or resisted its infallibility. The Catholic and the Protestant had alternately waged the most ferocious and unrelenting warfare on each other; and Protestantism itself, at the very moment, that it was proclaiming the right of private judgment, prescribed boundaries to that right, beyond which if any one dared to pass, he must seal his rashness with the blood of martyr-

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1 Lloyd's Debates, 218 to 225; 4 Elliot's Debates, 139 to 141.

2 See also M'Culloh v. Maryland, 4 Wheat. R. 415, 416.

dom.1 The history of the parent country, too, could not fail to instruct them in the uses, and the abuses of religious tests. They there found the pains and penalties of non-conformity written in no equivocal language, and enforced with a stern and vindictive jealousy. One hardly knows, how to repress the sentiments of strong indignation, in reading the cool vindication of the laws of England on this subject, (now, happily, for the most part abolished by recent enactments,) by Mr. Justice Blackstone, a man, in many respects distinguished for habitual moderation, and a deep sense of justice. "The second species," says he "of non-conformists, are those, who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists, and protestant dissenters; both of which were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papists divided from it upon material, though erroneous, reasons; but many of the dissenters, upon matters of indifference, or, in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If, through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or, (which is often the case,) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such, as

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1 See 4 Black. Comm. 44, 59, and ante; Vol. I, § 53.

threaten ruin or disturbance to the state. He is bound, indeed, to protect the established church; and, if this can be better effected, by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do; the disposal of offices being matter of favour and discretion. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known, or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment."1

§ 1842. And again: "As to papists, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend ton subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of reliques and images; nay even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain, if the laws of that kingdom will not treat them upon the footing of good subjects."2

§ 1843. Of the English laws respecting papists, Montesquieu observes, that they are so rigorous,

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1 4 Black. Comm. 52, 53.

2 4 Black. Comm. 54, 55.

though not professedly of the sanguinary kind, that they do all the hurt, that can possibly be done in cold blood. To this just rebuke, (after citing it, and admitting its truth,) Mr. Justice Blackstone has no better reply to make, than that these laws are seldom exerted to their utmost rigour; and, indeed, if they were, it would be very difficult to excuse them.1 The meanest apologist of the worst enormities of a Roman emperor could not have shadowed out a defence more servile, or more unworthy of the dignity and spirit of a freeman. With one quotation more from the same authority, exemplifying the nature and objects of the English test laws, this subject may be dismissed. "In order the better to secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are, however, two bulwarks erected, called the corporation and testacts.

By the former of which, no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the Lord's supper according to the rights of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy, at the same time, that he takes the oath of office; or, in default of either of these requisites, such election shall be void. The other, called the test-act, directs all officers, civil and military, to take the oaths, and make the declaration against transubstantiation, in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months

1 4 Black. Comm. 57.

after their admission; and also within the same time to receive the sacrament of the Lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon; and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses, upon forfeiture of 500/, and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I.c. 2., which permits no persons to be naturalized, or restored in blood, but such as undergo a like test; which test, having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation."1 It is easy to foresee, that without some prohibition of religious tests, a successful sect, in our country, might, by once possessing power, pass testlaws, which would secure to themselves a monopoly of all the offices of trust and profit, under the national government.2

§ 1844. The seventh and last article of the constitution is: "The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same."

§ 1845. Upon this article it is now wholly unnecessary to bestow much commentary, since the constitution has been ratified by all the states. If a ratification had been required of all the states, instead of nine, as a condition precedent, to give it life and motion, it is now known, that it would never have

1 See also 2 Kent's Comm. Lect. 24, (2 edit.) p. 35, 36; Rawle on the Constitution, ch. 10, p. 121; 1 Tuck. Black. Comm. App. 296; 2 Tuck. :Black. Comm. App. Note (G.),p. 3.

2 See ante, Vol. II, § 621.

been ratified. North Carolina in her first convention rejected it; and Rhode-Island did not accede to it, until more than a year after it had been in operation.1 Some delicate questions, under a different state of things, might have arisen. What they were, and how they were disposed of at the time, is made known by the Federalist, in a commentary upon the article, which will conclude this subject.

§ 1846. "This article speaks for itself. The express authority of the people alone could give due validity to the constitution. To have required the unanimous ratification of the thirteen states, would have subjected the essential interests of the whole, to the caprice or corruption or a single member. It would have marked a want of foresight in the convention, which our own experience would have rendered inexcusable.

§ 1847. "Two questions of a very delicate nature present themselves on this occasion. (1.) On what principle the confederation, which stands in the Solemn form of a compact among the states, can be superceded without the unanimous consent of the parties to it? (2.) What relation is to subsist between the nine or more states ratifying the constitution, and the remaining few, who do not become parties to it?

§ 1848. "The first question is answered at once, by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature, and of nature's God, which declares, that the safety and happiness of society, are the objects, at which.all political institutions

1 Ante, VoL. I, § 279.

aim, and to which all such institutions must be sacrificed. Perhaps, also, an answer may be found, without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the confederation, that, in many of the states, it had received no higher sanction, than a mere legislative ratification. The principle of reciprocity seems to require, that its obligation on the other states should be reduced to the same standard. A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity, than a league or treaty between the parties. It is an established doctrine, on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others; and authorizes them, if they please, to pronounce the compact violated, and void. Should it unhappily be necessary to appeal to these delicate truths, for a justification for

dispensing with the consent of particular states to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions, with which they may be confronted? The time has been, when it was incumbent on us all to veil the idea, which this paragraph exhibits.The scene is now changed, and with it, the part, which the same motives dictated.

§ 1849. "The second question is not less delicate; and the flattering prospect of its being nearly hypothetical, forbids an over-curious discussion of it. It is one of those cases, which must be left to provide for itself. In general, it may be observed, that although no politi-

cal relation can subsist between the assenting and dissenting states, yet the moral relations will remain uncancelled. The claims of justice, both on one side, and on the other, will be in force, and must be fulfilled; the rights of humanity must, in all cases, be duly and mutually respected; whilst considerations of a common interest, and above all, the remembrance of the endearing scenes, which are past, and the anticipation of a speedy triumph over the obstacles to re-union, will, it is hoped, not urge in vain moderation on one side, and prudence o.n the other."1

§ 1850. And here closes our review of the constitution in the original form, in which it was framed for, and adopted by, the people of the United States. The concluding. passage of it is, "Done in convention by the unanimous consent of all the states present, the seventeenth day of September, in the year of our Lord one thousand, seven hundred and eighty-seven, and of the Independence of the United States of America, the twelfth." At the head of the illustrious men, who framed, and signed it, (men, who have earned the eternal gratitude of their country,) stands the name of GEORGE WASHINGTON, "President and Deputy from Virginia;" a name, at the utterance of which envy is dumb, and pride bows with involuntary reverence, and piety, with eyes lifted to heaven, breathes forth a prayer of profound gratitude.

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1 The Federalist, No. 43.

CHAPTER XLIV.
AMENDMENTS TO THE CONSTITUTION.

§ 1851. We have already had occasion to take notice of some of the amendments made to the constitution, subsequent to its adoption, in the progress of our review of the provisions of the original instrument. The present chapter will be devoted to a consideration of those, which have not fallen within the scope of our former commentaries.

§ 1852. It has been already ,stated, that many objections were taken to the constitution, not only on account of its actual provisions, but also on account of its deficiencies and omissions.1 Among the latter, none were proclaimed with more zeal, and pressed with more effect, than the want of a bill of rights. This, it was said, was a fatal defect; and sufficient of itself to bring on the ruin of the republic.2 To this objection several answers were given; first, that the constitution did in fact contain many provisions in the nature of a bill of rights, if the whole constitution was not in fact a bill of rights; secondly, that a bill of rights was in its nature more adapted to a monarchy, than to a government, professedly founded upon the will of the people, and executed by their immediate representatives and agents; and, thirdly, that a formal bill of rights, beyond what was contained in it, was wholly unnecessary, and might even be dangerous.3

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1 Vol. I., B. 3, ch. 2.

2 2 Amer. Museum, 423, 424, 425; Id. 435; Id. 534; Id. 540, 543, 546; Id. 553.

3 The Federalist, No. 8; 3 Amer. Museum, 78, 79; Id. 559.

§ 1853. The first answer was supported by reference to the clauses in the constitution, providing for the judgment in cases of impeachment; the privilege of the writ of habeas corpus; the trial by jury in criminal cases; the definition, trial, and punishment of treason; the prohibition of bills of attainder, ex post facto laws, laws impairing the obligation of contracts, laws granting titles of nobility, and laws imposing religious tests. All these were so many declarations of rights for the protection of the citizens, not exceeded in value by any, which could possibly find a place in any bill of rights.1

§ 1854. Upon the second point it was said, that bills of rights are in their origin stipulations between kings and their subjects, abridgments of prerogative in favour of privilege, and reservations of rights not surrendered to the prince. Such was Magna Charta obtained by the barons, sword in hand, of King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the petition of right assented to by Charles the First in

the beginning of his reign. Such, also, was the declaration of rights presented by the lords and commons to the prince of Orange in 1688, and afterwards put into the form of an act of parliament, called the bill of rights.2 It is evident, therefore, that according to its primitive signification, a bill of rights has no application to constitutions professedly founded upon the power of the people, and executed by persons, who are immediately chosen by them to execute their will. In our

1 The Federalist, No. 84.

. 2 Mr. Chancellor Kent has given an exact, though succinct history of the hills of fights, both in the mother country and the colonies, in 2 Kent's Comm. Lect. 24.

country, in strictness, the people surrender nothing; and as they retain every thing, they have no need of particular reservations.1 "We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America"-is a better recognition of popular rights, than volumes of those aphorisms, which make a principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics, than in a constitution of government.2

§ 1855. Upon the third point, it was said, that a minute detail of particular rights was certainly far less applicable to a constitution, designed to regulate the general political concerns of the nation, than to one, which had the regulation of every species of personal and private concerns. But (it was added) the argument might justly be carried further. It might be affirmed, that a bill of rights, in the sense and extent, which is contended for, was not only wholly unnecessary, but might even be dangerous. Such a bill would contain various exceptions to powers not granted; and on this very account might afford a colourable pretext to claim more than was granted.3 For why (it might be asked) declare, that things shall not be done, which there is no power to do? Why, for instance, that the liberty of the press shall not be restrained, when no power is given, by which restrictions may be imposed? It is true, that upon sound reasoning a declaration of this sort could not fairly be construed to imply a regulating power; but it

1 1 Lloyd's Debates, 430, 431, 432.

2 The Federalist, No. 84.

3 1 Lloyd's Debates, 433, 437.

might be seized upon by men disposed to usurpation, in order to furnish a plausible pretence for claiming the power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against an abuse of an authority, which was not given; and that the provision against restraining the liberty of the press, afforded a clear implication, that a right to prescribe proper regulations concerning it, was intended to be vested in the national government.

§ 1856. It was further added, that in truth the constitution itself was, in every rational sense, and to every useful purpose, a bill of rights for the Union. It specifies, and declares the political privileges of the citizens in the structure and administration of the government. It defines certain immunities and modes of proceeding, which relate to their personal, private, and public rights and concerns. It confers on them the unalienable right of electing their rulers; and prohibits any tyrannical measures, and vindictive prosecutions. So, that, at best, much of the force of the objection rests on mere nominal distinctions, or upon a desire to make a frame of government a code to regulate rights and remedies.1

§ 1857. Although it must be conceded, that there is much intrinsic force in this reasoning,2 it cannot in

1 The Federalist, No. 84. See 1 Lloyd's Debates, 428, 429, 430; 3 Amer. Museum, 559.

2 It had, beyond all question, extraordinary influence in the convention; for upon a motion being made to appoint a committee to prepare a bill of rights, the proposition was unanimously rejected. Journal of Convention, p. 369. This fact alone shows, that it was at best deemed a subject of doubtful propriety; and that it formed no line of distinction between any of the parties in the convention. There will be found considerable reasoning on the subject in the debates in congress on the amendments proposed in 1729. See 1 Lloyd's Debates, 414 to 426; Id. 426 to 447.

candour be admitted to be wholly satisfactory, or conclusive on the subject. It is rather the argument of an able advocate, than the reasoning of a constitutional statesman. In the first place, a bill of rights (in the very sense of this reasoning) is admitted in some cases to be important; and the constitution itself adopts, and establishes its propriety to the extent of its actual provisions. Every reason, which establishes the propriety of any provision of this sort in

the constitution, such as a right of trial by jury in criminal cases, is, pro tanto, proof, that it is neither unnecessary nor dangerous. It reduces the question to the consideration, not whether any bill of rights is necessary, but what such a bill of rights should properly contain. That is a point for argument, upon which different minds may arrive at different conclusions. That a bill of rights may contain too many enumerations, and especially such, as more correctly belong to the ordinary legislation of a government, cannot be doubted. Some of our state bills of rights contain clauses of this description, being either in their character and phraseology quite too loose, and general, and ambiguous; or covering doctrines quite debatable, both in theory and practice; or even leading to mischievous consequences, by restricting the legislative power under circumstances, which were not foreseen, and if foreseen, the restraint would have been pronounced by all persons inexpedient, and perhaps unjust.1 Indeed, the rage of theorists to make constitutions a vehicle for the conveyance of their own crude, and visionary aphorisms of government, requires

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1 2 Kent's Comm. Lect. 24, p. 6, (2d edition, p. 9,) and note Ibid.; 1 Lloyd's Debates, 431, 432.

to be guarded against with the most unceasing vigilance.1

§ 1858. In the next place, a bill of rights is important, and may often be indispensable, whenever it operates, as a qualification upon powers, actually granted by the people to the government.2 This is the real ground of all the hills of rights in the parent country, in the colonial constitutions and laws, and in the state constitutions. In England, the bills of rights were not demanded merely of the Crown, as withdrawing a power from the royal prerogative; they were equally important, as withdrawing power from parliament. A large proportion of the most valuable of the provisions in Magna Charta, and the bill of rights in 1688, consists of a solemn recognition, of limitations upon the power of parliament; that is, a declaration, that parliament ought not to abolish, or restrict those rights. Such are the right of trial by jury; the right to personal liberty and private property according to the. law of the land; that the subjects ought to have a right to bear arms; that elections of members of parliament ought to be free; that freedom of speech and debate in parliament ought not to be impeached, or questioned elsewhere; and that excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.3 Whenever, then, a general power exists, or is granted to a government, which may in its actual exercise or abuse be dangerous to the people, there seems a peculiar

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1 This whole subject is treated with great felicity and force by Mr. Chancellor Kent in his Commentaries; and the whole lecture will reward a most diligent perusal. 2 Kent's Comm. Lect. 24.

2 1 Lloyd's Debates, 429, 430, 431, 432.

3 See Magna Charta, ch. 29; Bill of Rights, 1688; 5 Cobbettes Parl. Hist. p. 110.

propriety in restricting its operations, and in excepting from it some at least of the most mischievous forms, in which it may be likely to be abused. And the very exception in such cases will operate with a silent, but irresistible influence to control the actual abuse of it in other analogous cases.1

§ 1859. In the next place, a bill of rights may be important, even when it goes beyond powers supposed to be granted. It is not always possible to foresee the extent of the actual reach of certain powers, which are given in general terms. They may be construed to extend (and perhaps fairly) to certain classes of cases, which did not at first appear to be within them. A bill of rights, then, operates, as a guard upon any extravagant or undue extension of such powers. Besides; (as has been justly remarked,) a bill of rights is of real efficiency in controlling the excesses of party spirit. It serves to guide, and enlighten public opinion, and to render it more quick to detect, and more resolute to resist, attempts to disturb private rights. It requires more than ordinary hardihood and audacity of character, to trample down principles, which our ancestors have consecrated with reverence; which we imbibed in our early education; which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the imposing force and solemnity of a constitutional sanction. Bills of rights are a part of the muniment of freemen, showing their title to protection; and they become of increased value, when placed under the protection of an inde-

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1 1 Lloyd's DebateR, 431, 432, 433, 434.

pendent judiciary instituted, as the appropriate guardian of the public and private rights of the citizens.1

§ 1860. In the next place, (it has been urged with much earnestness,) a bill of rights is an important protection against unjust and oppressive conduct on the part of the people themselves. In a government modified, like that of

the United States, (said a great statesman,2) the great danger lies rather in the abuse of the community, than of the legislative body. The prescriptions in favour of liberty ought to be levelled against that quarter, where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in the executive or legislative departments of government; but in the body of the people, operating by the majority against the minority. It may be thought, that all paper barriers against the power of the community are too weak to be worthy of attention. They are not so strong, as to satisfy all, who have seen and examined thoroughly the texture of such a defence. Yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favour, and to rouse the attention of the whole community, it may be one means to control the majority from those acts, to which they might be otherwise inclined.3

§ 1861. In regard to another suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favour of other powers, it might be sufficient to say, that such a course of reasoning could never be sustained upon any solid basis; and it could never furnish any just

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1 1 Kent's Comm. Lect. 94, p. 5, 6, (2d edition, p. 8); 1 Lloyd's Debates, 429, 430, 431.

2 Mr. Madison, 1 Lloyd's Deb. 431.

3 Ibid.

ground of objection, that ingenuity might pervert, or usurpation overleap, the true sense. That objection will equally lie against all powers, whether large or limited, whether national or state, whether in a bill of rights, or in a frame of government. But a conclusive answer is, that such an attempt may be interdicted, (as it has been,) by a positive declaration in such a bill of rights, that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.1

§ 1862. The want of a bill of rights, then, is not either an unfounded or illusory objection. The real question is not, whether every sort of right or privilege or claim ought to be affirmed in a constitution; but whether such, as in their own nature are of vital importance, and peculiarly susceptible of abuse, ought not to receive this solemn sanction. Doubtless, the want of a formal bill of rights in the constitution was a matter of very exaggerated declamation, and party zeal, for the mere purpose of defeating the constitution.2 But so far as the objection was well founded in fact, it was right to remove it by subsequent amendments; and congress have (as we shall see) accordingly performed the duty with most prompt and laudable diligence.3

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1 Constitution, 9th Amendment; 1 Lloyd's Deb. 433.

2 The Federalist, No. 84. See also 2 Elliot's Deb. 65, 160, 243, 330, 331, 334, 344, 345, 346; l Jefferson's Corresp. 64; 2 Jefferson's Corresp. 274, 291, 344, 443, 459; 1 Tuck. Black. Comm. App. 308; 2 Amer. Museum, 334, 378, 424, 540; 3 Amer. Museum, 548, 559; 1 Loyd's Deb. 423 to 437; 5 Marshall's Life of Washington, ch. 3, p. 207 to 210.

3 See 5 Marshall's Life of Washington, ch. 3, p. 207 to 210.-- Congress, in the preamble to these amendments, use the following language: "The conventions of a number of the states having at the time of adopting the constitution expressed a desire, in order to prevent mis-

§ 1863. Let us now enter upon the consideration of the amendments, which, it will be found, principally regard subjects properly belonging to a bill of rights.

§ 1864. The first is, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for a redress of grievances."

§ 1865. And first, the prohibition of any establishment of religion, and the freedom of religious opinion and worship.

How far any government has a right to interfere in matters touching religion, has been a subject much discussed by writers upon public and political law. The right and the duty of the interference of government, in matters of religion, have been maintained by many distinguished authors, as well those, who were the warmest advocates of free governments, as those, who were attached to governments of a more arbitrary character.1 Indeed, the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice. The promulgation of

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construction, or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best ensure the beneficent ends of its institution, &c. &c." l Tuck. Black. Comm. App. 269.

1 See Grotius, B. 2, ch. 20, 44 to 51; Vattell, B. 1, ch. 12, § 125, 126; Hooker's Ecclesiastical Polity, B. 5, § 1 to 10; Bynkershaeck, 2 P.J. Lib. 2, ch. 18; Woodeson's Elem. Lect. 3, p. 49; Burlemaqui, Pt. 1, ch. 3, p. 171, and Montesq. B. 24, ch. 1 to ch. 8, ch. 14 to ch. 16, B. 25, ch. 1, 9, 10, 11, 12.

the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues; -- these never can be a matter of indifference in any well ordered community.1 It is, indeed, difficult to conceive, how any civilized society can well exist without them. And at all events, it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects. This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.

§ 1866. The real difficulty lies in ascertaining the limits, to which government may righttnlly go in fostering and encouraging religion. Three cases may easily be supposed. One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state. For instance, a government may simply declare, that the Christian religion shall be the religion of the state,

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1 See Burlemaqui, Pt. 3, ch. 3, p. 171, &c.; 4 Black. Comm. 43.

and shall be aided, and encouraged in all the varieties of sects belonging to it; or it may declare, that the Catholic or Protestant religion shall be the religion of the state, leaving every man to the free enjoyment of his own religious opinions; or it may establish the doctrines of a particular sect, as of Episcopalians, as the religion of the state, with a like freedom; or it may establish the doctrines of a particular sect, as exclusively the religion of the state, tolerating others to a limited extent, or excluding all, not belonging to it, from all public honours, trusts, emoluments, privileges, and immunities.

§ 1867. Now, there will probably be found few persons in this, or any other Christian country, who would deliberately contend, that it was unreasonable, or unjust to foster and encourage the Christian religion generally, as a matter of sound policy, as well as of revealed truth. In fact, every American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an exception,) did openly, by the whole course of its laws and institutions, support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the states down to the present period, without the slightest suspicion, that it was against the principles of public law, or republican liberty.1 Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion, as the great, basis, on which it must rest for its support and permanence, if it be, what it has ever been deemed by

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1 2 Kent's Comm. Lect. 34, p. 35 to 37; Rawle on Const. ch. 10, p. 121, 122.

its truest friends to be, the religion of liberty. Montesquieu has remarked, that the Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel is incompatible with the despotic rage, with which a prince punishes his subjects, and exercises himself in cruelty.1 He has gone even further, and affirmed, that the Protestant religion is far more congenial with the spirit of political freedom, than the Catholic. "When," says he, "the Christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the north embraced the Protestant, and those of the south still adhered to the Catholic. The reason is plain. The people of the north have, and will ever have, a spirit of liberty and independence, which the people of the south have not. And, therefore, a religion, which has no visible head, is more agreeable to the independency of climate, than that, which has one."2 Without stopping to inquire, whether this remark be well founded, it is certainly true, that the parent country has acted upon it with a severe and vigilant zeal; and in most of the colonies the same

rigid jealousy has been maintained almost down to our own times. Massachusetts, while she has promulgated in her BILL OF RIGHTS the importance and necessity of the public support of religion, and the worship of God, has authorized the legislature to require it only for Protestantism. The language of that bill of rights is remarkable for its pointed affirmation of the duty of government to support Christianity, and the reasons for it. "As," says the

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1 Montesq. Spirit of Laws, B. 24, ch. 3.

2 Montesq. Spirit of Laws, B. 24, ch. 5.

third article, "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through the community, but by the institution of the public worship of God, and of public instructions in piety, religion, and morality; therefore, to promote their happiness and to secure the good order and preservation of their government the people of this Commonwealth have a right to invest their legislature with power to authorize, and require, and the legislature shall from time to time authorize and require, the several towns, parishes, &c. &c. to make suitable provision at their own expense for the institution of the public worship of God, and for the support and maintenance of public protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily." Afterwards there follow provisions, prohibiting any superiority of one sect over another, and securing to all citizens the free exercise of religion.

§ 1868. Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.1

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1 See 2 Lloyd's Deb. 195, 196.

§ 1869. It yet remains a problem to be solved in human affairs, whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape. The future experience of Christendom, and chiefly of the American states, must settle this problem, as yet new in the history of the world, abundant, as it has been, in experiments in the theory of government.

§ 1870. But the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires. It has been truly said, that "religion or the duty we owe to our Creator, and the manner of discharging it, can be dictated only by reason and conviction, not by force or violence,"1 Mr. Locke himself, who did not doubt the right of government to interfere in matters of religion, and especially to encourage Christianity, at the same time has expressed his opinion of the right of private judgment, and liberty of conscience, in a manner becoming his character, as a sincere friend of civil and religious liberty. "No man, or society of men," says he, "have any authority to impose their opinions or interpretations on any other, the meanest Christian; since, in matters of religion, every man must know, and believe, and give an account for himself."2 The rights of conscience are, indeed, beyond the just reach of any human power. They are given by God, and cannot be encroached upon by human authority, without

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1 Virginia Bill of Rights, 1 Tuck. Back. Comm. App. 296; 2 Tuck. Black. Comm. App. note G. p. 10, 11.

2 Lord King's Life of Locke, p. 373.

a criminal disobedience or, the precepts or natural, as well as o.r revealed religion.

§ 1871. The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.1 The history of the parent country had afforded the most solemn warnings and melancholy instructions on this head;2 and even NewEngland, the land of the persecuted puritans, as well as other colonies, where the Church of England had maintained its superiority, would furnish out a chapter, as full of the

darkest bigotry and intolerance, as any, which could be found to disgrace the pages of foreign annals.3 Apostacy, heresy, and nonconformity had been standard crimes for public appeals, to kindle the flames of persecution, and apologize for the .most atrocious triumphs over innocence and virtue.4

§ 1872. Mr. Justice Blackstone, after having spoken with a manly freedom of the abuses in the Romish church respecting heresy; and, that Christianity had be on deformed by the demon of persecution upon the continent, and that the island of Great Britain had

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1 2 Lloyd's Deb. 195.

2 4 Black. Comm. 41 to 59.

3 Ante, Vol. I. § 53, 72, 74.

4 See 4 Black. Comm. 43 to 59.

not been entirely free from the scourge,1 defends the final enactments against nonconformity in England, in the following set phrases, to which, without any material change, might be justly applied his own sarcastic remarks upon the conduct of the Roman ecclesiastics in punishing heresy.2 "For nonconformity to the worship of the church," (says he,) "there is much more to be pleaded than for the former, (that is, reviling the ordinances of the church,) being a matter of private conscience, to the scruples of which our present laws have shown a very just, and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church. There is always a difference to be made between

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1 "Entirely"! Should he not have said, never free from the scourge, as more conformable to historical truth? 2 4 Black. Comm. 45. 46. -- His words are: "It is true, that the sanctimonious hypocrisy of the Canonists went, at first, no further, than enjoining penance, excommunication, and ecclesiastical deprivation for heresy, though afterwards they proceeded 10 imprisonment by the ordinary, and confiscation of goods in pios usus. But in the mean time they had prevailed upon the weakness of bigotted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence; the Romish Ecclesiastics determining, without appeal, whatever they pleased, to be heresy, and shifting off to the secular arm the odium and the drudgery of executions, with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede, and pray in behalf of the convicted heretic, ut eltra mortis periculum sentantis circum eum moderaturt well knowing, at the same time, that they were delivering the unhappy victim to certain death." 4 Black. Comm. 45, 46. Yet the learned author, in the same breath, could calmly vindicate the outrageous oppressions of the Church of England upon Catholics and Dissenters with the unsuspecting satisfaction of a bigot.

toleration and establishment."1 Let it be remembered, that at the very moment, when the learned commentator was penning these cold remarks, the laws of England merely tolerated protestant dissenters in their public worship upon certain conditions, at once irritating and degrading; that the test and corporation acts excluded them from public and corporate offices, both of trust and profit; that the learned commentator avows, that the object of the test and corporation acts was to exclude them from office, in common with Turks, Jews, heretics, papists, and other sectaries;2 that to deny the Trinity, however conscientiously disbelieved, was a public offence, punishable by fine and imprisonment; and that, in the rear of all these disabilities and grievances, came the long list of acts against papists, by which they were reduced to a state of political and religious slavery, and cut off from some of the dearest privileges of mankind.3

§ 1873. It was under a solemn consciousness of the. dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic, as well as in foreign 'annals, that it was deemed advisable to exclude from the national government all power to act upon the subject.4 The situation, too, of the different states

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1 4 Black. Comm. 51, 52.

2 1 Black. Comm. 58.

3 1 Black. Comm. 51 to 59. -- Mr. Tucker, in his Commentaries on Blackstone, has treated the whole subject in a manner of most marked contrast to that of Mr. J. Blackstone. His ardour is as strong, as the coolness of his adversary is humiliating, on the subject of religious liberty. 2 Tuck. Black. Comm. App.

Note G.p. 3, &c. See also 4 Jefferson's Corresp. 103, 104; Jefferson's Notes on Virginia, 264 to 270; 1 Tuck. Black. Comm. App. 296.

4 2 Lloyd's Debates, 195, 196, 197. -- "The sectarian spirit," said the late Dr. Curtis, "is uniformly selfish, proud, and unfeeling." (Edinburgh Review, April, 1832, p. 125.)

equally proclaimed the policy, as Well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others, presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife, and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Armenian, the Jew and the. Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.1

§ 1874. The next clause of the amendment respects the liberty of the press. "Congress shall make no law abridging the freedom of speech, or of the press."2 That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to

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1 See 2 Kent's Comm. Lect. 24, (2d edition, p. 35 to 37); Rawle on Const. ch. 10, p. 121, 122; 2 Lloyd's Deb. 195. See also Vol. II. § 621.

2 In the convention a proposition was moved to insert in the constitution a clause, that "the liberty of the press shall be inviolably preserved;" but it was negatived by a vote of six states against five. Journal of Convention, p. 377.

be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow citizens by the most atrocious calumnies; might disturb, nay, overturn all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the innocent; might prejudice all a man's civil, and political, and private rights; and might stir up sedition, rebellion, and treason even against the government itself, in the wantonness of his passions, or the corruption of his heart. Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance, to make up for the deficiencies of the law; and assassinations, and savage cruelties, would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plum, then, that the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his fights, person, property, or reputation;1 and so always, that he does not thereby disturb the public peace, or attempt to subvert the government.2 It is neither more nor less, than an expansion of the great doctrine, recently

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1 1 Tuck. Black. Comm. App. 297 to 299; 2 Tuck. Black. Comm. App. II; 2 Kent's Comm. Lect. 24, p. 16 to 26.

2 Rawle on Const. ch. 10, p. 19.3, 124; 2 Kent's Comm. Lect. 34, p. 16 to 26; De Lolme, B. 2, ch. 12, 13; 2 Lloyd's Deb. 197, 198.

brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives and for justifiable ends. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form.

§ 1875. A little attention to the history of other countries in other ages will teach us the vast importance of this right. It is notorious, that, even to this day, in some foreign countries it is a crime to speak on any subject, religious, philosophical, or political, what is contrary to the received opinions of the government, or the institutions of the

country, however laudable may be the design, and however virtuous may be the motive. Even to animadvert upon the conduct of public men, of rulers, or representatives, in terms of the strictest truth and courtesy, has been, and is deemed, a scandal upon the supposed sanctity of their stations and characters, subjecting the party to grievous punishment. In some countries no works can be printed at all, whether of science, or literature, or philosophy, without the previous approbation of the government; and the press has been shackled, and compelled to speak only in the timid language, which the cringing courtier, or the capricious inquisitor, should license for publication. The Bible itself, the common inheritance not merely of Christendom, but of the world, has been put exclusively under the control of government; and not allowed to be seen, or heard, except in a language unknown to the common inhabitants of the country.

To publish a translation in the vernacular tongue, has been in former times a flagrant offence.

§ 1876. The history of the jurisprudence of England, (the most free and enlightened of all monarchies,) on this subject, will abundantly justify this statement. The art of printing, soon after its introduction, (we are told,) was looked upon, as well in England, as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated in England by the king's proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the court of Star Chamber; which limited the number of printers, and of presses, which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the long parliament of Charles the First, after their rupture with that prince, assumed the same powers, which the Star Chamber exercised, with respect to licensing books; and during the commonwealth, (such is human frailty, and the love of power, even in republics!) they issued their ordinances for that purpose, founded principally upon a Star Chamber decree, in 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force; but it was so strongly resisted by parliament, that it expired in 1694, and has never since been revived.1 To this

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1 4 Black. Comm. 152, note; 2 Tucker's Black. Comm. App. Note G. p. 12, 13; De Lolme, B. 2, ch. 12, 13; 2 Kent's Comm. Lect. 24, (2d edition, p. 17, 18, 19.)

very hour the liberty of the press in England stands upon this negative foundation. The power to restrain it is dormant, not dead. It has never constituted an article of any of her numerous bills of rights; 'and that of the revolution of 1688, after securing other civil and political privileges, left this without notice, as unworthy of care, or fit for restra int.

§ 1877. This short review exhibits, in a striking light, the gradual progress of opinion in favour of the liberty of publishing and printing opinions in England, and the frail and uncertain tenure, by which it has been held. Down to this very day it is a contempt of parliament, and a high breach of privilege, to publish the speech of any member of either house, without its consent.1 It is true, that it is now silently established by the course of popular opinion to be innocent in practice, though not in law. But it is notorious, that within the last fifty years the publication was connived at, rather than allowed; and that for a considerable time the reports were given in a stealthy manner, covered up under the garb of speeches in a fictitious assembly.

§ 1878. There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such, that, like the king of England, it could do no wrong, and was free from every inquiry, and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer, with regard to the rights and duties belonging to governments generally, or to the state gov-

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1 See Comyn's Dig. Parliament, G. 9.

ernments in particular. If it were admitted to be correct, it might be justly affirmed, that the liberty of the press was incompatible with the permanent existence of any free government. Mr. Justice Blackstone has remarked, that the liberty of the press, properly understood, is essential to the nature of a free state; but, that this consists in laying, no previous restraints upon publications, and not in freedom from censure for criminal matter, when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. But, if he publishes what is improper, mischievous, or illegal, he must take the consequences

of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done before, and since the revolution (of 1688), is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish any dangerous or offensive writings, which, when published, shall, on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and. good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left;the disseminating, or making public of bad sentiments, destructive of the ends of society, is the crime, which society corrects. A man may be allowed to keep poisons in his closet; but not publicly to vend them as cordials. And after some additional reflections, he concludes with this memorable

sentence: "So true will it be found, that to censure the licentiousness, is to maintain the liberty of the press."1

§ 1879. De Lolme states the same view of the subject; and, indeed, the liberty of the press, as understood by all England, is the right to publish without any previous restraint, or license; so, that neither the courts of justice, nor other persons, are authorized to take notice of writings intended for the press; but are confined to those, which are printed. And, in such cases, if their character is questioned, whether they are lawful, or libellous, is to be tried by a jury, according to due proceedings at law.2 The noblest patriots of England, and the most distinguished friends of liberty, both in parliament, and at the bar, have never contended for a total exemption from responsibility, but have asked only, that the guilt or innocence of the publication should be ascertained by a trial by jury.3

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1 1 Black. Comm. 152, 153; Rex v. Burdett, 4 Barn. & Ald. R. 95.-- Mr. Justice Best in Rex v. Burdett, (4 Barn. & Ald. R. 95, 132,) said "my opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance guy new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men; but, he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent, without violating another equally sacred right, the right of character. This right can only be attacked in a court of justice, where the party attacked. has t fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends."

2 De Lolme, B. 2, ch. 12, 291 to 297.

3 See also Rex v. Burdett, 4 Barn. & Ald. 95. -- The celebrated act of parliament of Mr. Fox, giving the right to the jury, in trials for libels, to judge of the whole matter of the charge, and to return a general verdict, did not effect to go farther. The celebrated defence of Mr. Erakine, on the trial of the Dean of St. Asaph, took the same ground. Even Junius, with his severe and bitter assaults upon established au-

§ 1880. It would seem, that a very different view of the subject was taken by a learned American commentator, though it is not, perhaps, very easy to ascertain the exact extent of his opinions. In one part of his disquisitions, he seems broadly to contend, that the security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but, from legislative restraint also; and that this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.1 In other places, he seems as explicitly to admit, that the liberty of the press does not include the right to do injury to the reputation of another, or to take from him the enjoyment of his rights or property, or to justify slander and calumny upon him, as a private or public man. And yet it is added, that every individual certainly has a right to speak, or publish his sentiments on the measures of government. To do this without restraint,

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thority and doctrines, stopped here. "The liberty of the press," (said he,) "is the palladium of all the civil, political, and religious rights of an Englishman, and the right of juries to return a general verdict in all cases whatsoever, is an essential part of our constitution." "The laws of England, provide as effectually, as any human laws can do, for the protection of the subject in his reputation, as well as in his person and property. If the characters of private men are insulted, or injured, a double remedy is open to them, by action and by indictment." -- "With regard to strictures upon the characters or men in office, and the measures of government, the ease is a little different. A considerable latitude must be allowed in the discussion of public affairs, or the liberty of the press will be of no benefit to society." But he no where contends for the right to publish seditious libels; and, on the contrary, through his whole reasoning he admits the duty to punish those, which are really so.

control, or fear of punishment for of doing, is that which constitutes the genuine freedom of the press.1 Perhaps the apparent contrariety of these opinions may arise from mixing up, in the same disquisitions, a discussion of the right of the state governments, with that of the national government, to interfere in cases of this sort, which may stand upon very different foundations. Or, perhaps, it is meant to be contended, that the liberty of the press, in all cases, excludes public punishment for public wrongs; but not civil redress for private wrongs, by calumny and libels.

§ 1881. The true mode of considering the subject is, to examine the case with reference to a state government, whose constitution, like that, for instance, of Massachusetts, declares, that "the liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth." What is the true interpretation of this clause? Does it prohibit the legislature from passing any laws, which shall control the licentiousness of the press, or afford adequate protection to individuals, whose private comfort, or good reputations are assailed, and violated by the press? Does it stop the legislature from passing any laws to punish libels and inflammatory publications, the object of which is to excite sedition against the government, to stir up resistance to its laws, to urge on conspiracies to destroy it, to create odium and indignation against virtuous citizens, to compel them to yield up their rights, or to make them the objects of popular

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vengeance? Would such a declaration in Virginia (for she has, on more than one occasion, boldly proclaimed, that the liberty of the press ought not to be restrained,) prohibit the legislature from passing laws to punish a man, who should publish, and circulate writings, the design of which avowedly is to excite the slaves to general insurrection against their masters, or to inculcate upon them the policy of secretly poisoning, or murdering them? In short, is it contended, that the liberty of the press is so much more valuable, than all other rights in society, that the public safety, nay the existence of the government itself is to yield to it? Is private redress for libels and calumny more important, or more valuable, than the maintenance of the good order, peace, and safety of society? It would be difficult to answer these questions in favour of the liberty of the press, without at the same time declaring, that such a licentiousness belonged, and could belong only to a despotism; and was utterly incompatible with the principles of a free government.

§ 1882. Besides: -- What is meant by restraint of the press, or an abridgment of its liberty? If to publish without control, or responsibility be its genuine meaning; is not that equally violated by allowing a private compensation for damages, as by a public fine? Is not a man as much restrained from doing a thing by the fear of heavy damages, as by public punishment? Is he not often as severely punished by one, as by the other? Surely, it can make no difference in the case, what is the nature or extent of the restraint, if all restraint is prohibited. The legislative power is just as much prohibited from one mode, as from another. And it may be asked, where is the

ground for distinguishing between public and private amesnability for the wrong? The prohibition itself states no distinction. It is general;it is universal. Why, then, is the distinction attempted to be made? Plainly, because of the monstrous consequences flowing from such a doctrine. It would prostrate all personal liberty, all private peace, all enjoyment of property, and good reputation. These are the great objects, for which government is instituted; and, if the licentiousness of the press must endanger, not only. these, but all public rights and public liberties, is it not as plain, that the right of government to punish the violators of them (the only mode of redress, which it can pursue) flows from the primary duty of self-preservation? No one can doubt the importance, in a free government, of a right to canvass the acts of public men, and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy, and plans of the government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious, discussion must be encouraged. But the exercise of a right is essentially different from an abuse of it. The one is no legitimate inference from the other. Common sense here promulgates the broad doctrine, sic utere tuo, ut non alienurn laedas; so exercise your own freedom, as not to infringe the rights of others, or the public peace and safety.

§ 1883. The doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (as far as is known) by any solemn decision of any of the state courts, in respect to their own municipal jurisprudence. On the contrary,

it has been repeatedly affirmed in several or the states, notwithstanding their constitutions, or laws recognize, that "the liberty or the press ought not to be restrained," or more emphatically, that "the liberty of the press shall be inviolably maintained." This is especially true in regard to Massachusetts, South-Carolina, and Louisiana.1 Nay; it has farther been held, that the truth of the facts is not alone sufficient to justify the publication, unless it is done from good motives, and for justifiable purposes, or, in other words, on an occasion, (as upon the canvass of candidates for public office,) when public duty, or private right requires it.2 And the very circumstance, that, in the constitutions of several other states, provision is made for giving the truth in evidence, in prosecutions for libels for official conduct, when the matter published is proper for public information, is exceedingly strong to show, how the general law is understood. The exception establishes in all other cases the propriety of the doctrine. And Mr. Chancellor Kent, upon a large survey of the whole subject, has not scrupled to declare, that "it has become a constitutional principle in this country, that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and, that no law can rightfully be passed, to restrain, or abridge the freedom of the press."3

§ 1884. Even with these reasonable limitations, it is not an uncommon opinion among European states

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1 Commonwealth v. Clap, 4 Mass. R. 163; Commonwealth v. Blanding, 3 Pick. R. 304: The State v. Lehre, 2 Rep. Const. Court, 809 ; 2 Kent's Comm. Lect. 24, (2d edition, p. 17 to 94.)

2 Ibid.

3 1 Kent's Comm. Lect. 94, (2d edition, p. 17 to 24.) See also Rawle on Const. ch. 10, p. 123, 124.

men of high character and extensive attainments, that the liberty of the press is incompatible with the permanent existence of any free government; nay, of any government at all. That, if it be true, that free governments cannot exist without it, it is quite as certain, that they cannot exist with it. In short, that the press is a new element in modern society; and likely, in a great measure, to control the power of armies, and the sovereignty of the people. That it works with a silence, a cheapness, a suddenness, and a force, which may break up, in an instant, all the foundations of society, and. move public opinion, like a mountain torrent, to a general desolation of every thing within its reach.

§ 1885. Whether the national government possesses a power to pass any law, not restraining the liberty of the press, but punishing the licentiousness of the press, is a question of a very different nature, upon which the commentator abstains from expressing any opinion. In 1798, Congress, believing that they possessed a constitutional authority for that purpose, passed an act, punishing all unlawful combinations, and conspiracies, to oppose the measures of the government, or to impede the operation of the laws, or to intimidate and prevent any officer of the United States from undertaking, or executing his duty. The same act further provided, for a public presentation, and punishment by fine, and imprisonment, of all persons, who should write, print, utter, or publish any false, scandalous, and malicious writing, or writings against the government of the United States, or of either house of congress, or of the president, with an intent to defame them, or bring them into contempt, or disrepute, or to excite against them the hatred of the good people of the United States; or to excite them to oppose any

law, or act of the president, in pursuance of law of his.constitutional powers; or to resist, or oppose, or defeat any taw; or to aid, encourage, or abet any hostile designs of any foreign nation against the United States. And the same act authorized the truth to be given in evidence on any such prosecution; and the jury, upon the. trial, to determine the law and the fact, as in other cases.1

§ 1886. This act was immediately assailed, as unconstitutional, both in the state legislatures, and the courts of law, where prosecutions were pending. Its constitutionality was deliberately affirmed by the courts of law; and in a report made by a committee of congress. It was denied by a considerable number of the states; but affirmed by a majority. It became one of the most prominent points of attack upon the existing administration; and the appeal thus made was, probably, more successful with the people, and more consonant with the feelings of the times, than any other made upon that occasion. The act, being limited to a short period, expired by its own limitation, in March, 1801; and has never been renewed. It has continued, down to this very day, to be a theme of reproach with many of those, who have since succeeded to power.2

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1 Act of 14th July, 1798, ch. 91.

2 The learned reader will find the subject discussed at large in many of the pamphlets of that day, and especially in the Virginia Report., and. Resolutions of the Virginia Legislature, in December, 1798, and January, 1800; in the Report of a Committee of congress on the Alien and, Sedition laws, on the 25th of

February, 1799; in the Resolutions of the legislatures of Massachusetts and Kentucky, in 1799; in Bayard's Speech on the Judiciary act, in 1802; in Addison's charges to the grand jury, in Pennsylvania, printed with his Reports; in 2 Tucker's Black. Comm. App. note G.p. 11 to 30. It is surprising, with what facility men

§ 1886. The remaining clause secures "the right of the people peaceably to assemble and to petition the government for a redress of grievances."

§ 1887. This would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions. It is impossible, that it could be practically denied, until the spirit of liberty had wholly disappeared, and the people had become so servile and debased, as to be unfit to exercise any of the privileges of freemen.1

§ 1888. The provision was probably borrowed from the declaration of rights in England, on the revolution of 1688, in which the right to petition the king for a redress of grievances was insisted on; and the right to petition parliament in the like manner has been provided for, and guarded by statutes passed before, as well as since that period.2 Mr. Tucker has indulged himself in a disparaging criticism upon the phraseology of this clause, as savouring too much of that style of condescension, in which favours are supposed to be

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glide into the opinion, that a measure is universally deemed unconstitutional, because it is so in their own opinion, especially if it has become unpopular. It has been often asserted, by public men, as the universal sense of the nation, that this act was unconstitutional; and that opinion has been promulgated recently, with much emphasis, by distinguished statesmen; as we have already had occasion to notice. What the state of public and professional opinion on this subject now is, it is, perhaps, difficult to determine. But it is well known, that the opinions then deliberately given by many professional men, and judges, and legislature, in favour of the constitutionality of the law, have never been retracted. See Vol. Iii. § 1288, 1289, and note.

l See 2 Lloyd's Debates, 197, 198, 199.

2 See 1 Black. Comm. 143; 5 Cobbett's Parl'y. Hist. p. 109, 110; Rawle on Const. ch. 10, p. 124; 3 Amer. Museum, 420; 2 Kent's Comm. Lect. 24, p. 7, 8.

granted.1 But this seems to be quite overstrained; since it speaks the voice of the people in the language of prohibition, and not in that of affirmance of a right, supposed to be unquestionable, and inherent.

§ 1889. The next amendment is: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

§ 1890. The importance of this article will scarcely be doubted by any persons, who have duly reflected upon the subject. The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.2 And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid

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1 1 Tucker's Black. Comm. App. 299.

2 1 Tucker's Black. Comm. App. 300; Rawle on Const. ch. 10, p. 125; 2 Lloyd's Debates, 219, 220.

of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.1

§ 1891. A similar provision in favour of protestants (for to them it is confined) is to be found in the bill of rights of 1688, it being declared, "that the subjects, which are protestants, may have arms for their defence suitable to their

condition, and as allowed by law."2 But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege.3

§ 1892. The next amendment is: "No soldier shall in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

§ 1893. This provision speaks for itself. Its plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion. The billeting of soldiers in time of peace upon the people has been a common resort of arbitrary princes, and is full of inconvenience and peril. In the

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1 It would be well for Americans to reflect upon the passage in Tacitus, (Hist. IV. ch. 74): "Nam neque quies sine armis, neque arma,sine stipendiis, neque stipendia sine tributis, haberi queunt." Is there any escape from a large standing army, but in a well disciplined militia? There is much wholesome instruction on this subject in 1 Black. Comm. ch. 13, p. 408 to 417.

2 5 Cobbett's Parl. Hist. p. 110; 1 Black. Comm. 143, 144.

3 1 Tucker's Black. Comm. App. 300.

petition of right (4 Charles I.), it Was declared by parliament to be a great grievance.1

§ 1894. The next amendment is: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but. upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things. to be seized."

§ 1895. This provision seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property. It is little more. than the affirmance of a great constitutional doctrine of the common law. And its introduction into the amendments was doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution. Although special warrants upon complaints under oath, stating the crime, and the party by name, against whom the accusation is made, are the only legal warrants, upon which an arrest can be made according to the law of England;2 yet a practice had obtained in the secretaries' office ever since the restoration, (grounded on some clauses in the acts for regulating the press,) of issuing general warrants to take up, without naming any persons in particular, the authors, printers, and publishers of such obscene, or seditious libels, as were particularly specified in the warrant. When these acts expired, in 1694, the same practice was continued in every reign, and under every administration, except the four last years of Queen Anne's

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1 2 Cabbett's Parl. Hist. 375; Rawle on Const. ch. 10, p. 126, 127; 1 Tueker's Black. Comm. App. 300, 301; 2 Lloyd's Debates, 223.

2 And see Ex parte Burford, 3 Cranch, 447; 2 Lloyd's Deb. 226, 227.

reign, down to the year 1763. The general warrants, so issued, in general terms authorized the officers to apprehend all persons suspected, without naming, or describing any person in special. In the year 1763, the legality of these general warrants was brought before the King's Bench for solemn decision; and they were adjudged to be illegal, and void for uncertainty.1

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1 Money v. Leach, 3 Burr, 1743; 4 Black. Comm. 291, 292, and note ibid. See also 15 Hansard's Pad. Hist. 1398 to 1418, (1764); Bell v. Clapp, 10 John. R. 263; Sailly v. Smith, 11 John. R. 500; 1 Tucker's Black. Comm. App. 301; Rawle on Const. ch. 10, p. 127. -- It was on account of a supposed repugnance to this article, that a vehement opposition was made to the alien act of 1798, ch. 75, which authorized the president to order all such aliens, as he should judge dangerous to the peace and safety of the United States, or have reasonable grounds to suspect of any treasonable, or secret machinations against the government to depart out of the United States; and in case of disobedience, punished the refusal with imprisonment. That law having long since passed away, it is not my design to enter upon the grounds, upon which its constitutionality was asserted or denied. But the learned reader will find ample information on the subject in the report of a committee of congress, on the petitions for the repeal of the alien and sedition laws, 25th of February, 1799; the report and resolutions of the Virginia legislature of 7th of January, 1800; Judge Addison's charges to the grand jury in the Appendix to his reports; and 1 Tucker's Black. Comm. App. 301 to 304; Id. 306. See also Vol. III. § 1288, 1289, and note.

Mr. Jefferson has entered into an elaborate defence of the right and duty of public officers to disregard, in certain cases, the injunctions of the law, in a letter addressed to Mr. Colvin in 1810.* On that occasion, he justified a very gross violation of this very article by General Wilkinson, (if, indeed, he did not authorize it,) in the seizure of two American citizens by military force, on account of supposed treasonable conspiracies against the United States, and transporting them, without any warrant, or order of any civil authority, from New-Orleans to Washington for trial. They were both discharged from custody at Washington by the Supreme Court, upon a full hearing of the case.+ Mr. Jefferson reasons out the whole case, and assumes, without the slightest hesitation, the positive guilt of the parties. His language is: "Under these circumstances, was he (General Wilkinson) justifiable (1.) in seizing notorious conspirators? On this there can be but

*** 4 Jefferson's Corresp. 149, 151.**

+ Ex parte Bollman & Swartout, 4 Cranch, 75 to 136.

A warrant, and the complaint, on which the same is founded, to be legal, must not only state the name of the party, but also the time, and place, and nature of the offence with reasonable certainty.1

§ 1896. The next amendment is: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." This is an exact transcript of a clause in the bill of rights, framed at the revolution of 1688.2 The provision would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct.3 It was, however, adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts.4 In those

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two opinions; one, of the guilty, and their accomplice; the other, that of all honest men!! (2.) In sending them to the seat of government, when the written law gave them a right to trial by jury? The danger of their rescue, of their continuing their machinations, the tardiness and weakness of the law, apathy of the judges, active patronage of the whole tribe of lawyers, unknown disposition of the juries, an hourly expectation of the enemy, salvation of the city, and of the Union itself, which would have been convulsed to its centre, had that conspiracy succeeded; all these constituted a law of necessity and self-preservation; and rendered the salus populi supreme over the written law!!" Thus, the constitution is to be wholly disregarded, because Mr. Jefferson has no confidence in judges, or juries, or laws. He first assumes the guilt of the parties, and then denounces every person connected with the courts of justice, as unworthy of trust. Without any warrant or lawful authority, citizens are dragged from their homes under military force, and exposed to the perils of a long voyage, against the plain language of this very article; and yet three years after they are discharged by the. Supreme Court, Mr. Jefferson uses this strong language.

1 See Ex parte Burford, 3 Cranch, 447.

2 5 Cobbett's Parl. Hist. 110.

3 2 Elliot's Debates, 845.

4 See 2 Lloyd's Debates, 225, 226; 3 Elliot's Debates, 345.

times, a demand of excessive bail was often made against persons, who were odious to the court, and its favourites; and on failing to procure it, they were committed to prison.1 Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments inflicted. Upon this subject Mr. Justice Blackstone has wisely remarked, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the Decemviri, were full of cruel punishments; the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished. Under the emperors severe laws were revived, and then the empire fell.2

§ 1897. It has been held in the state courts, (and the point does not seem ever to have arisen in the courts of the United States,) that this clause does not apply to punishments inflicted in a state court for a crime against such state; but that the prohibition is addressed solely to the national government, and operates, as a restriction upon its powers.3

§ 1898. The next amendment is: "The enumeration in the constitution of certain rights shall not be construed to deny, or disparage others retained by the people." This clause was manifestly introduced to prevent any perverse, or ingenious misapplication of the well known maxim, that an affirmation in particular cases implies a negation in all others; and e converso, that

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1 Rawle on Const. ch. 10, p. 130, 131.

2 4 Black. Comm. 17. See De Lolme, B. 2, ch. 16, p. 366, 367, 368, 369.

3 See Barker v. The People, 3 Cowen's R. 686; James v. Commonwealth, 12 Sergeant and Rawle's R. 220. See Barton v. Mayor of Baltimore, 7 Peters's R. (1833.)

a negation in particular cases implies, an affirmation in all others.1 The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the Federalist on the subject of a general bill of rights.2

§ 1899. The next and last amendment is: "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."

§ 1900. This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.3 When this amendment was before congress, a proposition was moved, to insert the word "expressly" before "delegated," so as to read "the powers not expressly delegated to the United States by the constitution," &c. On that occasion it was remarked, that it is impossible to confine a government to the exercise of express powers. There must necessarily be admitted powers by implication, unless the constitution descended to the most minute details.4 It is a general principle that all corporate

1 See ante, Vol. I. § 448; The Federalist, No. 83.

2 The Federalist, No. 84; ante, Vol. III. § 1852 to 1857; 1 Lloyd's Debates, 433, 437; 1 Tucker's Black. Comm. App. 307, 308.

3 See 1 Tucker's Black. Comm. App. 307, 308, 309.

4 Mr. Madison added, that he remembered the word "expressly" had been moved in the Virginia Convention by the opponents to the ratifi-

bodies possess all powers incident to a corporate capacity, without being absolutely expressed. The motion was accordingly negatived.1 Indeed, one of the great defects of the confederation was, (as we have already seen,) that it contained a clause, prohibiting the exercise of any power, jurisdiction, or right, not expressly delegated.2 The consequence was, that congress were crippled at every step of their progress; and were often compelled by the very necessities of the times to usurp powers, which they did not constitutionally possess; and thus, in effect to break down all the great barriers against tyranny and oppression.3

§ 1901. It is plain, therefore, that it could not have been the intention of the framers of this amendment to give it effect, as an abridgment of any of the powers granted under the constitution, whether they are express or implied, direct or incidental. Its sole design is to exclude any interpretation, by which other powers should be assumed beyond those, which are granted. All that are granted in the original instrument, whether express or implied, whether direct or incidental, are left in their original state. All powers not delegated, (not all powers not expressly delegated,) and not prohibited, are reserved.4 The attempts, then, which have been made from time to time, to force upon this language an abridging, or restrictive influence, are utterly unfounded in any just rules of interpreting the words,

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cation; and after a fall and fair discussion, was given up by them, and the system allowed to retain its present form. 2 Lloyd's Debates, 234.

1 2 Lloyd's Deb. 243, 244; McCulloh v. Maryland, 4 Wheat. R. 407; Martin v. Hunter, 1 Wheat. R. 325; Houston v. Moore, 5 Wheat. R. 49; Anderson v. Dunn, 6 Wheat. R. 225, 226.

2 Confederation, Article 2, ante Vol. I. § 230.

3 The Federalist, No. 33, 38, 42, 44; ante Vol. I. § 269.

4 McCulloh v. Maryland, 4 Wheat. R. 406, 407; ante VoL I. § 433,

or the sense of the instrument. Stripped of the ingenious disguises, in which they are clothed, they are neither more nor less, than attempts to foist into the text the word "expressly;" to qualify, what is general, and obscure, what is clear, and defined. They make the sense of the passage bend to the wishes and prejudices of the interpreter; and employ criticism to support a theory, and not to guide it. One should suppose, if the history of the human mind did not furnish abundant proof to the contrary, that no reasonable man would contend for an interpretation founded

neither in the letter, nor in the spirit of an instrument. Where is controversy to end, if we desert both the letter and the spirit? What is to become of constitutions of government, if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions, to suit the temporary passions and interests of the day? Let us never forget, that our constitutions of government are solemn instruments, addressed to the common sense of the people and designed to fix, and perpetuate their rights and their liberties. They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders. They are to speak in the same voice now, and for ever. They are of no man's private interpretation. They are ordained by the will of the people; and can be changed only by the sovereign command of the people.

§ 1902. It has been justly remarked, that the erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution, founded upon the total, or

partial incorporation of a number of distinct sovereignties. Time alone can mature and perfect so compound a system; liquidate the meaning of all the parts; and adjust them to each other in a harmonious and consistent whole.1

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1 The Federalist, No. 82 See also Mr. Hume's Essays, Vol. I. Essay on the Rise of Arts and Sciences.

CHAPTER XLV.
CONCLUDING REMARKS.

§ 1903. We have now reviewed all the provisions of the original constitution of the United States, and all the amendments, which have been incorporated into it. And, here, the task originally proposed in these Commentaries is brought to a close. Many reflections naturally crowd upon the mind at such a moment; many grateful recollections of the past; and many anxious thoughts of the future. The past is secure. It is unalterable. The seal of eternity is upon it. The wisdom, which it has displayed, and the blessings, which it has bestowed, cannot be obscured; neither can they be debased by human folly, or human infirmity. The future is that, which may well awaken the most earnest solicitude, both for the virtue and the permanence of our republic. The fate of other republics, their rise, their progress, their decline, and their fall, are written but too legibly on the pages of history, if indeed they were not continually before us in the startling fragments of their ruins. They have perished; and perished by their own hands. Prosperity has enervated them, corruption has debased them, and a venal populace has consummated their destruction. Alternately the prey of military chieftains at home, and of ambitious invaders from abroad, they have been sometimes cheated out of their liberties by servile demagogues; sometimes betrayed into a surrender of them by false patriots; and sometimes they have willingly sold them for a price to the despot, who has bidden

highest for his victims. They have disregarded the warning voice of their best statesmen; and have persecuted, and driven from office their truest friends. They have listened to the fawning sycophant, and the base calumniator of the wise and the good. They have reverenced power more in its high abuses and summary movements, than in its calm and constitutional energy, when it dispensed blessings with an unseen, but liberal hand. They have surrendered to faction, what belonged to the country. Patronage and party, the triumph of a leader, and the discontents of a day, have outweighed all solid principles and institutions of government. Such are the melancholy lessons of the past history of republics down to our own.

§ 1904. It is not my design to detain the reader by any elaborate reflections addressed to his judgment, either by way of admonition or of encouragement. But it may not be wholly without use to glance at one or two considerations, upon which our meditations cannot be too frequently indulged.

§ 1905. In the first place, it cannot escape our notice, how exceedingly difficult it is to settle the foundations of any government upon principles, which do not admit of controversy or question. The, very elements, out of which it is to be built, are susceptible of infinite modifications; and theory too often deludes us by the attractive simplicity of its plans, and imagination by the visionary perfection of its speculations. In theory, a government may promise the most perfect harmony of operations in all its various combinations. In practice, the whole machinery may be perpetually retarded, or thrown out of order by accidental mal-adjustments. In theory, a government may seem deficient in unity of design and symmetry of parts; and yet, in practice, it

may work with astonishing accuracy and force for the general welfare. Whatever, then, has been found to work well in experience, should be rarely hazarded upon conjectural improvements. Time, and long and steady operation are indispensable to the perfection of all social institutions. To be of any value they must become cemented with the

habits, the feelings, and the pursuits of the people. Every change discomposes for a while the whole arrangements of the system. What is safe is not always expedient; what is new is often pregnant with unforeseen evils, and imaginary good.

§ 1906. In the next place, the slightest attention to the history of the national constitution must satisfy every reflecting mind, how many difficulties attended its formation and adoption, from real or imaginary differences of interests, sectional feelings, and local institutions. It is an attempt to create a national sovereignty, and yet to preserve the state sovereignties; though it is impossible to assign definite boundaries in every case to the powers of each. The influence of the disturbing causes, which, more than once in the convention, were on the point of breaking up the Union, have since immeasurably increased in concentration and vigour. The very inequalities of a government, confessedly founded in a compromise, were then felt with a strong sensibility; and every new source of discontent, whether accidental or permanent, has since added increased activity to the painful sense of these inequalities. The North cannot but perceive, that it has yielded to the South a superiority of representatives, already amounting to twenty-five, beyond its due proportion; and the South imagines, that, with all this preponderance in representation, the other parts of the Union enjoy a more perfect protection of their interests, than her own. The

West feels her growing power and weight in the Union; and the Atlantic states begin to learn, that the sceptre must one day depart from them. If, under these circumstances, the Union should once be broken up, it is impossible, that a new constitution should ever be formed, embracing the whole Territory. We shall be divided into several nations or confederacies, rivals in power and interest, too proud to brook injury, and too close to make retaliation distant or ineffectual. Our very animosities will, like those of all other kindred nations, become more deadly, because our lineage, laws, and language are the same. Let the history of the Grecian and Italian republics warn us of our dangers. The national constitution is our last, and our only security. United we stand; divided we fall.

§ 1907. If these Commentaries shall but inspire in the rising generation a more ardent love of their country, an unquenchable thirst for liberty, and a profound reverence for the constitution and the Union, then they will have accomplished all, that their author ought to desire. Let the American youth never forget, that they possess a noble inheritance, bought by the toils, and sufferings, and blood of their ancestors; and capable, if wisely improved, and faithfully guarded, of transmitting to their latest posterity all the substantial blessings of fife, the peaceful enjoyment of liberty, property, religion, and independence. The structure has been erected by architects of consummate skill and fidelity; its foundations are solid; its compartments are beautiful, as well as useful; its arrangements are full of wisdom and order; and its defences are impregnable from without. It has been reared for immortality, if the work of man may justly aspire to such a title. It may, nevertheless, perish in an hour by the folly, or corruption, or

negligence of its only keepers, THE PEOPLE. Republics are created by the virtue, public spirit, and intelligence of the citizens. They fall, when the wise are banished from the public councils, because they dare to be honest, and the profligate are rewarded, because they flatter the people, in order to betray them.

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A
BRIEF ENQUIRY
INTO THE
TRUE NATURE AND CHARACTER
OF OUR
FEDERAL GOVERNMENT:

BEING A REVIEW

OF

JUDGE STORY'S COMMENTARIES

ON THE

CONSTITUTION OF THE UNITED STATES,

BY ABEL P. UPSHUR

WITH AN INTRODUCTION AND COPIOUS CRITICAL AND EXPLANATORY NOTES.

by

C. CHAUNCEY BURR.

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1868.

INTRODUCTION BY THE EDITOR.

The author of this volume was considered one of the ablest legal minds in the United States. He studied law under William Wirt, the eminent author of the Life of Patrick Henry, and his practiced profession with great success from 1810 to 1824. After an interval of retirement, he held a high judicial position as Judge of the General Court of Virginia, from 1826 to 1841; at which time he entered Mr. Tyler's Cabinet as Secretary of the Navy. On Mr. Webster's retirement, in the spring of 1843, Judge Upshur succeeded him as Secretary of State. On the 28th of February 1844, the explosion of the great gun ("Peacemaker") on board the steamer Princeton killed this eminent jurist and statesman. His reputation in private life was as spotless as his public fame was exalted and unrivaled.

This review of Judge Story's *Commentaries on the Constitution of the United States* is perhaps the ablest analysis of the nature and character of the Federal Government that has ever been published. It has remained unanswered. Indeed, we are not aware that any attempt has been made to invalidate the soundness of its reasoning. As a law writer, Judge Story has been regarded as one of the ablest of his school, which was that of the straightest type of "Federalists" of the elder Adams's party. His commentaries are a good deal marred with the peculiar partisan doctrines of that school of politicians; indeed, they may be looked upon as a plea for the severe political principles which ruled the administration of President John Adams. The Alien and Sedition Laws, which have long since passed into a by-word of reproach, will still find abundant support in Judge Story's *Commentaries*. He perpetually insisted on construing the Constitution from the standpoint of that small and defeated party in the Federal Convention which wanted to form a government on the model of the English monarchy in everything but the name. This party was powerful in respectability and talents, but weak or few in numbers — and after it was so signally defeated in the Constitutional Convention, it still held on to its monarchical principles, and sought to invest the new government with kingly powers, notwithstanding the Constitution had been constructed upon principles entirely opposite to its doctrine. In a letter of U. S. Senator John Langdon, of New Hampshire to Samuel Ringgold, of the date of October 10th, 1800, he says: "Mr. Adams certainly expressed himself that he hoped, or expected to see the day when Mr. Taylor, and his friend, Mr. Giles, would be convinced that the people of America would never be happy without a hereditary Chief Magistrate and Senate or at least for life." Mr. Rose, a Senator from Pennsylvania, and a friend of the Adams party, left the table of Mr. Hollines, of Philadelphia, when "the Constitution of the United States" was given as a toast. John Wood, the historian of the time, speaking of the principles of the Federalists, says: "They bestowed unbounded panegyrics upon Alexander Hamilton, because this gentleman acted the part of Prime Minister to the President. They thought the administration and the government ought to be confounded and identified; that the administration was the government, and the government the administration; and that the people ought to bow in tame submission to its whim and caprice." Writing of Mr. Adams, Jefferson says: "Mr. Adams had originally been a Republican. The glare of royalty and nobility, during his mission in England, had made him believe their fascination to be a necessary ingredient in government. His book on the American Constitution had made known his political bias. He was taken up by the monarchical Federalists in his absence, and was by them, made to believe that the general disposition of our citizens was favorable to monarchy."

At a dinner given by Mr. Jefferson, when he was a member of Washington's Cabinet, he declares that, "after dinner, Mr. Adams said: 'Purge the British Constitution of its corruption, and give to its popular branch equality of representation, and it would be the most perfect Constitution ever devised by the wit of man.' Hamilton replied: 'Purge it of its corruption, and give to its popular branch equality of representation, and it would become then an impracticable government. As it stands at present, with all its supposed defects, it is the most perfect government that ever existed.'" Mr. Jefferson adds: "Hamilton was not only a monarchist, but for a monarchy bottomed on corruption." The Federalists having a majority in Congress, passed an act to continue in force during the administration of Mr. Adams, declaring that "if any person should write or publish, or cause to be published, any libel against the Government of the United States, or either House of Congress, or against the President, he shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." A great many editors, and other gentlemen, were imprisoned under this act. Even to ridicule the President was pronounced by the corrupt partisan judges a violation of the law. Men were beaten almost to death for neglecting to pull off their hats when the President was passing, and every man who did not instantly prostrate himself before the ensigns of Federal royalty, was denounced as the enemy of his country. The following letter, addressed to President John Adams by the merchants of Boston, shows to what lengths that party had dragged the public mind in the direction of monarchy:

> "We, the subscribers, inhabitants and citizens of Boston, in the State of Massachusetts, deeply impressed with the alarming situation of our country, and convinced of the

> necessity of uniting with firmness at this interesting crisis, beg leave to express to you, the Chief Magistrate and supreme ruler over the United States, our fullest approbation of all the measures, external and internal, you have pleased to adopt, under direction of divine authority. We beg leave also to express the high and elevated opinion we entertain of your talents, your virtue, your wisdom and your prudence; and our fixed resolution to support, at the risk of our lives and fortunes, such measures as you may determine upon to be necessary for promoting and securing the honor and happiness of America."

Any one can see that men who could address the President after this fashion, had a great deal less respect for the restraints and limitations of a written Constitution, than for the will and force of individual power. That was the drift of a certain portion of public opinion in America at that time. But the tyrannical excesses of that party soon brought it into such odium, that it was driven from power by the election of Mr. Jefferson to the Presidency. Though defeated, its partisans never ceased to labor to drag the Constitution away from its Democratic foundations, by giving the Constitution a construction utterly antagonistic to the intentions of the Convention which framed and of the States which adopted it. The great vice of the Federalists consisted in desiring to clothe the Federal Government with almost monarchical powers; whereas the States had carefully and resolutely reserved the great mass of political power to themselves. The powers which they delegated to the Federal Government were few, and were general in their character. Those which they reserved embraced their original and inalienable sovereignty, which no State imagined it was surrendering when it, adopted the Constitution. Mr. Madison dwelt with great force upon the fact that "a delegated is not a surrendered power." The States surrendered no powers to the Federal Government. They only delegated them. The powers of the States are original. Those of the Federal Government are only derived and secondary; and they were delegated, not for the purpose of aggrandizing the Federal Government, but for the sole purpose of protecting the rights and sovereignty of "the several States." The Federal Government was formed by the States for their own benefit. The Federal Government is simply an agency, commissioned by the "several States" for their own convenience and safety. In the Convention of Virginia, Patrick Henry said: "Liberty, sir, is the primary object. Liberty, the greatest of all earthly blessings — give us that precious jewel, and you may take away everything else." And, with an eloquence more powerful than that which shook the throne of Macedon, he demonstrated that the battles of the Revolution were fought, not to make "a great and mighty empire," but "for liberty." It was for liberty — for the liberty of the people of the "several States" that the Federal Government was established. Not for the kingly grandeur and power of government, but for the happiness, safety and liberty of "the people of the several States." Nothing could possibly be stronger than the determination pervading the mind of the Federal Convention to sacrifice no iota of the essential sovereignty of the States in the formation of the general Union. This feeling was most happily expressed by Chief Justice Ellsworth, of Connecticut, in, the Convention that framed our Constitution, in the following words:

> "I want domestic happiness as well as general security. A General Government will never grant me this, as it cannot know my wants, nor relieve my distress. My State is only as one out of thirteen. Can they, the General Government, gratify my wishes? My happiness depends as much on the existence of my State Government as a new-born infant depends upon its mother for nourishment."

In the Convention of Massachusetts, Fisher Ames said:

> "A consolidation of the States would subvert the new Constitution, and against which this article is our best security. Too much provision cannot be made against consolidation. The State Governments represent the wishes and feelings, and local interests of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights."

Such were the views and sentiments of the men who framed and who adopted the Federal Constitution. But Judge Story belonged to another school of politicians, and his *Commentaries upon the Constitution* were written in the interests of the Consolidationists, who have ever insisted on giving that instrument an interpretation in harmony with their wishes and ideas. This review of Judge Upshur, however, does not leave a single point of the Federalistic

heresy unanswered. It will ever stand as a text-book of the true theory of our government. We are confident that no book has ever appeared in this country which so thoroughly meets the demands of the present hour. With this book in his hand, the Democratic statesman or orator is armed at every point against the sophistries of the foes of State sovereignty and self-government. There is no vital point which it does not discuss and settle upon the basis of invulnerable truth.

The Notes which we have added, we hope, will be found useful to the unprofessional reader. They will show that the authors reasoning is confirmed by our Constitutional history and by the early decisions of the Supreme Court. In every instance, our own Notes are distinguished from those of the author by our initials —

" C. C. B."

PREFACE BY THE AUTHOR.

The book to which the following pages relate has been for several years before the public. It has been reviewed by some of the principal periodicals of the country, and recommended in the strongest terms to public favor. I have no disposition to detract from its merits as a valuable compendium of historical facts, or as presenting just views of the Constitution in many respects. My attention has been directed to its political principles alone, and my sole purpose has been to inquire into the correctness of those principles, so far as they relate to the true nature and character of our Federal Government,

It may well excite surprise, that so elaborate a work as this of Judge Story, and one so well calculated to influence public opinion, should have remained so long unnoticed by those who do not concur in the author's views. No one can regret this circumstance, more than I do; for I would willingly have devolved upon abler hands the task which I now have undertaken. I offer no apology for the manner in which that task has been performed. It is enough for me to say, that the reader, howsoever favorable his opinion of this essay may be will not be more sensible of its imperfections than I am. I know that the actual practice of the Federal Government for many years past, and the strong tendencies of public opinion in favor of federal power, forbid me to hope for a favorable reception, except from the very few who still cherish the principles which I have endeavored to reestablish.

The following essay was prepared about three years ago, with a view to its publication in one of our periodical reviews. Circumstances, which it is unnecessary to mention, prevented this from being done, and the work was laid aside and forgotten. My attention has been again called to it within a few weeks past, and I am now induced to give it to the public, under the hope that it may not be without its influence in directing the attention of those, who have not yet lost all interest in the subject, to the true principles of our constitution of government.

I do not claim the merit of originality. My conclusions are drawn from the authentic information of history, and from a train of reasoning, which will occur to every mind, on the facts which history discloses. My object will be answered, if even the few by whom these pages will probably be read shall be induced to re-examine, with a sincere desire after truth, the great principles upon which political parties in our country were once divided, but which there is much reason to fear are no longer respected, even if they be not wholly forgotten.

I do not offer this essay as a commentary on the Federal Constitution. Having proposed to myself but a single object, I have endeavored to compress my matter within as small a compass as possible, consistent with a due regard to clearness, and a proper reference to authorities, where authorities are relied on.

THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT.

CHAPTER I.

THE CHARACTER OF JUDGE STORY'S COMMENTARIES ON THE CONSTITUTION.

It came within the range of Judge Story's duties, as Dane Professor of Law in Harvard University, to expound and illustrate the Constitution of the United States. His lectures upon that subject have been abridged by himself, and published in a separate volume. Although the work is given to the public as an abridgment, it is nevertheless, as it professes to be, "a full analysis and exposition of the constitution of government of the United States and presents, in the opinion of the author himself, the "leading doctrines" of the original, "so far as they are necessary to a just understanding of the actual provisions of the Constitution." The author professes to have compiled it "for the use of

colleges and high schools," but as it contains all the important historical facts, and all the leading reasons upon which his own opinions have been based, and as it has been prepared with elaborate care in other respects, we may reasonably suppose, without impeaching his modesty, that he expected it to be received as a complete work. It is, indeed, quite as full as any such work needs to be, for any purpose, except, perhaps, the very first lessons to the student of constitutional law. The politician and the jurist may consult it, with a certainty of finding all the prominent topics of the subject fully discussed.

A work presenting a proper analysis and correct views of the Constitution of the United States has long been a desideratum with the public. It is true that the last fifteen years have not been unfruitful in commentaries upon that instrument; such commentaries, however, as have, for the most part met a deserved fate, in immediate and total oblivion. Most of them have served only to throw ridicule upon the subject which they professed to illustrate. A few have appeared, however, of a much higher order, and bearing the stamp of talent, learning, and research. Among these, the work before us, and the Commentaries of Chief Justice Kent, hold the first rank. Both of these works are, as it is natural they should be, strongly tinctured with the political opinions of their respective authors; and as there is a perfect concurrence between them in this respect, their joint authority can scarcely fail to exert a strong influence upon public opinion. It is much to be regretted that some one, among the many who differ from them in their views of the Constitution, and who possess all the requisite qualifications for the task, should not have thought it necessary to vindicate his own peculiar tenets, in a work equally elaborate, and presenting just claims to public attention. The authority of great names is of such imposing weight, that mere reason and argument can rarely counterpoise it in the public mind; and its preponderance is not easily overcome, except by adding like authority to the weight of reason and argument, in the opposing scale. I hope it is not yet too late for this suggestion to have its effect upon those to whom it is addressed.

The first commentary upon the Constitution, the Federalist, is decidedly the best, which has yet appeared. The writers of that book were actors in all the interesting scenes of the period, and two of them were members of the convention which formed the Constitution. Added to this, their extensive information, their commanding talents, and their experience in great public affairs, qualified them, in a peculiar degree, for the task which they undertook. Nevertheless, their great object was to recommend the Constitution to the people, at a time when it was very uncertain whether they would adopt it or not; and hence their work, although it contains a very full and philosophical analysis of the subject, comes to us as a mere argument in support of a favorite measure, and, for that reason, does not always command our entire confidence. Besides, the Constitution was and its true character, which is to be learned only from its practical operation, could only be conjectured. Much has been developed, in the actual practice of the government, which no politician of that day could either have foreseen or imagined. New questions have arisen, not then anticipated, and difficulties and embarrassments, wholly unforeseen, have sprung from new events in the relation of the States to one another, and to the general government. Hence the Federalist cannot be relied on, as full and safe authority in all cases. It is, indeed, matter of just surprise, and affording the strongest proof of the profound wisdom and far-seeing sagacity of the authors of that work, that their views of the Constitution have been so often justified in the course of its practical operation. Still, however, it must be admitted that the Federalist is defective in some important particulars, and deficient in many more. The Constitution is much better understood at this day than at the time of its adoption. This is not true of the great principles of civil and political liberty, which lie, at the foundation of that instrument; but it is emphatically true of some of its provisions, which were considered at the time as comparatively unimportant, or so plain as not to be misunderstood, but which have been shown, by subsequent events, to be pregnant with the greatest difficulties, and to exert the most important influence upon the whole character of the government. Contemporary expositions of the Constitution, therefore, although they should be received as authority in some cases, and may enlighten our judgments in most others, cannot be regarded as safe guides, by the expounder of that instrument at this day. The subject demands our attention now as strongly as it did before the Federalist was written.[Error! Bookmark not defined.]

It is not surprising, therefore, that the work now under consideration should have been hailed with pleasure and received with every favorable disposition. Judge Story fills a high station in the judiciary of the United States, and has acquired a character, for talents and learning, which ensures respect to whatever he may publish under his own name. His duty, as a Judge of the Supreme Court, has demanded of him frequent investigations of the nicest questions of constitutional law; and his long service in that capacity has probably brought under his review every provision of that instrument in regard to which any difference of opinion has prevailed. Assisted as he has been by the arguments of the ablest counsel, and by the joint deliberations of the other judges of the court, it would be indeed wonderful, if he should hazard his well-earned reputation as a jurist, upon any hasty or unweighed opinion, upon subjects so grave and important. He has also been an attentive observer of political events, and although by no means obtrusive in politics, has yet a political character, scarcely less distinguished than his character as a jurist. To

all, these claims to public attention and respect, may be added a reputation for laborious research, and for calm and temperate thinking. A work on the Constitution of the United States, emanating from such a source, cannot fail to exert a strong influence upon public opinion, and it is, therefore, peculiarly important that its real character should be understood. Whatever may be the cast of its political opinions, it can scarcely fail to contain many valuable truths, and much information which will be found useful to all classes of readers. And, so far as its political opinions are concerned, it is of the highest importance to guard the public mind against the influence which its errors, if errors they be, may borrow from the mere authority of the distinguished name under which they are advanced.

The plan of the work before us is very judicious. In order to a correct understanding of the Constitution, it is absolutely necessary to understand the situation of the States before it was adopted. The author, acting upon this idea, distributes his work into three great divisions. "The first will embrace a sketch of the charters, constitutional history, and anterevolutionary jurisprudence of the Colonies. The second will embrace the constitutional history of the States, during the Revolution, and the rise, progress, decline, and fall of the Confederation. The third will embrace the history of the rise and adoption of the Constitution, and a full exposition of all its provisions, with the reasons on which they were respectively founded, the objections by which they were respectively assailed, and such illustrations drawn from contemporaneous documents, and the subsequent operations of the government, as may best enable the reader to estimate for himself, the true value of each." This plan is at once comprehensive and analytical. It embraces every topic necessary to a full understanding of the subject, while, at the same time, it presents them in the natural order of investigation. It displays a perfect acquaintance with the true nature of the subject, and promises every result which the reader can desire. The first part relates to a subject of the greatest interest to every American, and well worthy the study of philosophical enquirers, all over the world. There is not, within the whole range of history, an event more important, with reference to its effects upon the world at large, than the settlement of the American Colonies. It did not fall within the plan of our author to enquire very extensively, or very minutely, into the mere history of events which distinguished that extraordinary enterprise. So far as the first settlers may be regarded as actuated by avarice, by ambition, or by any other of the usual motives of the adventurer, their deeds belong to the province of the historian alone. We, however, must contemplate them in another and a higher character. A deep and solemn feeling of religion, and an attachment to, and an understanding of, the principles of civil liberty, far in advance of the age in which they lived, suggested to most of them the idea of seeking a new home and founding new institutions in the western world. To this spirit we are indebted for all that is free and liberal in our present political systems, it would be a work of very great interest, and altogether worthy of the political historian, to trace the great principles of our institutions back to their sources. Their origin would probably be discovered at a period much more remote than is generally supposed. We should derive from such a review much light in the interpretation of those parts of our systems as to which we have no precise rules in the language of our constitutions of government. It is to be regretted that Judge Story did not take this view of the subject. Although not strictly required by the plan of his work, it was, nevertheless, altogether consistent with it, and would have added much to its interest with the general reader. His sources of historical information were ample, and his habits and the character of his mind fitted him well for such an investigation, and for presenting the result in an analytical and philosophical form. He has chosen, however, to confine himself within much narrower limits. Yet, even within those limits, he has brought together a variety of historical facts of great interest, and has presented them in a condensed form, well calculated to make a lasting impression on the memory. The brief sketch which he has given of the settlement of the several colonies, and of the charters from which they derived their rights and powers as separate governments, contains much to enable us to understand fully the relation which they bore to one another and to the mother country. This is the true starting point in the investigation of those vexed questions of constitutional law which have so long divided political parties in the United States. It would seem almost impossible that any two opinions could exist upon the subject; and yet the historical facts, upon which alone all parties must rely, although well authenticated and comparatively recent, have not been understood by all men alike. Our author was well aware of the importance of settling this question at the threshold of his work. Many of the powers which have been claimed for the Federal Government, by the political party to which he belongs, depend upon a denial of that separate existence, and separate sovereignty and independence, which the opposing party has uniformly claimed for the States. It is, therefore, highly important to the correct settlement of this controversy, that we should ascertain the precise political condition of the several colonies prior to the Revolution. This will enable us to determine how far Judge Story has done justice to his subject, in the execution of the first part of his plan; and by tracing the colonies from their first establishment as such, through the various stages of their progress up to the adoption of the Federal Constitution, we shall be greatly aided in forming a correct opinion as to the true character of that instrument.

CHAPTER II.

THE NON-RELATION OF THE COLONIES TO EACH OTHER — THEY WERE NOT ONE PEOPLE.

It appears to be a favorite object of Judge Story to impress upon the mind of the reader, at the very commencement of his work, the idea that the people of the several colonies were, as to some objects, which he has not explained, and to some extent which he has not defined, "one people." This is not only plainly inferable from the general scope of the book, but is expressly asserted in the following passage "But although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow-subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony, and as a British subject he was capable of inheriting lands by descent in every other colony. The commercial intercourse of the colonies, too, was regulated by the general laws of the British empire, and could not be restrained or obstructed by colonial legislation. The remarks of Mr. Chief Justice Jay are equally just and striking: "All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him, and all the civil authority then existing or exercised here flowed from the head of the British empire. They were in a strict sense fellow-subjects and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, to wit, only that affinity and social connection which results from the mere circumstance of being governed by the same prince.'"

In this passage the author takes his ground distinctly and boldly. The first idea suggested by the perusal of it is, that he discerned very clearly the necessity of establishing his position, but did not discern quite so clearly by what process of reasoning he was to accomplish it. If the passage stood alone, it would be fair to suppose that he did not design to extend the idea of a unity among the people of the colonies beyond the several particulars which he has enumerated. Justice to him requires that we should suppose this; for, if it had been otherwise, he would scarcely have failed to support his opinion by pointing out some one of the "many purposes," for which the colonies were, in his view of them, "one people." The same may be said of Mr. Chief Justice Jay. He also has specified several particulars in which he supposed this unity to exist, and arrives at the conclusion, that the people of the several colonies were, "in a variety of respects, one people." In what respect they were "one," except those which he has enumerated, he does not say and of course it is fair to presume that he meant to rest the justness of his conclusion upon them alone. The historical facts stated by both of these gentlemen are truly stated; but it is surprising that it did not occur to such cool reasoners, that every one of them is the result of the relation between the colonies and the mother country, and not the result of the relation between the colonies themselves. Every British subject, whether born in England proper or in a colony, has a right to reside anywhere within the British realm; and this by the force of British laws. Such is the right of every Englishman, wherever he may be found. As to the right of the colonist to inherit lands by descent in any other colony than his own, Judge Story himself informs us that it belonged to him "as a British subject." That right, indeed, is in consequence of his allegiance. By the policy of the British constitution and laws, it is not permitted that the soil of her territory should belong to any from whom she cannot demand all the duties of allegiance. This allegiance is the same in all the colonies as it is in England proper and, wherever it exists, the correspondent right to own and inherit the soil attaches. The right to regulate commercial intercourse among her colonies belongs, of course, to the parent country, unless she relinquishes it by some act of her own; and no such act is shown in the present case. On the contrary, although that right was resisted for a time by some of the American colonies, it was fully yielded, as our author himself informs us, by all those of New England, and I am not informed that it was denied by any other. Indeed, the supremacy of Parliament, in most matters of legislation which concerned the colonies, was generally — nay, universally — admitted up to the very eve of the Revolution. It is true, the right to tax the colonies was denied, but this was upon a wholly different principle. It was the right of every British subject to be exempt from taxation, except by his own consent; and as the colonies were not, and from their local situation could not be, represented in Parliament, the right of that body to tax them was denied, upon a fundamental principle of English liberty. But the right of the mother country to regulate commerce among her colonies is of a different character, and it never was denied to England by her American colonies, so long as a hope of reconciliation remained to them. In like manner, the facts relied on by Mr. Jay, that "all people of this country were then subjects of the King of Great Britain, and owed allegiance to him" and that "all the civil authority then existing or exercised here flowed from the head of the British empire," are but the usual incidents of colonial dependence, and are by no means peculiar to the case he was considering. They do, indeed, prove a unity between all the colonies and the mother country, and show that these, taken altogether, are in the strictest sense of the terms, "one

people"; but I am at a loss to perceive how they prove, that two or more parts or subdivisions of the same empire necessarily constitute "one people." If this be true of the colonies, it is equally true of any two or more geographical sections of England proper; for every one of the reasons assigned applies as strictly to this case as to that of the colonies. Any two countries may be "one people," or "a nation de facto," if they can be made so by the facts that their people are "subjects of the King of Great Britain, and owe allegiance to him," and that "all the civil authority exercised therein flows from the head of the British empire."

It is to be regretted that the author has not given us his own views of the sources from which these several rights and powers were derived. If they authorize his conclusion, that there was any sort of unity among the people of the several colonies, distinct from their common connection with the mother country, as parts of the same empire, it must be because they flowed from something in the relation betwixt the colonies themselves, and not from their common relation to the parent country. Nor is it enough that these rights and powers should, in point of fact, flow from the relation of the colonies to one another; they must be the necessary result of their political condition. Even admitting, then, that they would, under any state of circumstances, warrant the conclusion which the author has drawn from them, it does not follow that the conclusion is correctly drawn in the present instance. For aught that he has said to the contrary, the right of every colonist to inhabit and inherit lands in every colony, whether his own or not, may have been derived from positive compact and agreement among the colonies themselves; and this presupposes that they were distinct and separate, and not "one people." And so far as the rights of the mother country are concerned, they existed in the same form, and to the same extent, over every other colony of the empire. Did this make the people of all the colonies "one people?" If so, the people of Jamaica, the British East India possessions, and the Canadas are, for the very same reason, "one people" at this day. If a common allegiance to a common sovereign, and a common subordination to his jurisdiction, are sufficient to make the people of different countries "one people," it is not perceived (with all deference to Mr. Chief Justice Jay) why the people of Gaul, Britain, and Spain might not have been "one people," while Roman provinces, notwithstanding "the patriots" did not say so. The general relation between the colonies and the parent country is as well settled and understood as any other, and it is precisely the same in all cases, except where special consent and agreement may vary it. Whoever, therefore, would prove that any peculiar unity existed between the American colonies, is bound to show something in their charters, or some peculiarity in their condition, to exempt them from the general rule. Judge Story was too well acquainted with the state of the facts to make any such attempt in the present case. The Congress of the nine colonies, which assembled at New York, in October, 1765, declare that the colonists "owe the same allegiance to the Crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body, the Parliament of Great Britain." "That the colonists are entitled to all the inherent rights and liberties of his [the King's] natural born subjects within the Kingdom of Great Britain," We have here an all-sufficient foundation of the right of the Crown to regulate commerce among the colonies, and of the right of the colonists to inhabit and to inherit land in each and all the colonies. They were nothing more than the ordinary rights and liabilities of every British subject; and, indeed, the most that the colonies ever contended for was an equality, in these respects, with the subjects born in England. The facts, therefore, upon which Judge Story's reasoning is founded, spring from a different source from that from which he is compelled to derive them, in order to support his conclusion.

So far as Judge Story's argument is concerned, the subject might be permitted to rest here. Indeed, one would be tempted to think, from the apparent carelessness and indifference with which the argument is urged, that he himself did not attach to it any particular importance. It is not his habit to dismiss grave matters with such light examination, nor does it consist with the character of his mind to be satisfied with reasoning which bears even a doubtful relation to his subject. Neither can it be supposed that he would be willing to rely on the simple ipse dixit of Chief Justice Jay, unsupported by argument, unsustained by any reference to historical facts, and wholly indefinite in extent and bearing. Why, then, was this passage written? As mere history, apart from its bearing on the Constitution of the United States, it is of no value in this work, and is wholly out of place. All doubts upon this subject will be removed in the progress of this examination. The great effort of Judge Story, throughout the entire work, is to establish the doctrine, that the Constitution of the United States is a government of "the people of the United States," as contradistinguished from the people of the several States; or, in other words, that it is a consolidated, and not a federative system. His construction of every contested federal power depends mainly upon this distinction; and hence the necessity of establishing a oneness among the people of the several colonies, prior to the Revolution. It may well excite our surprise, that a proposition so necessary to the principal design of the work, should be stated with so little precision, and dismissed with so little effort to sustain it by argument. One so well informed as Judge Story, of the state of political opinions in this country, could scarcely have supposed that it would be received as an admitted truth, requiring no examination. It enters too deeply into grave questions of Constitutional law, to be so

summarily disposed of. We should not be content, therefore, with simply proving that Judge Story has assigned no sufficient reason for the opinion he has advanced. The subject demands of us the still farther proof that his opinion is, in fact, erroneous, and that it cannot be sustained by any other reasons.

In order to constitute "one people," in a political sense, of the inhabitants of different countries, some thing more is necessary than that they should owe a common allegiance to a common sovereign. Neither is it sufficient that, in some particulars, they are bound alike, by laws which that sovereign, may prescribe; nor does the question depend on geographical relations. The inhabitants of different islands may be one people, and those of contiguous countries may be, as we know they in fact are, different nations. By the term "people," as here used, we do not mean merely a number of persons. We mean by it a political corporation, the members of which owe a common allegiance to a common sovereignty, and do not owe any allegiance which is not common; who are bound by no laws except such as that sovereignty may prescribe; who owe to one another reciprocal obligations; who possess common political interests; who are liable to common political duties; and who can exert no sovereign power except in the name of the whole. Anything short of this, would be an imperfect definition of that political corporation which we call a "people."

Tested by this definition, the people of the American colonies were, in no conceivable sense, "one people." They owed, indeed, allegiance to the British King, as the head of each colonial government, and as forming a part thereof; but this allegiance was exclusive, in each colony, to its own government, and, consequently, to the King as the head thereof, and was not a common allegiance of the people of all the colonies, to a common head.[Error! Bookmark not defined.] These colonial governments were clothed with the sovereign power of making laws, and of enforcing obedience to them, from their own people. The people of one colony owed no allegiance to the government of any other colony, and were not bound by its laws. The colonies had no common legislature, no common treasury, no common military power, no common judicatory. The people of one colony were not liable to pay taxes to any other colony, nor to bear arms in its defence; they had no right to vote in its elections; no influence nor control in its municipal government; no interest in its municipal institutions. There was no prescribed form by which the colonies could act together, for any purpose whatever; they were not known as "one people" in any one function of government. Although they were all, alike, dependencies of the British Crown, yet, even in the action of the parent country, in regard to them, they were recognized as separate and distinct. They were established at different times, and each under an authority from the Crown, which applied to itself alone. They were not even alike in their organization. Some were provincial, some proprietary, and some charter governments. Each derived its form of government from the particular instrument establishing it, or from assumptions of power acquiesced in by the Crown, without any connection with, or relation to, any other. They stood upon the same footing, in every respect, with other British colonies, with nothing to distinguish their relation either to the parent country or to one another. The charter of any one of them might have been destroyed, without in any manner affecting the rest. In point of fact, the charters of nearly all of them were altered, from time to time, and the whole character of their government changed. These changes were made in each colony for itself alone, sometimes by its own action, sometimes by the power and authority of the Crown; but never by the joint agency of any other colony, and never with reference to the wishes or demands of any other colony. Thus they were separate and distinct in their creation; separate and distinct in the changes and modifications of their governments, which were made from time to time; separate and distinct in political functions, in political rights, and in political duties.

The provincial government of Virginia was the first established. The people of Virginia owed allegiance to the British King, as the head of their own local government. The authority of that government was confined within certain geographical limits, known as Virginia, and all who lived within those limits were "one people." When the colony of Plymouth was subsequently settled, were the people of that colony "one" with the people of Virginia? When, long afterwards, the proprietary government of Pennsylvania was established, were the followers of William Penn "one" with the people of Plymouth and Virginia? If so, to which government was their allegiance due? Virginia had a government of her own, and Massachusetts a government of her own. The people of Pennsylvania could not be equally bound by the laws of all three governments, because those laws might happen to conflict; they could not owe the duties of citizenship to all of them alike, because they might stand in hostile relations to one another. Either, then, the government of Virginia, which originally extended over the whole territory, continued to be supreme therein, (subject only to its dependence on the British Crown), or else its supremacy was yielded to the new government. Every one knows that this last was the case; that within the territory of the new government the authority of that government alone prevailed. How then could the people of this new government of Pennsylvania be said to be "one" with the people of Virginia, when they were not citizens of Virginia, owed her no allegiance and no duty, and when their allegiance to another government might place them in the relation of enemies of Virginia?[Error! Bookmark not defined.]

In farther illustration of this point, let us suppose that some one of the colonies had refused to unite in the Declaration of Independence, what relation would it then have held to the others? Not having disclaimed its allegiance to the British Crown, it would still have continued to be a British colony, subject to the authority of the parent country, in all respects as before. Could the other colonies have rightfully compelled it to unite with them in their revolutionary purposes, on the ground that it was part and parcel of the "one people," known as the people of the colonies? No such right was ever claimed, or dreamed of, and it will scarcely be contended for now, in the face of the known history of the time. Such recusant colony would have stood precisely as did the Canadas, and every other part of the British empire. The colonies, which had declared war, would have considered its people as enemies, but would not have had a right to treat them as traitors, or as disobedient citizens resisting their authority. To what purpose, then, were the people of the colonies "one people," if, in a case so important to the common welfare, there was no right in all the people together, to coerce the members of their own community to the performance of a common duty?

It is thus apparent that the people of the colonies were not "one people," as to any purpose involving allegiance on the one hand, or protection on the other. What, then, I again ask, are the "many purposes" to which Judge Story alludes? It is certainly incumbent on him who asserts this identity, against the inferences most naturally deducible from the historical facts, to show at what time, by what process, and for what purposes, it was effected. He claims too much consideration for his personal authority, when he requires his readers to reject the plain information of history, in favor of his bare assertion. The charters of the colonies prove no identity between them, but the reverse; and it has already been shown that this identity is not the necessary result of their common relation to the mother country. By what other means they came to be "one," in any intelligible and political sense, it remains for Judge Story to explain.

If these views of the subject be not convincing, Judge Story himself has furnished proof, in all needful abundance, of the incorrectness of his own conclusion. He tells us that, "though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connection with each other. Each was independent of all the others; each, in a limited sense, was sovereign within its own territory. There was neither alliance nor confederacy between them. The assembly of one province could not make laws for another, nor confer privileges which were to be enjoyed or exercised in another, farther than they could be in any independent foreign States. They were known only as dependencies, and they followed the fate of the parent country, both in peace and war, without having assigned to them, in the intercourse or diplomacy of nations, any distinct or independent existence. They did not possess the power of forming any league or treaty among themselves, which would acquire an obligatory force, without the assent of the parent State. And though their mutual wants and necessities often induced them to associate for common purposes of defense, these confederacies were of a casual and temporary nature, and were allowed as an indulgence, rather than as a right. They made several efforts to procure the establishment of some general superintending government over them all; but their own difference of opinion, as well as the jealousy of the Crown, made these efforts abortive."

The English language affords no terms stronger than those which are here used to convey the idea of separateness, distinctness, and independence, among the colonies. No commentary could make the description plainer, or more full and complete. The unity, contended for by Judge Story, nowhere appears, but is distinctly disaffirmed in every sentence. The colonies were not only distinct in their creation, and in the powers and faculties of their governments, but there was not even "an alliance or confederacy between them." They had "no general superintending government over them all," and tried in vain to establish one. Each was "independent of all the others," having its own legislature, and without power to confer either right or privilege beyond its own territory. "Each, in a limited sense, was sovereign within its own territory"; and to sum up all, in a single sentence, "they had no direct political connection with each other!" The condition of the colonies was, indeed, anomalous, if Judge Story's view of it be correct. They presented the singular spectacle of "one people," or political corporation, the members of which had "no direct political connection with each other," and who had not the power to form such connection, even "by league or treaty among themselves."

This brief review will, it is believed, be sufficient to convince the reader that Judge Story has greatly mistaken the real condition and relation of the colonies, in supposing that they formed "one people," in any sense, or for any purpose whatever. He is entitled to credit, however, for the candor with which he has stated the historical facts. Apart from all other sources of information, his book affords to every reader abundant materials for the formation of his own opinion, and for enabling him to decide satisfactorily whether Judge Story's inferences from the facts, which he himself has stated, be warranted by them or not.

CHAPTER III.

RELATION OF THE COLONIES TO EACH OTHER DURING THE REVOLUTION — THEY WERE NOT THEN ONE PEOPLE.

In the execution of the second division of his plan, very little was required of Judge Story, either as a historian or a commentator. Accordingly, he has alluded but slightly to the condition of the colonies during the existence of the revolutionary government, and has sketched with great rapidity, yet sufficiently in detail, the rise, decline and fall of the Confederation. Even here, however, he has fallen into some errors, and has ventured to express decisive and important opinions, without due warrant. The desire to make "the people of the United States" one consolidated nation is so strong and predominant, that it breaks forth, often uncalled for, in every part of his work. He tells us that the first Congress of the Revolution was "a general or a national government"; that it "was organized under the auspices and with the consent of the people, acting directly in their primary sovereign capacity," and without the intervention of the functionaries to whom the ordinary powers of government were delegated in the colonies. He acknowledges that the powers of this Congress were but ill-defined; that many of them were exercised by mere usurpation, and were acquiesced in by the people, only from the confidence reposed in the wisdom and patriotism of its members, and because there was no proper opportunity, during the presence of the war, to raise nice questions of the powers of government. And yet he infers, from the exercise of powers thus ill-defined, and, in great part, usurped, that "from the moment of the Declaration of Independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation de facto," &c.

A very slight attention to the history of the times will place this subject in its true light. The colonies complained of oppressions from the mother country, and were anxious to devise some means by which their grievances might be redressed. These grievances were common to all of them; for England made no discrimination between them in the general course of her colonial policy. Their rights, as British subjects, had never been well defined; and some of the most important of these rights, as asserted by themselves, had been denied by the British Crown. As early as 1765 a majority of the colonies had met together in congress, or convention, in New York, for the purpose of deliberating on these grave matters of common concern and they then made a formal declaration of what they considered their rights, as colonists and British subjects. This measure, however, led to no redress of their grievances. On the contrary, the subsequent measures of the British Government gave new and just causes of complaint; so that, in 1774, it was deemed necessary that the colonies should again meet together, in order to consult upon their general condition, and provide for the safety of their common rights. Hence the Congress which met at Carpenters' Hall, in Philadelphia, on the 5th of September, 1774. It consisted of delegates from New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut from the city and county of New York, and other counties in the province of New York, New Jersey, Pennsylvania, New Castle, Kent, and Sussex in Delaware, Maryland, Virginia, and South Carolina. North Carolina was not represented until the 14th September, and Georgia not at all. It is also apparent that New York was not represented as a colony, but only through certain portions of her people;[Error! Bookmark not defined.] in like manner, Lyman Hall was admitted to his seat, in the succeeding Congress, as a delegate from the parish of St. John's, in Georgia, although he declined to vote on any question requiring a majority of the colonies to carry it, because he was not the representative of a colony. This Congress passed a variety of important resolutions, between September, 1774, and the 22nd October, in the same year; during all which time Georgia was not represented at all; for even the parish of St. John's did not appoint a representative till May, 1775. In point of fact, the Congress was a deliberative and advisory body, and nothing more; and, for this reason, it was not deemed important, or, at least, not indispensable, that all the colonies should be represented, since the resolutions of Congress had no obligatory force whatever. It was appointed for the sole purpose of taking into consideration the general condition of the colonies, and of devising and recommending proper measures for the security of their rights and interests. For these objects no precise powers and instructions were necessary, and beyond them none were given. Neither does it appear that any precise time was assigned for the duration of Congress. The duty with which it was charged was extremely simple; and it was taken for granted that it would dissolve itself as soon as the duty should be performed.[Error! Bookmark not defined.]

It is perfectly apparent that the mere appointment of this Congress did not make the people of all the colonies "one people," nor a "nation de facto." All the colonies did not unite in the appointment, neither as colonies nor by any portion of their people acting in their primary assemblies, as has already been shown. The colonies were not independent, and had not even resolved to declare themselves so at any future time. On the contrary, they were extremely desirous to preserve and continue their connection with the parent country, and Congress was charged with the duty of devising such measures as would enable them to do so, without involving a surrender of their rights

as British subjects. It is equally clear that the powers, with which Congress was clothed, did not flow from, nor constitute "one people," or "nation de facto," and that that body was not "a general or national government," nor a government of any kind what ever. The existence of such government was absolutely inconsistent with the allegiance which the colonies still acknowledged to the British Crown. Judge Story, himself informs us, in a passage already quoted, that they had no power to form such government, nor to enter into "any league or treaty among themselves." Indeed, Congress did not claim any legislative power whatever, nor could it have done so consistently with the political relations which the colonies still acknowledged and desired to preserve. Its acts were in the form of resolutions, and not in the form of laws; it recommended to its constituents whatever it believed to be for their advantage, but it commanded nothing. Each colony, and the people thereof, were at perfect liberty to act upon such recommendation or not, as they might think proper.[Error! Bookmark not defined.]

On the 22nd October, 1774, this Congress dissolved itself, having recommended to the several colonies to appoint delegates to another Congress, to be held in Philadelphia in the following May. Accordingly delegates were chosen, as they had been chosen to the preceding Congress, each colony and the people thereof acting for themselves, and by themselves; and the delegates thus chosen were clothed with substantially the same powers, for precisely the same objects, as in the former Congress. Indeed, it could not have been otherwise; for the relations of the colonies were still unchanged, and any measure establishing "a general or national government," or uniting the colonies so as to constitute them "a nation de facto," would have been an act of open rebellion, and would have severed at once all the ties which bound them to the mother country, and which they were still anxious to preserve. New York was represented in this Congress precisely as she had been in the former one, that is, by delegates chosen by a part of her people; for the royal party was so strong in that colony, that it would have been impossible to obtain from the legislature an expression of approbation of any measure of resistance to British authority. The accession of Georgia to the general association was not made known till the 20th of July, and her delegates did not take their seats till the 13th of September. In the meantime Congress had proceeded in the discharge of its duties, and some of its most important acts, and among the rest the appointment of a commander-in-chief of their armies, were performed while these two colonies were unrepresented. Its acts, like those of the former Congress, were in the form of resolution and recommendation; for as it still held out the hope of reconciliation with the parent country, it did not venture to assume the function of authoritative legislation. It continued to hold this attitude and to act in this mode till the 4th of July, 1776, when it declared that the colonies there represented (including New York, which had acceded after the Battle of Lexington), were, and of right ought to be, free and independent States.[Error! Bookmark not defined.]

It is to be remarked, that no new powers were conferred on Congress after the Declaration of Independence. Strictly speaking, they had no authority to make that Declaration. They were not appointed for any such purpose, but precisely the reverse; and although some of them were expressly authorized to agree to it, yet others were not. Indeed, we are informed by Mr. Jefferson, that the Declaration was opposed by some of the firmest patriots of the body, and among the rest, by R. R. Livingston, Dickenson, Wilson, and E. Rutlege, on the ground that it was premature; that the people of New York, New Jersey, Maryland and Delaware were not yet ripe for it, but would soon unite with the rest, if not indiscreetly urged. In entering upon so bold a step, Congress acted precisely as they did in all other cases, in the name of the States whose representatives they were, and with a full reliance that those States would confirm whatever they might do for the general good. They were, strictly, agents or ministers of independent States, acting each under the authority and instructions of his own, State, and having no power whatever, except what these instructions conferred. The States themselves were not bound by the resolves of Congress, except so far as they respectively authorized their own delegates to bind them. There was no original grant of powers to that body, except for deliberation and advisement; there was no constitution, no law, no agreement, to which they could refer, in order to ascertain the extent of their powers. The members did not all act under the same instructions, nor with the same extent of authority. The different States gave different instructions, each according to its own views of right and policy, and without reference to any general scheme to which they were all bound to conform. Congress had in fact no power of government at all, nor had it that character of permanency which is implied in the idea of government. It could not pass an obligatory law, nor devise an obligatory sanction, by virtue of any inherent power in itself. It was, as already remarked, precisely the same body after the Declaration of Independence as before. As it was not then a government, and could not establish any new or valid relations between the colonies, so long as they acknowledged themselves dependencies of the British Crown, they certainly could not do so after the Declaration of Independence, without some new grant of power. The dependent colonies had then become independent States; their political condition and relations were necessarily changed by that circumstance; the deliberative and advisory body, through whom they had consulted together as colonies, was functus officio; the authority which appointed them had ceased to exist, or was suspended by a higher authority. Everything which they did, after this period and before the Articles of Confederation, was without any

other right or authority than what was derived from the mere consent and acquiescence of the several States. In the ordinary business of that government de facto, which the occasion had called into existence, they did whatever the public interest seemed to require, upon the secure reliance that their acts would be approved and confirmed. In other cases, however, they called for specific grants of power; and in such cases, each representative applied to his own State alone, and not to any other State or people. Indeed, as they were called into existence by the colonies in 1775, and as they continued in existence, without any new election or new grant of power, it is difficult to perceive how they could form a "general or national government, organized by the people." They were elected by subjects of the King of England; subjects who had no right, as they themselves admitted, to establish any government whatever; and when those subjects became citizens of independent States, they gave no instructions to establish any such government. The government exercised was, as already remarked, merely a government de facto, and no farther de jure than the subsequent approval of its acts by the several States made it so.

This brief review will enable us to determine how far Judge Story is supported in the inferences he has drawn, in the passages last quoted. We have reason to regret that in these, as in many others, he has not been sufficiently specific, either in stating his proposition or in citing his proof. To what people does he allude, when he tells us that the "first general or national government" was organized "by the people?"

The first and every recommendation to send deputies to a general Congress was addressed to the colonies as such; in the choice of those deputies each colony acted for itself, without mingling in any way with the people or government of any other colony; and when the deputies met in Congress, they voted on all questions of public and general concern by colonies, each colony having one vote, whatever was its population or number of deputies. If, then, this government was organized by "the people" at all, it was clearly the people of the several colonies, and not the joint people of all the colonies. And where is Judge Story's warrant for the assertion, that they acted "directly in their primary sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated in the colonies"? He is in most respects a close follower of Marshall, and he could scarcely have failed to see the following passage, which is found in a note in the 168th page of the second volume of the Life of Washington. Speaking of the Congress of 1774, Marshall says: "The members of this Congress were generally elected by the authority of the colonial legislatures, but in some instances a different system had been pursued. In New Jersey and Maryland the elections were made by committees chosen in the several counties for that particular purpose; and in New York, where the royal party was very strong, and where it is probable that no legislative act, authorizing an election of members to represent that colony in Congress, could have been obtained, the people themselves assembled in those places, where the spirit of opposition to the claim of Parliament prevailed, and elected deputies, who were very readily received into Congress," Here the general rule is stated to be, that the deputies were elected by the "colonial legislatures," and the instances in which the people acted "directly in their primary, sovereign capacity, without the intervention of the ordinary functionaries of government," are given as exceptions. And even in those cases, in which delegates were appointed by conventions of the people, it was deemed necessary in many instances, as we have already seen, that the appointment should be approved and confirmed by the ordinary legislature, As to New York, neither her people nor her government had so far lost their attachment to the mother country as to concur any measure of opposition until after the battle of Lexington in April, 1775; and, the only representatives which New York had in the Congress of 1774 were those of a comparatively small portion of her people. It is well known — and, indeed, Judge Story himself so informs us — that the members of the Congress of 1775 were elected substantially as were those of the preceding Congress; so that there were very few of the colonies, in which the people performed that act in their "primary, sovereign capacity," without the intervention of their constituted authorities. It is of little consequence, however, to the present inquiry whether the deputies were chosen by the colonial legislatures, as was done in most of the colonies, or by conventions, as was done in Georgia and some others, or by committees appointed for the purpose, as was done in one or two instances, or by the people in primary assemblies, as was done in part of New York. All these modes were resorted to, according as the one or the other appeared most convenient or proper in each particular case. But, whichever mode was adopted, the members were chosen by each colony in and for itself, and were the representatives of that colony alone, and not of any other colony, or any nation de facto or de jure. The assertion, therefore, that "the Congress thus assembled exercised de facto and de jure a sovereign authority, not as the delegated agents of the government de facto of the colonies, but in virtue of the original powers derived from the people," is, to say the least of it, very bold, in one who had undoubtedly explored all the sources of information upon the subject. Until the adoption of the Articles of Confederation, Congress had no "original powers," except only for deliberation and advisement, and claimed no "sovereign authority " whatever. It was an occasional, and not a permanent body, or one renewable from time to time. Although they did, in many instances, "exercise de facto" a power of legislation to a certain extent, yet they never held that power "de jure," by any grant from the colonies or the people; and the acts became valid only

by subsequent confirmation of them, and not because they had any delegated authority to perform them. The whole history of the period proves this, and not a single instance can be cited to the contrary. The course of the revolutionary government throughout attests the fact, that, however the people may have occasionally acted, in pressing emergencies, without the intervention of the authorities of their respective colonial governments, they never lost sight of the fact that they were citizens of separate colonies, and never, even impliedly, surrendered that character, or acknowledged a different allegiance. In all the acts of Congress, reference was had to the colonies, and never to the people. That body had no power to act directly upon the people, and could not execute its own resolves as to most purposes, except by the aid and intervention of the colonial authorities. Its measures were adopted by the votes of the colonies as such, and not by the rule, of mere numerical majority. Which prevails in every legislative assembly of an entire nation. This fact alone is decisive to prove, that the members were not the representatives of the people of all the colonies, for the judgment of each colony was pronounced by its own members only, and no others had any right to mingle in their deliberations. What, then, was this "sovereign authority?" What was the nature, what the extent of its "original powers?" From what "people" were these powers derived? I look in vain for answers to these questions to any historical record which has yet met my view, and have only to regret that Judge Story has not directed me to better guides.

CHAPTER IV.

THE NATURE AND EXTENT OF POWERS EXERCISED BY THE REVOLUTIONARY GOVERNMENT DID NOT MAKE THE COLONIES ONE PEOPLE.

Judge Story's conclusion is not better sustained by the nature and extent of the powers exercised by the revolutionary government. It has already been stated, that no original powers of legislation were granted to the Congresses of 1774 and 1775; and it is only from their acts that we can determine what powers they actually exercised. The circumstances under which they were called into existence precluded the possibility of any precise limitations of their powers, even if it had been designed to clothe them with the functions of government. The colonies were suffering under common oppressions, and were threatened with common dangers, from the mother country. The great object which they had in view was to produce that concert of action among themselves which would best enable them to resist their common enemy, and best secure the safety and liberties of all. Great confidence must necessarily be reposed in public rulers under circumstances of this sort. We may well suppose, therefore, that the revolutionary government exercised every power which appeared to be necessary for the successful prosecution of the great contest in which they were engaged; and we may, with equal propriety, suppose that neither the people nor the colonial governments felt any disposition to scrutinize very narrowly any measure which promised protection and safety to themselves. They knew that the government was temporary only; that it was permitted only for a particular and temporary object, and that they could at any time recall any and every power which it had assumed. It would be a violent and forced inference, from the powers of such an agency, (for was not a government, although I have sometimes, for convenience, called it so), however great they might be, to say that the people, or States, which established it, meant thereby to me their distinctive character, to merge their distinctive character, to surrender all the rights and privileges which belonged to them as separate communities, and to consolidate themselves into one nation.

In point of fact, however, there was nothing in the powers, exercised by the revolutionary government, so far as they can be known from their acts, inconsistent with the perfect sovereignty and independence of the States. These were always admitted in terms, and were never denied in practice. So far as external relations were concerned, Congress seems to have exercised every power of a supreme government. They assumed the right to "declare war and to make peace; to authorize captures; to institute appellate prize courts; to direct and control all national military and naval operations; to form alliances and make treaties; to contract debts and issue bills of credit on national account." These powers were not "exclusive," however, as our author supposes. On the contrary, troops were raised, vessels of war were commissioned, and various military operations were conducted by the colonies, on their own separate means and authority. Ticonderoga was taken by the troops of Connecticut before the Declaration of Independence; Massachusetts and Connecticut fitted out armed vessels to cruise against those of England, in October, 1775; South Carolina soon followed their example. In 1776, New Hampshire authorized her executive to issue letters of marque and reprisal.

These instances are selected out of many, as sufficient to show that in the conduct of the war Congress possessed no "exclusive" power, and the colonies (or States) retained, and actually asserted, their own sovereign right and power

as to that matter. And not as to that matter alone, for New Hampshire established post offices. The words of our author may, indeed, import that the power of Congress over the subject of war was "exclusive" only as to such military and naval operations as he considers national, that is, such as were undertaken by the joint power of all the colonies; and, if so, he is correct. But the comma after the word "national " suggests a different interpretation. At all events, the facts which I have mentioned prove that Congress exercised no power which was considered as abridging the absolute sovereignty and independence of the States.

Many of those powers which, for greater convenience, were entrusted exclusively to Congress, could not be effectually exerted except by the aid of the State authorities. The troops required by Congress were raised by the States, and the commissions of their officers were countersigned by the Governors of the States. Congress were allowed to issue bills of credit, but they could not make them a legal tender, nor punish the counterfeiter of them. Neither could they bind the States to redeem them, nor raise by their own authority the necessary funds for the purpose. Congress received ambassadors and other public ministers, yet they had no power to extend to them that protection which they receive from the government of every foreign nation. A man by the name of De Longchamps entered the house of the French Minister Plenipotentiary in Philadelphia, and there threatened violence to the person of Francis Barbe Marboise, Secretary of the French Legation, Consul General of France, and Consul for the State of Pennsylvania; he afterwards assaulted and beat him in the public street. For this offence, he was indicted and tried in the Court of Oyer and Terminer of Philadelphia, and punished under its sentence. The case turned chiefly upon the law of nations, with reference to the protection which it affords to foreign ministers. A question was made, whether the authorities of Pennsylvania should not deliver up De Langechamps to the French Government, to be dealt with at their pleasure. It does not appear that the Federal Government was considered to possess any power over the subject, or that it was deemed proper to invoke its counsel or authority in any form. This case occurred in 1784, after the adoption of the Articles of Confederation; but if the powers of the Federal Government were less under those articles than before, it only proves that, however great its previous powers may have been, they were held at the will of the States, and were actually recalled by the Articles of Confederation. Thus it appears that, in the important functions of raising an army, of providing a public revenue, of paying public debts, and giving security to the persons of foreign ministers, the boasted "sovereignty" of the Federal Government was merely nominal, and owed its entire efficiency to the co-operation and aid of the State governments. Congress had no power to coerce these governments; nor could it exercise any direct authority over their individual citizens.

Although the powers actually assumed and exercised by Congress were certainly very great, they were not always acquiesced in, or allowed, by the States. Thus, the power to lay an embargo was earnestly desired by them, but was denied by the States. And in order the more clearly to indicate that many of their powers were exercised merely by sufferance, and at the same time to lend a sanction to their authority so far as they chose to allow it, it was deemed necessary, by at least one of the States, to pass laws indemnifying those who might act in obedience to the resolutions of that body.[Error! Bookmark not defined.]

A conclusive proof, however, of the true relation which the colonies hold to the revolutionary government, even in the opinion of Congress itself, is furnished by their own journals. In June, 1776, that body recommended the passing of laws for the punishment of treason; and they declare that the crime shall be considered as committed against the colonies individually, and not against them all, as united or confederated together. This could scarcely have been so, if they had considered themselves "a government de facto and de jure," clothed with "sovereign authority." The author, however, is not satisfied to rest his opinion upon historical facts; he seeks also to fortify himself by a judicial decision. He informs us that, "soon after the organization of the present government, the question [of the powers of the Continental Congress] was most elaborately discussed before the Supreme Court of the United States, in a case calling for an exposition of the appellate jurisdiction of Congress in prize causes, before the ratification of the Confederation. The result of that examination was, that Congress, before the Confederation, possessed, by the consent of the people of the United States, sovereign and supreme powers for national purposes; and, among others, the supreme powers of peace and war, and, as an incident, the right of entertaining appeals in the last resort, in prize causes, even in opposition to State legislation. And that the actual powers exercised by Congress, in respect to national objects, furnished the best exposition of its constitutional authority, since they emanated from the people, and were acquiesced in by the people."

There is in this passage great want of accuracy, and perhaps some want of candor. The author, as usual, neglects to cite the judicial decision to which he alludes, but it must be the case of Penhallow and others against Doane's administrators. (3 Dallas' Reports, 54.) Congress, in November, 1775, passed a resolution, recommending to the several colonies to establish prize courts, with a right of appeal from their decisions to Congress. In 1776, New Hampshire accordingly passed a law upon the subject, by which an appeal to Congress was allowed in cases of capture by vessels in the service of the united colonies; but where the capture was made by "a vessel in the service

of the united colonies and of any particular colony or person together," the appeal was allowed to the Superior Court of New Hampshire. The brigantine Susanna was captured by a vessel owned and commanded by citizens of New Hampshire, and was duly condemned as prize by her own Court of Admiralty. An appeal was prayed to Congress and denied; and thereupon an appeal to the Superior Court of New Hampshire was prayed and allowed. From the decision of this Court an appeal was taken to Congress, in the mode prescribed by their resolution, and the case was disposed of by the Court of Appeals, appointed by Congress to take cognizance of such cases. After the adoption of the present Constitution and the organization of the judiciary system under it, a libel was filed in the District Court of New Hampshire, to carry into effect the sentence of the Court of Appeals above mentioned. The cause being legally transferred to the Circuit Court, was decided there, and an appeal allowed to the Supreme Court. That Court, in its decision, sustains the jurisdiction of the Court of Appeals established by Congress. Mr. Justice Patterson's opinion is founded mainly upon these grounds: That the powers actually exercised by Congress ought to be considered as legitimate, because they were such as the occasion absolutely required, and were approved and acquiesced in by "the people"; that the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign, supreme power of war and peace; that this power was lodged in the Continental Congress by the consent and acquiescence of "the people"; that the legality of all captures on the high seas must be determined by the law of nations; that New Hampshire had committed herself upon this subject, by voting in favor of the exercise of the same power by Congress in the case of the brig Active; and as the commission, under which the capture in the case under consideration was made, was issued by Congress, it resulted, of necessity, that the validity of all captures made by virtue of that commission, should be judged of by Congress, or its constituted authority, because "every one must be amenable to the authority under which he acts." It is evident that this opinion, while it sustains the authority of Congress in the particular case, does not prove its general supremacy, nor that the States had surrendered to it any part of their sovereignty and independence. On the contrary, it affirms that the "sovereign and supreme power of war and peace" was assumed by Congress, and that the exercise of it became legitimate, only because it was approved and acquiesced in; and that thus legitimated, the appellate jurisdiction in prize cases followed as a necessary incident. All the powers, which Patterson contends for as exercised by Congress, may all be conceded, without in the slightest degree affecting the question before us; they were as consistent with the character of a federative, as with that of a consolidated government. He does not tell us to what people he alludes, when he says the powers exercised by Congress were approved and ratified by "the people." He does not, in any part of his opinion, authorize the idea of the author, that "Congress possessed, before the Confederation, by the consent of the people of the United States, sovereign and supreme powers for national purposes." On the contrary, as to one of these powers, he holds the opposite language; and, therefore, it is fair to presume, that he intended to be so understood in regard to all the rest. This is his language: "The authority exercised by Congress, in granting commissions to privateers, was approved and ratified by the several colonies or States, because they received and filled up the commissions and bonds, and returned the latter to Congress." This approval and ratification alone rendered, in his opinion, the exercise of this, and other similar powers assumed by Congress, legitimate.

Judge Iredell, in delivering his opinion, goes much more fully into the examination of the powers of the revolutionary government. He thinks that, as the power of peace and war was entrusted to Congress, they held, as a necessary incident, the power to establish prize courts; and that whatever powers they did in fact exercise, were acquiesced in and consented to, and, consequently, legitimated and confirmed. But he leaves no room to doubt as to the source whence this confirmation was derived. After proving that the several colonies were, to all intents and purposes, separate and distinct, and that they did not form "one people" in any sense of the term, he says: "If Congress, previous to the Articles of Confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province, in the first instance." "The authority was not possessed by Congress, unless given by all the States." "I conclude, therefore, that every particle of authority, which originally resided either in Congress or in any branch of the State governments, was derived from the people who were permanent inhabitants of each province, in the first instance, and afterwards became citizens of each State; that this authority was conveyed by each body separately, and not by all the people in the several provinces or States jointly." No language could be stronger than this, to disarm Judge Story's conclusion, that the powers exercised by Congress were exercised "by the consent of the people of the United States." Certainly, Iredell did not think so.

The other two Judges, Blair and Cushing, affirm the general propositions upon which Patterson and Iredell sustained the power of Congress in the particular case, but lend us no support to the idea of any such unity among the people of the several colonies or States, as our author supposes to have existed. Cushing, without formally discussing the question, expressly says that "he has no doubt of the sovereignty of the States."'

This decision, then, merely affirms, what no one has ever thought of denying, that the revolutionary government exercised every power which the occasion required; that, among these, the powers of peace and war were most important, because Congress, alone, represented all the colonies, and could, alone, express the general will, and wield the general strength; that wherever the powers of peace and war are lodged, belongs also the right to decide all questions touching the laws of nations; that prize causes are of this character; and, finally, that all these powers were not derived from any original grant, but are to be considered as belonging to Congress, merely because Congress exercised them, and because they were sustained in so doing by the approbation of the several colonies or States, whose representatives they were. Surely, then, our author was neither very accurate nor very candid in so stating this decision as to give rise to the idea that, in the opinion of the Supreme Court, Congress possessed original sovereign powers, by the consent of "the people of the United States." Even, however, if they court had so decided, in express terms, it would have been of no value in the present inquiry, as will by-and-by be shown.

The examination of this part of the subject has probably already been drawn out to too great an extent; but it would not be complete without some notice of another ground, upon which our author rests his favorite idea — that the people of the colonies formed, "one people," or nation. Even if this unity was not produced by the appointment of the revolutionary government, or by the nature of the powers exercised by them, and acquiesced in by the people, he thinks there can be no doubt that this was the necessary result of the Declaration of independence. In order that he may be fully understood upon this point, I will transcribe the entire passage relating to it: "In the next place, the colonies did not severally act for themselves, and proclaim their own independence.[Error! Bookmark not defined.] It is true that some of the States had previously formed incipient governments for themselves; but it was done in compliance with the recommendations of Congress. Virginia, on the 29th of June, 1776, by a convention of delegates, declared 'the government of this country, as formerly exercised under the Crown of Great Britain, totally dissolved,' and proceeded to form a new constitution of government. New Hampshire also formed a new government, in December, 1775, which was manifestly intended to be temporary, 'during,' as they said, 'the unhappy and unnatural contest with Great Britain.' New Jersey, too, established a frame of government, on the 2d July, 1776; but it was expressly declared that it should be void upon a reconciliation with Great Britain. And South Carolina, in March, 1776, adopted a constitution of government; but this was in like manner 'established until an accommodation between Great Britain and America could be obtained.' But the declaration of the independence of all the colonies was the united act of all. It was 'a declaration of the representatives of the United States of America, in Congress assembled;' 'by the delegates appointed by the good people of the colonies,' as in a prior declaration of rights, they were called. It was not an act done by the State governments then organized, nor by persons chosen by them. It was emphatically the act of the whole people of the united colonies, by the instrumentality of their representatives, chosen for that, among other purposes. It was an act not competent to the State governments, or any of them, as organized under their charters to adopt. Those charters neither contemplated the case nor provided for it. It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness. So the Declaration of Independence treats it. No State had presumed, of itself, to form a new government, or to provide for the exigencies of the times, without consulting Congress on the subject; and when they acted, it was in pursuance of the recommendation of Congress. It was, therefore, the achievement of the whole, for the benefit of the whole. The people of the united colonies made the united colonies free and independent States, and absolved them from allegiance to the British Crown. The Declaration of Independence has, accordingly, always been treated as an act of paramount and sovereign authority, complete and perfect per se; and ipso facto working an entire dissolution of all political, connection with, and allegiance to, Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice." The first question which this passage naturally suggests to the mind of the reader is this: if two or more nations of people, confessedly separate, distinct and independent, each having its own peculiar government, without any "direct political connection with each other," yet owing the same allegiance to one common superior, should unite in a declaration of rights which they believed belonged to all of them all, would that circumstance alone make them "one people?" Stripped of the circumstances with which Judge Story has surrounded it, this is, at last, the only proposition involved. If Spain, Naples, and Holland, while they were "dependencies" of the Imperial Crown of France, had united in declaring that they were oppressed, in the same mode and degree, by the measures of that Crown, and that they did, for that reason, disdain all allegiance to it, and assume the station of "free and independent States," would they thereby have become one people? Barely this will not be asserted by any one. We should see, in that act, nothing more than the union of several independent sovereignties, for the purpose of effecting a common object, which each felt itself too weak to effect alone. Nothing would be more natural, than that nations so situated should establish a common military power, a common treasury, and a common agency, through which, to carry on their intercourse with other powers; but that all this should unite

them together, so as to form them into one nation, is a consequence not readily perceived. The case here supposed is precisely that of the American colonies, if those colonies were, in point of, fact, separate, distinct, and independent of one another. If they were so, (and I think it has been shown that they were), then the fact that they united in the Declaration of Independence does not make them "one people" any more than a similar declaration would have made Spain, Naples and Holland one people; if they were not so, then they were one people already, and the Declaration of Independence did not render them more or less identical. It is true, the analogy here supposed does not hold in every particular; the relations of the colonies to one another were certainly closer, in many respects, than those of Spain, Naples and Holland, to one another. But as to all purposes involved in the present inquiry, the analogy is perfect. The effect attributed to the Declaration of Independence presupposes that the colonies were not "one people" before; an effect which is in no manner changed or modified by any other circumstance in their relation to one another. That fact, alone, is necessary to be inquired into; and until that fact is ascertained, the author's reasoning as to the effect of the Declaration of Independence, in making them "one people," does not apply. He is obliged, therefore, to abandon the ground previously taken, to wit: that the colonies were one people before the Declaration of Independence. And having abandoned it, he places the colonies, as this question, upon the footing of any other separate and distinct nations; and, as to these, it is quite evident that the conclusion which he has drawn, in the case of the colonies, could not be correct, unless it would be equally correct in the case of Spain, Naples and Holland, above supposed.

CHAPTER V.

THE DECLARATION OF INDEPENDENCE DID NOT CONSOLIDATE THE COLONIES INTO ONE PEOPLE.

The mere fact, then, that the colonies united in the Declaration of Independence, did not necessarily make them one people. But it may be said that this fact ought, at least, to be received as proof that they considered themselves as one people already. The argument is fair, and freely let it go for what it is worth. The opinion of the Congress of 1775, whatever it may have been, and however strongly expressed, could not possibly change the historical facts. It depended upon those facts, alone, whether the colonies were one people or not. They might by their agreement, expressed through their agents in Congress, make themselves one people through all time to come; but their power, as to this matter, could not extend to the time past. Indeed, it is contended, not only by Judge Story, but by others, that the colonies did, by and in that act, agree, to become "one people" for the future. They suppose that such agreement is implied, if not expressed, in the following passages: "We, therefore, the representatives of the United States of America," "do, in the name and by the authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent States." Let us test the correctness of this opinion, by the history of the time, and by the rules of fair criticism.

The Congress of 1775, by which independence was declared, was appointed, as has been before shown, by the colonies in their separate and distinct capacity, each acting for itself, and not conjointly with any other. They were the representatives each of his own colony, and not of any other; each had authority to act in the name of his own colony, and not in that of any other; each colony gave its own vote by its own representatives, and not by those of any other colony. Of course, it was as separate and distinct colonies that they deliberated on the Declaration of Independence. When, therefore, they declare, in the adoption of that measure, that they act as "the representatives of the United States of America," and "in the name and by the authority of the good people of these colonies," they must of course be understood as speaking in the character in which they had all along acted; that is, as the representatives of separate and distinct colonies, and not as the joint representatives of any one people. A decisive proof of this is found in the fact that the colonies voted on the adoption of that measure in their separate character, each giving one vote by all its own representatives, who acted in strict obedience to specific instructions from their respective colonies, and the members signed the Declaration in that way. So, also, when they declared that "these united colonies are, and of right ought to be, free and independent States," they meant only that their respective communities, which until then had been dependent colonies, should thereafter be independent States, and that the same union, which existed between them as colonies, should be continued between them as States. The measure under consideration looked only to their relation to the mother country, and not to their relation to one another; and the sole question before them was, whether they should continue in a state of dependence on the British Crown or not. Having determined that they would not, they from that moment ceased to be colonies, and became States; united, precisely as before, for the common purpose of achieving their common liberty. The idea of forming a closer union, by the mere act of declaring themselves independent, could scarcely have occurred to any one of them. The

necessity of such a measure must be apparent to all, and it had long before engaged their attention in a different form. Men, of their wisdom and forecast, meditating a measure so necessary to their common safety, would not have left it as a mere matter of inference from another measure in point of fact, it was already before them, in the form of a distinct proposition, and had been so ever since their first meeting in May, 1775,[Error! Bookmark not defined.] it is impossible to suppose, therefore, in common justice to the sagacity of Congress, that they meant anything more by the Declaration of Independence, than simply to sever the tie which had theretofore bound them to England, and to assert the rights of the separate and distinct colonies, as separate and independent States particularly as the language which they use is fairly susceptible of this construction. The instrument itself is entitled, "The Unanimous Declaration of the Thirteen United States of America"; of States, separate and distinct bodies politic, and not of "one people" or nation, composed of all of them together; "united," as independent States may be, by compact or agreement, and not amalgamated, as they would be, if they formed one nation or body politic.

Is it true, then, as Judge Story supposes, that "the colonies did not severally act for themselves, and proclaim their own independence?" It is true that they acted together; but is it not equally true that each acted for itself alone, without pretending to any right or authority to bind any other? Their declaration was simply their joint expression of their separate wills; each expressing its own will, and not that of any other; each bound by its own act, and not responsible for the act of any other. If the colonies had severally declare their independence through their own legislatures, and had afterwards agreed to unite their forces together to make a common cause of their contest, and to submit their common interests to the management of a common council chosen by themselves, wherein would their situation have been different? And is it true that this Declaration of Independence "was not an act done by the State governments then organized, nor by persons chosen by them?" that "it was emphatically the act of the whole people of the united colonies, by the instrumentality of their representatives chosen for that, among other purposes?" What representatives were those that were chosen by "the people of the united colonies?" When and how were they chosen? Those who declared the colonies independent, were chosen more than a year before that event; they were chosen by the colonies separately, and, as has already been shown, through the instrumentality of their own "governments then organized"; they were chosen, not for the "purpose" of declaring the colonies independent, but of protecting them against oppression, and bringing about a reconciliation with the parent country, upon fair terms, if possible. (Jefferson's Notes, 1st ed., 128, 129.) If there were any other representatives than those concerned in the Declaration of Independence, if that act was performed by representatives chosen by the whole people of the colonies, for that or any other purpose, if any such representatives could possibly have been chosen by the colonies as then organized, no historical record, that has yet met my view, contains one syllable of the matter.

The author seems to attach but little importance to the fact, that several of the colonies had established separate governments for themselves, prior to the Declaration of Independence. He regards this as of little consequence; because he thinks that the colonies so acted only in pursuance of the recommendation of Congress, and would not have "presumed" to do it, "without consulting Congress upon the subject"; and because the governments so established were, for the most part, designed to be temporary, and to continue only during the contest with England. Such recommendation was given in express terms, to New Hampshire and South Carolina, in November, 1775, and to Virginia in December of that year; and on the 10th May, 1776, "it was resolved to recommend to the respective, assemblies and conventions of the united colonies where no government sufficient to the exigencies of their affairs had been established, to adopt such a government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their Constituents in particular, and of America in general." The preamble to this resolution was not adopted till, the 15th May. (1 Elliott's Debates, 80, 83.) It is evident from the language here employed, that Congress had no power over the colonies as to this matter, and no right to influence or control them in the exercise of the important function of forming their own governments. It recommended only; and contemplating the colonies as separate and distinct, referred it to the assembly or convention of each, to establish any form of government which might be acceptable to its own people. Of what consequence was it whether the colonies noted upon the recommendation and advice of others, or merely upon their own will and counsels? With whatever motive the act was performed, it was one of supreme and sovereign power, and such as could not have been performed except by a sovereign people. And whether the government so established was intended to last forever, or only for a limited time, did not affect its character as an act of sovereign power. In point of fact, then, the colonies which established such governments did, by that very act, assert their sovereignty and independence. They had no power under their charters, to change their governments. They could do so only by setting their charters aside, and acting upon their inherent, sovereign right: and this was revolution. In effect, therefore, many of the colonies had declared their independence prior to the 4th July, 1776; they had commenced the revolution, and were considered by England as in a state of rebellion. Of Virginia this is emphatically true. Her declaration of rights was made on the 12th of June, 1776; and her Constitution was adopted on the 28th of the same month. This Constitution

continued until 1829. Her subsequent declaration of independence, on the 4th of July, in common with the other colonies, was but a more public, though not a more solemn affirmation of what she had previously done; a pledge to the whole world, that what she had resolved on in her separate character, she would unite with the other colonies in performing. She could not declare herself free and independent more distinctly, in that form, than she had already done, by asserting her sovereign and irresponsible power, in throwing off her former government, and establishing a new one for herself.Error! Bookmark not defined.

There is yet another view of this subject, which cannot be properly omitted. It has already been shown that, prior to the Revolution, the colonies were separate and distinct, and were not, in any political sense, or for any purpose of government, "one people." The sovereignty over them was in the British Crown; but that sovereignty was not jointly over all, but separately over each, and might have been abandoned as to some, and retained so to others. The Declaration of Independence broke this connection. By that act, and not by the subsequent recognition of their independence, the colonies became free States. What then became of the sovereignty of which we speak? It could not be in abeyance; the moment it was lost by the British Crown, it must have vested somewhere else. Doubtless it vested in the States themselves. But, as they were separate and distinct as colonies, the sovereignty over one could not vest, either in whole or in part, in any other. Each took to itself that sovereignty which applied to itself, and for which alone it had contended with the British Crown, to wit: the sovereignty over itself. Thus each colony became a free and sovereign State. This is the character which they claim in the very terms of the Declaration of Independence; in this character they formed the Colonial Government, and in this character that government always regarded them. Indeed, even in the earlier treaties with foreign powers, the distinct sovereignty of the States is carefully recognized. Thus, the treaty of alliance with France, in 1778, is made between "the most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut," &c., enumerating them all by name. The same form is observed in the treaty of amity and commerce with the States General of the United Netherlands, in 1782, and in the treaty with Sweden, in 1783. In the convention with the Netherlands, in 1782, concerning recaptured vessels, the names of the States are not recited, but "the United States of America" is the style adopted; and so also in some others. This circumstance shows that the two forms of expression were considered equivalent; and that foreign nations, in treating with the revolutionary government, considered that they treated with distinct sovereignties, through their common agent, and not with a new nation, composed of all those sovereign countries together. It is true, they treated with them jointly, and not severally; they considered themselves all bound to the observance of their stipulations, and they believed that the common authority, which was established between and among them, was sufficient to secure that object. The provisional articles with Great Britain, in 1782, by which our independence was acknowledged, proceeded upon the same idea. The first, article declares, that "His Britannic Majesty acknowledges the said United States, to wit: New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free, sovereign and independent States that he treats with them as such," &c. Thus the very act, by which their former sovereign releases them from their allegiance to him, confirms to each one by name the sovereignty within its own limits, and acknowledges it to be a free, sovereign, and independent State; united, indeed, with all the others, but not as forming with them tiny new and separate nation. The language employed is not suited to convey any other idea. If it had been in the contemplation of the parties, that the States had merged themselves into a single nation, something like the following formula would naturally have suggested itself as proper: "His Britannic Majesty acknowledges that New Hampshire, Massachusetts Bay, &c., former colonies of Great Britain and now united together as one people, are a free, sovereign and independent State," &c. The difference between the two forms of expression, and the strict adaptation of each to the state of things which it contemplates, will be apparent to every reader.

It requires strong and plain proof to authorize us to say, that a nation once sovereign has ceased to be so. And yet Judge Story requires us to, believe this of the colonies, although he acknowledges that he cannot tell, with any degree of confidence or precision, when, how, or to what extent the sovereignty, which they acquired by declaring their independence, was surrendered. According to him, the colonies are to be presumed to have yielded this sovereignty to a government established by themselves for a special and temporary purpose, which existed only at their will, and by their aid and support; whose powers were wholly undefined, and for the most part exercised by usurpation on its part, and legitimated only by the acquiescence of those who appointed it; whose authority was without any adequate sanction which it could itself apply, and which, as to all the important functions of sovereignty, was a mere name — the shadow without the substance! If the fact was really so, I venture to affirm that the history of the world affords no similar instance of folly and infatuation.Error! Bookmark not defined.

CHAPTER VI.

THE ARTICLES OF CONFEDERATION DO NOT IMPAIR THE SOVEREIGNTY OF THE STATES, NOR CONSOLIDATE THEM INTO ONE PEOPLE.

Whatever may have been the condition of the colonies prior to 1781, there is no room for doubt on the subject, after the final ratification of the Articles of Confederation in that year. Those articles declare that "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The obvious construction of this clause requires that we should apply these latter words only to "powers, jurisdiction and rights"; some of which, as enjoyed by the States under the previous government, were clearly surrendered by the Articles of Confederation. But their entire sovereignty, their entire freedom, and their entire independence, are reserved, for these are not partible. Indeed, this is clear enough, from the provisions of that instrument, which, throughout, contemplate the States as free, sovereign and independent.[Error! Bookmark not defined.] It is singular, too, that it should escape the observation of any one, that the very fact of adopting those articles, and the course pursued in doing so, attest, with equal clearness and strength, the previous sovereignty and independence of the States. What had the States in their separate character to do with that act, if they formed altogether "one people?" And yet the States, and the States alone, performed it, each acting for itself, and binding itself. The articles were confirmed by ten States, as early as 1778, by another in 1779, and by another in 1780; and yet they were not obligatory until Maryland acceded to them, in 1781. Nothing less than the ratification of them by all the States, each acting separately for itself, was deemed sufficient to give them any binding force or authority.

There is much force and meaning in the word "retains," as it occurs in the clause above quoted. Nothing can properly be said to be retained, which was not possessed before; and of course the States possessed before "sovereignty, freedom, and independence." These they retained without any qualification, or limitation, and they also retained every "power, jurisdiction, and right," which they did not then, expressly surrender.

If these views on the subject be not wholly deceptive, Judge Story has hazarded, without due caution, the opinion that the colonies formed "one people," either before or after the Declaration of Independence, and that they are not to be regarded as sovereign States after that event. For myself, I profess my utter inability to perceive, in their condition, any nearer approach to political personality or individuality, than may be found in a mere league or confederation between sovereign and independent States; and a very loose confederation theirs undoubtedly was.[Error! Bookmark not defined.]

CHAPTER VII.

THE CONSTITUTION DID NOT CHANGE THE SOVEREIGN ATTITUDE OF THE STATES, OR CONSOLIDATE THEM INTO A NATIONAL GOVERNMENT

The third division of Judge Story's work commences with a history of the adoption of the Constitution. This also is given in an abridged form; but it omits nothing which can be considered material to the inquiry. Perhaps the author has fallen into one error, an important one, certainly, in stating that "at the time and place appointed, the representatives of twelve States assembled." When the deputies first met in Philadelphia, in May, 1787, the representatives of only nine States appeared; they were, soon after, joined by those of three others. The author next proceeds to state the various objections which were urged against the Constitution, with the replies thereto; to examine the nature of that instrument to ascertain whether it be a compact or not; to inquire who is the final judge or interpreter in Constitutional controversies; to lay down rules of interpretation; and, finally, to examine the Constitution in its several departments and separate clauses. In the execution of this part of his task he has displayed great research, laborious industry, and extensive judicial learning. The brief summary which he has given of the arguments by which the Constitution was assailed on the one hand, and defended on the other, is not only interesting as matter of history, but affords great aid in understanding that instrument. We should be careful, however, not to attach to these discussions an undue importance. All the members of the various conventions did not engage in the debates, and, of course, we have no means of determining by what process of reasoning they were led to their conclusions. And we cannot reasonably suppose that the debaters always expressed their deliberate and well weighed opinions in all the arguments, direct and collateral, by which they sought to achieve a single great

purpose. We are not, therefore, to consider the Constitution as the one thing or the other, merely because some of the framers, or some of the adopters of it, chose to characterize it in their debates. Their arguments are valuable as guides to our judgments, but not as authority to bind them.

In the interpretation of the Constitution, the author founds himself, whenever he can, upon the authority of the Supreme Court. This was to be expected; for, in so doing, he has, in most cases, only reiterated his own judicial decisions. We could not suppose that one, whose opinions are not lightly adopted, would advance, as a commentator, a principle which he rejected as a judge. In most cases, too, no higher authority in the interpretation of the Constitution is known in our systems, and none better could be desired. It is only in questions of political power, involving the rights of the States in reference to the Federal Government; that any class of politicians are disposed to deny the authority of the judgments of the Supreme Court.[Error! Bookmark not defined.] We shall have occasion to examine this subject more at large, in a subsequent part of this review.

In discussing the various clauses of the Constitution, Judge Story displays great research, and a thorough acquaintance with the history of that instrument. It is not perceived, however, that he has presented any new views of it, or offered any new arguments in support of the constructions which it has heretofore received. As a compendium of what others have said and done upon the subject, his work is very valuable. It facilitates investigation, whilst, at the same time, it is so full of matter, as to render little farther investigation necessary. Even in this view of the subject, however, it would have been much more valuable if it had contained references to the authorities on which its various positions are founded, instead of merely extracting their substance. The reader who, with his book as his guide, undertakes to acquaint himself with the Constitution of the United States, must take the authority of the author as conclusive, in most cases; or else he will often find himself perplexed to discover the sources from which he derives his information. This is a great defect in a work of this sort, and is the less excusable, because it might have been easily avoided. A writer who undertakes to furnish a treatise upon a frame of government, in relation to which great and contested political questions have arisen, owes it alike to his reader and to himself, to name the sources whence he draws whatever information he ventures to impart, and the authorities upon which he founds whatever opinions he ventures to inculcate. The reader requires this for the satisfaction of his own judgement; and the writer ought to desire it as affording the best evidence of his own truth and candor.

In this division of the work, the author pursues the idea cautiously hinted in the first division, and more plainly announced in the second; and he now carries it out boldly in its results. Having informed us that, as colonies, we were "for many purposes one people," and that the Declaration of Independence made us "a nation de facto," he now assumes the broad ground that this "one people," or nation de facto, formed the Constitution under which we live. The consequences of this position are very apparent throughout the remainder of the work. The inferences fairly deduced from it impart to the Constitution its distinctive character, as the author understands it; and, of course, if this fundamental position be wrong, that instrument is not in many of its provisions, what he represents it to be. The reader, therefore, should settle this question for himself in the outset; because, if he differ from the author upon this point, he will be compelled to reject by far the most important part of the third and principal division of these commentaries.

The opinion, that the Constitution was formed by "the people of the United States," as contradistinguished from the people of the several States, that is, as contradistinguished from the States as such, is founded exclusively on the particular terms of the preamble. The language is: "We, the people of the United States, do ordain and establish this Constitution for the United States of America." "The people do ordain and establish, not contract and stipulate with each other." "The people of the United States, not the distinct people of a particular State with the people of the other States." In thus relying on the language of the preamble, Judge Story rejects the lights of history altogether. I will endeavor, in the first place, to meet him on his own ground.

It is an admitted rule, that the preamble of a statute may be resorted to in the construction of it; and it may, of course, be used to the same extent in the construction of a constitution, which is a supreme law. But the only purpose for which it can be used is to aid in the discovery of the true object and intention of the law, where these would otherwise be doubtful. The preamble can, in no case, be allowed to contradict the law, or to vary the meaning of its plain language. Still less can it be used to change the true character of the lawmaking power. If the preamble of the Constitution had declared that it was made by the people of France or England, it might, indeed, have been received as evidence of that fact, in the absence of all proof to the contrary; but surely it would not be so received against the plain testimony of the instrument itself, and the authentic history of the transaction. If the convention which formed the Constitution was not, in point of fact, a convention of the people of the United States, it had no right to give itself that title; nor had it any right to act in that character, if it was appointed by a different power. And if the Constitution, when formed, was adopted by the several States, acting through their separate Conventions, it is, historically untrue that it was adopted by the aggregate people of the United States. The preamble, therefore, is of

no sort of value in settling this question; and it is matter of just surprise that it should be so often referred to, and so pertinaciously relied on, for that purpose. History alone can settle all difficulties upon this subject.

The history of the preamble itself ought to have convinced our author, that the inference which he draws from it could not be allowed. On the 6th of August, 1787, the committee appointed for that purpose reported the first draft of a Constitution. The preamble was in these words: "We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, do ordain, declare and establish the following Constitution, for the government of ourselves and our posterity." (1 Elliott's Debates, 255.) On the very next day this preamble was unanimously adopted; and the reader will at once perceive, that it carefully preserves the distinct sovereignty of the States, and discountenances all idea of consolidation. (Ib. 263.) The draft of the Constitution thus submitted was discussed, and various alterations and amendments adopted, (but without any change in the preamble), until the 8th of September, 1787, when the following resolution was passed: "It was moved and seconded to appoint a committee of five, to revise the style of, and arrange the articles agreed to by, the House; which passed in the affirmative." (Ib. 324.) It is manifest that this committee had no power to change the meaning of anything which had been adopted, but were authorized merely to "revise the style," and arrange the matter in proper order. On, the 12th of the same month they made their report. The preamble, as they reported it, is in the following words "We, the people of the United States, in order to form a more perfect union,[Error! Bookmark not defined.] to establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." (Ib. 326.) It does not appear that any attempt was made to change this phraseology in any material point, or to reinstate the original. The presumption is, therefore, that the two were considered as substantially the same, particularly as the committee had no authority to make any change except in the style. The difference in the mere phraseology of the two was certainly not overlooked; for on the 13th September, 1787, "it was moved and seconded to proceed to the comparing of the report from the committee of revision, with the articles which were agreed to by the House, and to them referred to for arrangement; which passed in the affirmative. And the same was read by paragraphs, compared, and, in some places, corrected and amended," (Ib. 338.) In what particulars these corrections and amendments were made, we are not very distinctly informed. The only change which was made in the preamble, was by striking out the word "to," before the words "establish justice"; and the probability is, that no other change was made in any of the articles, except such as would make "the report of the committee of revision" "correspond with the articles agreed to by the House." The inference, therefore, is irresistible, that the convention considered the preamble reported by the committee of revision, as substantially corresponding with the original draft, as unanimously "agreed to by the House."

There is, however, another and a perfectly conclusive reason for the change of phraseology, from the States by name, to the more general expression "the United States"; and this, too, without supposing that it was intended thereby to convey a different idea as to the parties to the Constitution. The revised draft contained a proviso, that the Constitution should go into operation when adopted and ratified by nine States. It was, of course, uncertain whether more than nine would adopt it or not, and if they should not, it would be altogether improper to name them as parties to that instrument. As to one of them, Rhode Island, she was not even represented in the convention, and, consequently, the others had no sort of right to insert her as a party. Hence it became necessary to adopt a form of expression which would apply to those who should ratify the Constitution, and not to those who should refuse to do so. The expression actually adopted answers that purpose fully. It means simply: "We, the people of those States who have united for that purpose, do ordain," &c. This construction corresponds with the historical fact, and reconciles the language employed with the circumstances of the case. Indeed, similar language was not unusual, through the whole course of the Revolution. "The people of His Majesty's colonies," "the people of the united colonies," "the people of the United, States," are forms of expression which frequently occur, without intending to convey any other idea than that of the people of the Several colonies or States.

It is, perhaps, not altogether unworthy of remark, in reference to this inquiry, that the word "people" has no plural termination in our language. If it had, the probability is that the expression would have been "we, the peoples," conveying, distinctly, the idea of the people of the several States. But, as no such plural termination is known in our language, the least that we can say is, that the want of it affords no argument in favor of the author's position.

This brief history of the preamble, collected from the Journals of the Convention, will be sufficient to show that the author has allowed it an undue influence in his construction of the Constitution. It is not from such vague and uncertain promises, that conclusions, so important and controlling, can be wisely drawn. Judge Story, however, is perfectly consistent in the two characters in which he appears before us; the commentator takes no ground which the judge does not furnish. It is remarkable that although this question was directly presented in the case of Martin vs.

Hunter's Lessees, and although the fact that the Constitution of the United States "was ordained and established, not by the States in their sovereign capacities, but emphatically by the people of the United States," is made the foundation of the judgment of the Supreme Court in that case; yet, Judge Story, in delivering the opinion of the Court, rests that position upon the preamble alone, and offers no other argument whatever to support it. And this, too, although in his own opinion, upon the right decision of that case rested "some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution of the United States." It is much to be regretted, that principles so important should be advanced as mere dogmas, either by our judges or by the instructors of our youth.

In this case, as in others, however, we ought not to be satisfied with simply proving that the author's conclusions are not warranted by the facts and arguments from which he derives them. Justice to the subject requires a much more full and detailed examination of this important and fundamental question. I have endeavored to show, in the preceding part of this review, that the people of the several States, while in a colonial condition, were not "one people" in any political sense of the terms; that they did not become so by the Declaration of Independence, but that each State became a complete and perfect sovereignty within its own limits; that the revolutionary government, prior to the establishment of the confederation, was, emphatically, a government of the States as such, through Congress, as their common agent and representative, and that by the Articles of Confederation, each State expressly reserved its entire sovereignty and independence. In no one of the various conditions, through which we have hitherto traced them, do we perceive any feature of consolidation; but their character as distinct and sovereign States is always carefully and jealously preserved. We are, then, to contemplate them as sovereign States, when the first movements towards the formation of the present Constitution were made.

Judge Story has given a correct history of the preparatory steps towards the call of a convention. It was one of those remarkable events, (of which the history of the world affords many examples), which have exerted the most important influence upon the destiny of mankind, and yet have sprang from causes which did not originally look to any such results. It is true, the defects of the confederation, and its total inadequacy to the purposes of an effective government, were generally acknowledged; but I am not aware that any decisive step was taken in any of the States, for the formation of a better system, prior to the year 1786. In that year the difficulties and embarrassments under which our trade suffered, in consequence of the conflicting and often hostile commercial regulations of the several States, suggested to the Legislature of Virginia the necessity of forming among all the States a general system, calculated to advance and protect the trade of all of them. They accordingly appointed commissioners, to meet at Annapolis, commissioners from such of the other States as should approve of the proceeding, for the purpose of preparing a uniform plan of commercial regulations, which was to be submitted to all the States, and, if by them ratified and adopted, to be executed by Congress. Such of the commissioners as met, however, soon discovered that the execution of the particular trust with which they were clothed, involved other subjects not within their commission, and which could not be properly adjusted without a great enlargement of their powers. They, therefore, simply reported this fact, and recommended to their respective legislatures to appoint delegates to meet in general convention in Philadelphia, for the purpose not merely of forming a uniform system of commercial regulations, but of reforming the government in any and every particular in which the interests of the States might require it. This report was also submitted to Congress, who approved of the recommendation it contained, and on the 21st of February, 1787, resolved, "that in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union.'" (1 Elliott's Debates, 185.)

Such was the origin of the Convention of 1787. It is apparent that the delegates to that body were to be appointed by the "several States," and not by "the people of the United States"; that they were to report their proceedings to "Congress and the several legislatures," and not to "the people of the United States"; and that their proceedings were to be part of the Constitution, only when "agreed to in Congress and confirmed by the States," and not when confirmed by "the people of the United States." Accordingly, delegates were, in point of fact, appointed by the States; these delegates did, in point of fact, report to Congress and the States; and Congress did, in point of fact, approve, and the States did, in point of fact, adopt, ratify and confirm the Constitution which they formed. No other agency than that of the States as such, and of, Congress, which was strictly the representative of the States, is to be discerned in any part of this whole proceeding. We may well ask, therefore, from what unknown source our author derives the idea, that the Constitution was formed by "the people of the United States," since the history of the

transaction, even as he has himself detailed it, proves that "the people of the United States" did not appoint delegates to the Convention, were not represented in that body, and did not adopt and confirm its act as their own!
Even, however, if the question now before us be not, merely and exclusively, a question of historical fact, there are other views of it scarcely less decisive against our author's position. In the first place, I have to remark, that there were no such people as "the people of the United States," in the sense in which he uses those terms. The Articles of Confederation formed, at that time, the only government of the United States; and, of course, we are to collect from them alone the true nature of the connection of the States with one another. Without deeming it necessary to enumerate all the powers which they conferred on Congress, it is sufficient to remark that they were all exercised in the name of the States, as free, sovereign and independent States. Congress was, in the strictest sense, the representative of the States. The members were appointed by the States, in whatever mode each State might choose, without reference either to Congress or the other States. They could, at their own will and pleasure, recall their representatives, and send others in their places, precisely as any sovereign may recall his minister at a foreign court. The members voted in Congress by States, each State having one vote, whatever might be the number of its representatives! There was no President, or other common executive, head. The States alone, as to all the more important operations of the government, were relied on to execute the resolves of Congress. In all this, and in other features of the confederation, which it is unnecessary to enumerate, we recognize a league between independent sovereignties, and not one nation composed of all of them together. It would seem to follow, as a necessary consequence, that if the States, thus united together by league, did not form one nation, there could not be a citizen or subject of that nation. Indeed, Congress had no power to make such citizen, either by naturalization or otherwise. It is true, the citizens of every State were entitled, with certain exceptions, such as paupers, vagabonds, &c., to all the privileges of citizens of every other State, when within the territories thereof; but this was by express compact in the Articles of Confederation, and did not otherwise result from the nature of their political connection. It was only by virtue of citizenship in some particular State, that its citizens could enjoy within any other State the rights of citizens thereof. They were not known as citizens of the United States, in the legislation either of Congress or of the several States. He who ceased to be a citizen of some particular State, without becoming a citizen of some other particular State, forfeited all the rights of a citizen in each and all of the States. There was no one right which the citizen could exercise, and no one duty which he could be called on to perform, except as a citizen of some particular State. In that character alone could he own real estate, vote at elections, sue or be sued and in that character alone could he be called on to bear arms, or to pay taxes.
What, then, was this citizenship of the United States, which involved no allegiance, conferred no right and subjected to no duty? Who were "the people of the United States?" Where was their domicil, and what were the political relations which they bore to one another? What was their sovereignty, and what was the nature of the allegiance which it claimed? Whenever these questions shall be satisfactorily answered, designating the people of the several States, distinctively as such, I shall feel myself in possession of new and unexpected lights upon the subject.
Even, however, if we concede that there was such a people as "the people of the United States," our author's position is still untenable. I admit that the people of any country may, if they choose, alter, amend or abrogate their form of government, or establish a new one, without invoking the aid of their constituted authorities. They may do this, simply because they have the physical power to do it, and not because such a proceeding would be either wise, just, or expedient. It would be revolution in the strictest sense of the term. Be this as it may, no one ever supposed that this course was pursued in the case under consideration. Every measure, both for the calling of the convention and for the ratification of the Constitution, was adopted in strict conformity with the recommendations, resolutions and laws of Congress and the State legislatures. And as "the people of the United States" did not, in point of fact, take the subject into their own hands, independent of the constituted authorities, they could not do it by any agency of those authorities. So far as the Federal Government was concerned, the Articles of Confederation, from which alone it derived its power, contained no provision by which "the people of the United States" could express authoritatively a joint and common purpose to change their government. A law of Congress authorizing them to do so, would have been void, for want of right in that body to pass it. No mode, which Congress might have prescribed for ascertaining the will of the people upon the subject, could have had that sanction of legal authority, which would have been absolutely necessary to give it force and effect. It is equally clear that there was no right or power reserved to the States themselves, by virtue of which any such authoritative expression of the common will and purpose of all the States could have been made. The power and jurisdiction of each State was limited to its own territory; it had no power to legislate for the people of any other State. No single State, therefore, could have affected such an object; and if they had all concurred in it, each acting, as it was only authorized to act, for itself, that would have been strictly the action of the states as such, and as contradistinguished from the action of the mass of the people of all the States. If "the people of the United States" could not, by any aid to be derived from their

common government, have effected such a change in their Constitution, that government itself was equally destitute of all power to do so. The only clause in the Articles of the Confederation, touching this subject, is in the following words:

"And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in Congress of the United States and be afterwards confirmed by the legislature of every State."

Even if this power had been given to Congress alone, without subjecting the exercise of it to the negative of the States, it would still have been the power of the States in their separate and independent capacities, and not the power of the people of the United States, as contradistinguished from them. For Congress was, as we have already remarked, strictly the representative of the States; and each State, being entitled to one vote, and one only, was precisely equal, in the deliberation of that body, to each other State. Nothing less, therefore, than a majority of the States could have carried the measure in question, even in Congress. But, surely there could be no doubt that the power to change their common government was reserved to the States alone, when we see it expressly provided that nothing less than their unanimous consent, as States, should be sufficient to effect that object.

There is yet another view of this subject. It results from the nature of all government, freely and voluntarily established, that there is no power to change, except the power which formed it. It will scarcely be denied by anyone, that the confederation was a government strictly of the States, formed by them as such, and deriving all its powers from their consent and agreement. What authority was there, superior to the States, which could undo their work? What power was there, other than the States themselves, which was authorized to declare that their solemn league and agreement should be abrogated? Could a majority of the people of all the States have done it? If so, whence did they derive that right? Certainly not from any agreement among the States, or the people of all the States; and it could not be legitimately derived from any other source. If therefore, they had exercised such a power, it would have been a plain act of usurpation and violence, Besides, if we may judge from the apportionment of representation as proposed in the convention, a majority of the people of all the States were to be found in the four States of Massachusetts, New York, Pennsylvania and Virginia; so that, upon this idea, the people of less than one-third of all the States could change the Articles of Confederation, although those articles expressly provided that they should not be changed without the consent of all the States! There was then no power superior to the power of the States; and, consequently, there was no power which could alter or abolish the government which they had established. If the Constitution has superceded the Articles of Confederation, it is because the parties to those articles have agreed that it should be so. If they have not so agreed, there is no such Constitution, and the Articles of Confederation are still the only political tie among the States. We need not, however, look beyond the attestation of the Constitution itself, for full evidence upon this point. It professes to have been "done by the unanimous consent of the States present, &c.," and not in the name or by the authority of "the people of the United States."

But it is not the mere framing of a constitution which gives it authority as such. It becomes obligatory only by its adoption and ratification; and surely that act, I speak of free and voluntary government, makes it the constitution of those only who do adopt it. Let us ascertain, then, from the authentic history of the times, by whom our own Constitution was adopted and ratified.

The resolution of Congress already quoted, contemplates a convention "for the sole and express purpose of revising the Articles of Confederation," and reporting suitable "alterations and provisions therein." The proceedings of the convention were to be reported to Congress and the several legislatures, and were to become obligatory, only when "agreed to in Congress and confirmed by the States." This is precisely the course of proceeding prescribed in the Articles of Confederation. Accordingly, the new Constitution was submitted to Congress; was by them approved and agreed to, and was afterwards, in pursuance of the recommendation, of the convention, laid before conventions of the several States, and by them ratified and adopted. In this proceeding, each State acted for itself, without reference to any other State. They ratified at different periods; some of them unconditionally, and others with provisos and propositions for amendment. This was certainly State action, in as distinct a form as can well be imagined. Indeed, it may well be doubted whether any other form of ratification, than by the States themselves, would have been valid. At all events, none other was contemplated, since the Constitution itself provides, that it shall become obligatory, "when ratified by nine States," between the States ratifying the same. "The people of the United States," as an aggregate mass, are no where appealed to, for authority and sanction to that instrument. Even it they could have made it their Constitution, by adopting it, they could not, being as they were separate and distinct political communities, have united themselves into one mass for that purpose, without previously overthrowing their own municipal governments; and, even then, the new Constitution would have been obligatory only on those who agreed to and adopted it, and not on the rest.

The distinction between the people of the several States and the people of the United States, as it is to be understood in reference to the present subject, is perfectly plain. I have already explained the terms "a people," when used in a political sense. The distinction of which I speak may be illustrated, by a single example. If the Constitution had been made by "the people of the united states," a certain portion of those people would have had authority to adopt it in the absence of all express provision to the contrary, we may concede that a majority would, prima facie, have had that right. Did that majority, in fact, adopt it? Was it ever ascertained whether a majority of the whole people were in favor of it or not? Was there any provision, either of law or constitution, by which it was possible to ascertain that fact? It is perfectly well known that there was no such provision; that no such majority was ever ascertained, or even contemplated. Let us suppose that the people of the States of Massachusetts, New York, Pennsylvania and Virginia, containing, as we have seen they probably did, a majority of the whole people, had been unanimous against the Constitution, and that a bare majority of the people, in each of the other nine States acting in their separate character as States, had adopted and ratified. There can be no doubt, that it would have become the Constitution of the United States; and that, too, by the suffrages of a decided minority, probably not exceeding one-fourth of the aggregate people of all the States. This single example shows, conclusively that the people of the United States, as contradistinguished from the people of the several States, had nothing to do, and could not have an thing to do with the matter.

This brief history of the formation and adoption of the Constitution, which is familiar to the mind of every one who has attended to the subject at all, ought, as it seems to me, to be perfectly satisfactory and conclusive, and should silence for ever all those arguments, in favor of consolidation, which, are founded on the preamble to that instrument. I do not perceive with what propriety it can be said, that the "people of the United States" formed the Constitution, since they neither appointed the convention, nor ratified their act, nor otherwise adopted it as obligatory upon them. Even if the preamble be entitled to all the influence which has been allowed to it, Judge Story's construction of its language is not, as has already been remarked, the only one of which it is susceptible. "We, the people of the United States," may, without any violence to the rules of fair construction, mean "we, the people of the States united." In this acceptation, its terms conform to the history of the preamble itself, to that of the whole Constitution, and those who made it. In any other acceptation, they are either without meaning, or else they affirm what history proves to be false.[Error! Bookmark not defined.]

It would not, perhaps, have been deemed necessary to bestow quite as much attention on this part of the work, if it were not evident that the author himself considered it of great consequence, not as matter of history, but as warranting and controlling his construction of the Constitution, in some of its most important provisions. The argument is not yet exhausted, and I am aware that much of what I have said is trite, and that little, perhaps no part of it, is new. Indeed, the subject has been so often and so ably discussed, particularly in parliamentary debates, that it admits very few new views, and still fewer new arguments in support of old views. It is still, however, an open question, and there is nothing in the present condition of public opinion to deprive it of any portion of its original importance. The idea that the people of these States were, while colonists, and, consequently, are now, "one people," in some sense which has never been explained, and to some extent which has never been defined, is constantly inculcated by those who are anxious to consolidate all the powers of the States in the Federal Government. It is remarkable, however, that scarcely one systematic argument, and very few attempts of any sort, have yet been made to prove this important position. Even the vast and clear mind of the late Chief Justice of the United States, which never failed to disembarrass and elucidate the most obscure and intricate subject, appears to have shrunk from this. In all his judicial opinions in which the question has been presented, the unity or identity of the people of the United States has been taken as a postulatum, without one serious attempt to prove it. The continued repetition of this idea, and the boldness with which it is advanced, have, I am induced to think, given it an undue credit with the public. Few men, far too few, inquire narrowly into the subject, and even those who do, are not in general skeptical enough to doubt what is so often and so peremptorily asserted; and asserted, too, with that sort of hardy confidence which seems to say, that all argument to prove it true would be supererogatory and useless. It is not, therefore, out of place, nor out of time, to refresh the memory of the reader, in regard to those well established historical facts, which are sufficient in themselves to prove that the foundation on which the consolidationists build their theory, is unsubstantial and fallacious.

I would not be understood as contending, in what I have already said, that the Constitution is necessarily federative, merely because it was made by the States as such, and not by the aggregate people of the United States. I readily admit, that although the previous system was strictly federative, and could not have been changed except by the States who made it, yet there was nothing to prevent the States from surrendering, in the provisions of the new system which they adopted all their power, and even their separate existence, if they chose to do so. The true inquiry is, therefore, whether they have in fact done so or not; or, in other words, what is the true character, in this respect,

of the present Constitution. In this inquiry, the history of their previous condition, and of the Constitution itself, is highly influential and important.

The author, carrying out the idea of a unity between the people of the United States, which, in the previous part of his work, he had treated as a postulatum, very naturally, and indeed necessarily, concludes that the Constitution is not a compact among sovereign States. He contends that it is "not a contract imposing mutual obligations, and contemplating the permanent subsistence of parties having an independent right to construe, control, and judge of its obligations. If in this latter sense, it is to be deemed a compact, it must be, either because it contains, on its face, stipulations to that effect, or because it is necessarily implied, from the nature and objects of a frame of government."

There is a want of appositeness and accuracy in the first sentence of this extract, which renders it somewhat difficult to determine whether the author designed it as a single proposition, or as a series of independent propositions. If the first, there is not one person in the United States, it is presumed, who would venture to differ from him. I confess, however, I do not very clearly discern what bearing it has on the question he was examining. It involves no point of difference between political parties, nor does it propound any question which has heretofore been contested, or which may be expected to arise hereafter, touching the true nature of the Constitution. If he designed a series of propositions, then the two first are so obviously false, that Judge Story himself would not venture to maintain them, and the last is so obviously true, that no one would dream of denying it. For example: he can scarcely mean to say that our government is not a "contract" whether made by the States as such, or by "the people of the United States"; and it is perfectly clear that it "contemplates the permanent subsistence of the parties to it," whoever those parties may be. These two propositions, therefore, taken distinctly, are not true in themselves, and neither of them was necessary, as qualifying or forming a part, of the third. And, as to the third, it is not easy to see why he announced it, since it never entered into the conception of any one, that the parties to the Constitution had "an independent right," as a general right, "to construe, control or judge of its obligations." We all admit that the power and authority of the Federal Government, within its constitutional sphere, are superior to those of the States, in some instances, and co-ordinate in others, and that every citizen is under an absolute obligation to render them respect and obedience: and this simply because his own State, by the act of ratifying the Constitution, has commanded him to do so. We all admit it to be true, as a general proposition, that no citizen nor State has an independent right to "construe," and still less to "control" the constitutional obligations of that government, and that neither a citizen nor a State can "judge," that is, decide, on the nature and extent of those obligations, with a view to control them. All that was ever contended for is, that a State has a right to judge of its own obligations, and, consequently, to judge of those of the Federal Government, so far as they relate to such State itself, and no farther. It is admitted on all hands, that when the Federal Government transcends its constitutional power, and when, of course, it is not acting within its "obligations," the parties to that government, whoever they may be, are no longer under any duty to respect or obey it. This has been repeatedly affirmed by our courts, both State and federal, and has never been denied by any class of politicians. Who, then, is to determine whether it has so transcended its constitutional obligations or not? It is admitted that, to a certain extent, the Supreme Court is the proper tribunal in the last resort, because the States, in establishing that tribunal, have expressly agreed to make it so. The jurisdiction of the federal courts extends to certain cases, affecting the rights of the individual citizens, and to certain others affecting those of the individual States. So far as the Federal Government is authorized to act on the individual citizen, the powers of the one and the rights of the other, are properly determinable by the federal courts. And the decision is binding too, and absolutely final, so far as the relation of the citizen to the Federal Government is concerned. There is not, within that system, any tribunal of appeal, from the decisions of the Supreme Court. And so also of those cases in which the rights of the States are referred to the federal tribunals. In this sense, and to this extent, it is strictly true that the parties have not "an independent right to construe, control and judge of the obligations" of the Federal Government, but they are bound by the decisions of the federal courts, so far as they have authorized and agreed to submit to them. But there are many cases involving the question of federal power which are not cognizable before the federal courts; and, of course, as to these, we must look out for some other umpire. It is precisely in this case that the question, who are the parties to the Constitution, becomes all important and controlling. If the States are parties as sovereign States, then it follows, as a necessary consequence, that each of them has the right which belongs to every sovereignty, to construe its own contracts and agreements, and to decide upon its own rights and powers. I shall take occasion, in a subsequent part of this review, to enter more fully into the question, who is the common umpire? The statement here given, of the leading point of difference between the great political parties of the country, is designed only to show that the author's proposition does not involve it. That proposition may mislead the judgment of the reader, but cannot possibly enlighten it, in regard to the true nature of the Constitution.

He has been scarcely less unfortunate in the next proposition. Taking his words in their most enlarged sense, he is probably correct in his idea, though he is not accurate in his language; but in the sense in which his own reasoning shows that he himself understands them, his proposition is wholly untenable. If, by the words "stipulations to that effect," he means simply that the effect must necessarily result from the provisions of the Constitution, he has merely asserted a truism which no one will dispute with him. Certainly, if it does not result from the nature of all government, that it is a compact, and if there be nothing in our Constitution to show that it is so, then it is not a compact. His own reasoning, however, shows that he means by the word "stipulations," something in the nature of express agreement or declaration; and, in that sense, the proposition is obviously untrue, and altogether defective as a statement for argument. It is very possible that our Constitution may be a compact, even though it contain no express agreement or declaration so denominating it, and though it may not "result from the nature and objects of a frame of government," that it is so; and this simply because it may "result from the nature and objects of our government" that it is a compact, whether such be the result of other governments or not. If the author designed to take this view of the subject, the examination which he has given of the Constitution, in reference to it, is scarcely as extended and philosophical as we had a right to expect from him. He has not even alluded to the frame and structure of the government in its several departments, nor presented any such analysis of it in any respect as to enable the reader to form any satisfactory conclusion as to its true character in the particular under consideration. Everything which he has urged as argument to prove his proposition, may well be true, and every sentence of the Constitution which he has cited for that purpose, may be allowed its full effect, and yet our government may be a compact, even in the strictest sense in which he has understood the term.

His first argument is, that the "United States were no strangers to compacts of this nature," and that those who ratified the Constitution, if they had meant it as a compact, would have used "appropriate terms" to convey that idea. I have already shown that if he means by this, that the Constitution would have contained some express declaration to that effect, he is altogether inaccurate. He himself knows, as a judge, that a deed, or other instrument, receives its distinctive character, not from the name which the parties may choose to give it, but from its legal effect and operation. The same rule applies to constitutions. Ours is a compact or not, precisely as its provisions make it so, or otherwise. The question, who are the parties to it, may influence, and ought to influence, the construction of it in this respect; and I propose presently to show, from this and other views of it, that it is, in its nature, "a mere confederation," and not a consolidated government, in any one respect. It does, therefore, contain "appropriate terms," if we take those words in an enlarged sense, to convey the idea of a compact.

Our author supposes, however, that a "conclusive" argument upon this subject is furnished by that clause of the Constitution which declares 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 the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Hence he concludes that the "people of any State cannot by any form of its own Constitution or laws, or other proceedings, repeal or abrogate, or suspend it."

Here, again, Judge Story displays a want of proper definiteness and precision, in the statement of his proposition. The people who make a law, can, upon the principles of all our institutions, either "repeal or abrogate, or suspend it"; and if, as he supposes, our Constitution was made by "the people of the United States," in the aggregate, then "the people of any State," or of half a State, may repeal, or abrogate, or, suspend it, if they happen to be a majority of the whole. The argument, therefore, if we are to take it in the full latitude in which it is laid down, is not sound, upon the author's own principles; and it can avail nothing, except upon the very supposition which he disallows, to wit: that the Constitution was formed by the States, and not by the people of the United States. Even in this acceptation, however, I am at a loss to perceive how it establishes the proposition with which he set out, to wit: that the Constitution is not a compact. Certainly it is very possible so to frame a compact, that no party to it shall have a right either to "repeal or abrogate, or suspend it"; and if it be possible to do so, then the mere absence of such right does not even tend to disprove the existence of compact. Our own Constitution, even in the opinion of those who are supposed by the author to be least friendly to it, is a compact of precisely this nature. The Nullifier contends only for the right of a State to prevent the Constitution from being violated by the general government, and not for the right either to repeal, abrogate or suspend it. The Seceder asserts only that a State is competent to withdraw from the Union whenever it pleases; but does not assert that in so doing it can repeal, or abrogate or suspend the Constitution, as to the other States. Secession would, indeed, utterly destroy the compact as to the seceding party; but would not necessarily affect its obligation as to the rest. If it would, then the rest would have no right to coerce the seceding State, nor to place her in the attitude of an enemy. It is certain, I think, they would not have such right; but those who assert that they would — and the author is among the number — must either abandon that idea, or they must admit that the act of secession does not break up the Constitution, except as to the seceding State. For the

moment the Constitution is destroyed, all the authorities which it has established cease to exist. There is no longer such a government as that of the United States, and, of course, they cannot, as such, either make any demand, or assert any right, or enforce any claim.

The conclusion, however, to which our author has arrived upon this point, is not that to which he originally designed that his premises should conduct him. The question of the right of a party to a compact to repeal or abrogate or suspend it, does not enter into his original proposition, nor result from the argument which he had immediately before used to sustain it. The proposition is, that our Constitution is not a compact, and the argument is, that it is not a compact, because it is a supreme law. The same idea is substantially reaffirmed, in the next argument by which he proposes to prove the main proposition. "The design" (of the Constitution) "is to establish a government. This, of itself, imports legal obligation, permanence, and uncontrollability by any, but the authorities authorized to alter or abolish it."

Admitting, as I cheerfully do, that all this is strictly true, I am yet unable to perceive how it demonstrates that our Constitution is not a compact. May not a compact between sovereign States be a government? Is there any such necessary restraint upon, or incident of, sovereign power, that it cannot, in any possible exercise of it, produce such a result? If there is, then it was incumbent on the author to show it, because, if there is not, his argument is of no force; and he himself will admit that the proposition, to say the least of it, is not quite clear enough to be taken as a postulate. His own historical information, if he had drawn on its ample funds, must have furnished him with numerous instances of governments established by compact. He need not, however, have gone beyond our own Confederation, which, although a compact among sovereign States, in the strictest sense, was yet treated as a government by the people at home, and recognized as such by all foreign powers. It was also "supreme," within its prescribed sphere of action; its rights and powers over the most important subjects of general concern were not only superior to those of the States, but were exclusive. The author's proposition and argument, reduced to their simple terms, may be thus stated: "Our Constitution is not a compact, because it is a government, and because that government is the supreme law."[Error! Bookmark not defined.] There are few minds, I think, prepared to embrace this conclusion, or to discern the connection which it has with the promises. There are still fewer who will not feel surprise, that our author should have formed such a conclusion, since an instance to disprove it, furnished by the history of his own country, and existing in his own times, had but just passed under his critical examination and review.

The remaining arguments upon this point are merely inferences drawn from the absence of express words in the Constitution, or from the opinions of members of the various conventions, expressed in the debates concerning it. These have already been sufficiently examined. Taking his whole chapter upon this subject together, the reader will probably think that it does not answer the expectations which the public have formed upon the author's powers as a reasoner. His political opponents will be apt to think, also, that he has done something less than justice to them, in the view which he has given of their principles. After laboring, in the way we have seen, to prove that our Constitution is not a compact, he informs us that "the cardinal conclusion for which this doctrine of a compact his been, with so much ingenuity and ability, forced into the language of the Constitution, (for the latter no where alludes to it), is avowedly to establish that, in construing the Constitution, there is no common umpire; but that each State, nay, each department of the government of each State, is the supreme judge for itself, of the powers and rights and duties arising under that instrument."

Judge Story must excuse me — I mean no disrespect to him — if I express my unfeigned astonishment that he should have admitted this passage into a grave and deliberate work on the Constitution. He must, indeed, have been a most careless observer of passing events, and a still more careless reader of the publications of the last ten years, upon this very point, if he has found either in the one or the other, the slightest authority for the opinion which is here advanced. The most ultra of those who have contended for the rights of the States, have asserted no such doctrine as he has imputed to them. Neither is it the necessary or legitimate consequence of any principle which they have avowed. I cannot impute to an author of his acknowledged ability, the weakness of stating a proposition merely for the sake of the poor triumph of refuting it. With what other motive, then, did he make a statement which is unsupported, as a matter of fact, which involves no disputed or doubted question of constitutional law, and which attributes to a large class of his fellow-citizens opinions which would justly expose them to the scorn of all correct thinkers? That class profess to hold, in their utmost latitude and in their strictest applications, the doctrines of the State Rights' school of politics. They believe that those doctrines contain the only principle truly conservative of our Constitution; that without them there is no effective check upon the Federal Government, and, of course, that that government can increase its own powers to an indefinite extent; that this must happen in the natural course of events, and that, ultimately, the whole character of our government will be so changed, that even its forms will be rejected, as cumbrous and useless, under the monarchy, in substance, into which we shall have insensibly glided. It

is, therefore, because they are lovers of the Constitution and of the Union, that they contend strenuously for the rights of the States. They are no lovers of anarchy nor of revolution. Their principles will cease to be dear to them, whenever they shall cease to subserve the purposes of good order, and of regular and established government. It is their object to preserve the institutions of the country as they are, sincerely believing that nothing more than this is necessary to secure to the people all the blessings which can be expected from any government whatever. They would consider themselves but little entitled to respect as a political party, if they maintained the loose, disjointed, and worse than puerile notions, which the author has not thought it improper to impute to them.

It is the peculiar misfortune of the political party to which I have alluded, to be misunderstood and misrepresented in their doctrines. The passage above quoted affords not the least striking instance of this. It is a great mistake to suppose that they have ever contended that the right of State interposition was given in the express terms of the Constitution; and, therefore, they have not "forced this principle into the language of that instrument." The right in question is supposed to belong to the States, only because it is an incident of their sovereignty, which the Constitution has not taken away. The author, it is presumed, could scarcely have failed to perceive the difference of the two propositions, nor could he have been unconscious that they did not depend upon the same course of investigation or reasoning. And it is not true, so far as my information extends, that any political party has ever asserted, as a general proposition, that in construing the Constitution, there is no common umpire. Cases have already been stated, in which the Supreme Court is universally admitted to be the common umpire, and others will be stated when we come more directly to that part of our subject. In the broad sense, then, in which the author lays down the proposition, it has never been contended for by any political party whatever. Neither is it true, as he is pleased to assert, that any political party has ever supposed that each department of the government of each State had a right to "judge for itself, of the powers, rights and duties, arising under" the Constitution. By the word "judge," he must be understood to mean decide finally; and, in this sense, I venture to affirm, that no political party, nor political partizan, even in the wildest dream of political phrensy, has ever entertained the absurd notion here attributed to them. It is difficult to suppose that the author could have been uninformed of the fact, that nothing short of the power of all the State, acting through its own constituted authorities, has ever been deemed of the least force in this matter. The better and more prevalent opinion is, that a State cannot properly so act, except by a convention called for that express purpose. This was the course pursued by South Carolina; but in the case of the Alien and Sedition Laws, Virginia acted through her ordinary legislature. As to this matter, however, the legislature was very properly considered as representing the power of the whole State.

Thus, in the short paragraph above quoted, Judge Story has fallen into three most remarkable errors, proving that he has, in the strangest way imaginable, misunderstood the principles which he attempted to explain. The young and plastic minds to which he addressed himself, with the professed object of instructing them in the truths of constitutional interpretation, will look in vain for the publication or other authority which sustains him. And the political party whose principles he has endeavored to hold up to reproach, has a right to demand of him why he has chosen to attribute to them absurd and revolutionary notions, unworthy alike of their patriotism and their reason.

It is submitted to the reader's judgment to determine how far the reasoning of the author, which we have just examined, supports his position that our Constitution is not a compact. The opinion of that Congress which recommended the call of the Convention seems to have been very different; they, at least, did not suppose that a compact could not be a government. Their resolution recommends the call of a convention, for the purpose of revising the Articles of Confederation, and reporting such alterations and provisions therein, as would render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union." In. the opinion of Congress, the Articles of Confederation, which were clearly a compact, were an inadequate Constitution, and, therefore, they recommended such alterations and provisions therein, as would make the same compact an adequate Constitution. Nothing is said about forming a new government, or changing the essential character of the existing one; and, in fact, no such thing was contemplated at the time.[Error! Bookmark not defined.] "The sole and exclusive purpose" of the convention was so to amend, or add to, the provisions of the Articles of Confederation, as would form "a more perfect union," &c., upon the principles of the Union. already existing. It is clear, therefore, that in the opinion of Congress, and of all the States that adopted their recommendation, that union or compact was a constitution of government.

It is worthy of remark, that of the States, New Hampshire, and the author's own State of Massachusetts, expressly call the Constitution a compact, in their acts of ratification; and no other State indicates a different view of it. This tends to prove that public opinion at the time had not drawn the nice distinction which is now insisted on, between a government and a compact; and that those who had for eight years been living under a compact, and forming treaties with foreign powers by virtue of its provisions, had never for a moment imagined that it was not a government.

But little importance, however, ought to be attached to reasoning of this kind. Those who contend that our Constitution is a compact, very properly place their principles upon much higher ground. They say that the Constitution is a compact, because it was made by sovereign States, and because that is the only mode in which sovereign States treat with one another. The conclusion follows irresistibly from the premises; and those who deny the one, are bound to disprove the other. Our adversaries begin to reason at the very point at which reasoning becomes no longer necessary. Instead of disproving our promises, they assume that they are wrong, and then, triumphantly deny our conclusion also. If we establish that the Constitution was made by the States, and that they were, at the time, distinct, independent and perfect sovereignties, it follows that they could not treat with one another, even with a view to the formation of a new common government, except in their several and sovereign characters. They must have maintained the same character when they entered upon that work, and throughout the whole progress of it. Whatever the government may be, therefore, in its essential character, whether a federative or a consolidated government, it is still a compact, or the result of a compact, because those who made it could not make it in any other way. In determining its essential character, therefore, we are bound to regard it as a compact, and to give it such a construction as is consistent with that idea. We are not to presume that the parties to it designed to change the character in which they negotiated with one another. Every fair and legitimate inference is otherwise. Its sovereignty is the very last thing which a nation is willing to surrender; and nothing short of the clearest proof can warrant us in concluding that it has surrendered it. In all cases, therefore, where the language and spirit of the Constitution are doubtful, and even where their most natural construction would be in favor of consolidation, (if there be any such case), we should still incline against it, and in favor of the rights of the States, unless no other construction can be admitted.

CHAPTER VIII.

THE UNION A FEDERATIVE AND NOT A NATIONAL GOVERNMENT

Having disposed of this preliminary question, we now approach the Constitution itself. I affirm that it is, in its structure, a federative and not a consolidated government; that it is so in all its departments, and in all its leading and distinguishing provisions and, of course, that it is to be so interpreted, by force of its own terms, apart from any influence to be derived from that role of construction which has just been laid down. We will first examine it in the structure of its several departments.Error! Bookmark not defined.

The Legislature. — This consists of two houses. The Senate is composed of two members from each State, chosen by its own legislature, whatever be its size or population, and is universally admitted to be strictly federative in its structure. The House of Representatives consists of members chosen in each State, and is regulated in its numbers according to a prescribed ratio of representation. The number to which each State is entitled is proportioned to its own population, and not to the population of the United States; and if there happen to be a surplus in any State less than the established ratio, the surplus is not added to the surplus or population of any other State, in order to make up the requisite number for a representative, but is wholly unrepresented. In the choice of representatives, each State votes by itself, and for its own representatives, and not in connection with any other State, nor for the representatives of any other State. Each State prescribes the qualifications of its own voters, the Constitution only providing that they shall have the qualifications which such State may have proscribed for the voters for the most numerous branch of its own legislature. And, as the right to vote is prescribed by the State, the duty of doing so cannot be enforced, except by the authority of the State. No one can be elected to represent any State, except a citizen thereof. Vacancies in the representation of any State are to be supplied under writs of election, issued by the Executive of such State. In all this, there is not one feature of nationality. The whole arrangement has reference to the States as such, and is carried into effect solely by their authority. The Federal Government has no agency in the choice of representatives, except only that it may prescribe the "times, places and manner of holding elections." It can neither prescribe the qualifications of the electors, nor impose any penalty upon them, for refusing to elect. The States alone can do these things; and, of course, the very existence of the House of Representatives depends, as much as does that of the Senate, upon the action of the States. A State may withdraw its representation altogether, and Congress has no power to prevent it, nor to supply the vacancy thus created. If the House of Representatives were national, in any practical sense of the term, the "nation" would have authority to provide for the appointment of its members, to prescribe the qualifications of voters, and to enforce the performance of that duty. All these things the State legislatures can do, within their respective States, and it is obvious that they are strictly national. In order to make the House of Representatives equally so, the people of the United States must be so consolidated that the Federal Government may distribute them, without regard to State boundaries, into numbers according to the prescribed ratio; so that all the people may be represented, and no unrepresented surplus be left in any State. If these

things could be done under the Federal Constitution, there would then be a strict analogy between the popular branches of the federal and State legislatures, and the former might, with propriety, be considered "national." But it is difficult to imagine a national legislature which does not exist under the authority of the nation, and over the very appointment of which the nation, as such, can exert no effective control.

There are only two reasons which I have ever heard assigned for the opinion that the House of Representatives is national, and not federative. The first is, that its measures are carried by the votes of a majority of the whole number, and not by those of a majority of the States. It would be easy to demonstrate that this fact does not warrant such a conclusion; but all reasoning is unnecessary, since the conclusion is disproved, by the example of the other branch of the federal legislature. The Senate, which is strictly federative, votes in the same way. The argument, therefore, proves nothing, because it proves too much.

The second argument is, that the States are not equally represented, but each one has a representation proportioned to its population. There in no reason, apparent to me, why a league may not be formed among independent sovereignties, giving to each an influence in the management of their common concerns, proportioned to its strength, its wealth, or the interest which it has at stake. This is but simple justice, and the rule ought to prevail in all cases, except where higher considerations disallow it. History abounds with examples of such confederations, one of which I will cite. The States General of the United Provinces were strictly a federal body. The Council of State had almost exclusively the management and control of all their military and financial concerns; and in that body, Holland and some other provinces had three votes each, whilst some had two, and others only one vote each. Yet it never was supposed that for this reason the United Provinces were a consolidated nation. A single example of this sort affords a fall illustration of the subject, and renders, all farther argument superfluous.

It is not, however, from the apportionment of its powers, nor from the modes in which these powers are exercised, that we can determine the true character of a legislative body, in the particular now under consideration. The true rule of decision is found in the manner in which the body is constituted, and that, we have already seen, is, in the case before us, federative, and not national.

We may safely admit, however, that the House of Representatives is not federative, and yet contend, with perfect security, that the legislative department is so. Congress consists of the House of Representatives and Senate. Neither is a complete legislature in itself, and neither can pass any law without the concurrence of the other. And, as the Senate is the peculiar representative of the States, no act of legislation whatever can be performed without the consent of the States. They hold, therefore, a complete check and control over the powers of the people in this respect, even admitting that those powers are truly and strictly represented in the other branch. It is true that the check is mutual; but if the legislative department were national, there would be no federative feature in it. It cannot be replied, with equal propriety, that, if it were federative, there would be no national feature in it. The question is, whether or not the States have preserved their distinct sovereign characters, in this feature of the Constitution. If they have done so in any part of it the whole must be considered federative; because national legislation implies a unity, which is absolutely inconsistent with all idea of a confederation; whereas, there is nothing to prevent the members of a confederation from exerting their several powers, in any form of joint action which may seem to them proper.

But there is one other provision of the Constitution which appears to me to be altogether decisive upon this point. Each State, whatever be its population, is entitled to at least one representative. It may so happen that the unrepresented surplus, in some one State, may be greater than the whole population of some other State and yet such latter State would be entitled to a representative. Upon what principle is this? Surely, if the House of Representatives were national, something like equality would be found in the constitution of it. Large surpluses would be arbitrarily rejected in some places, and smaller numbers, not equal to the general ratio, be represented in others. There can be but one reason for this: As the Constitution was made by the States, the true principles of the confederation could not be preserved, without giving to each party to the compact a place and influence in each branch of the common legislature. This was due to their perfect equality as sovereign States.

The Executive. — In the election of the President and Vice-President, the exclusive agency of the States, as such, is preserved with equal distinctness. These officers are chosen by electors, who are themselves chosen by the people of each State, acting by and for itself, and in such mode as itself may prescribe. The number of electors to which each State is entitled is equal to the whole number of its representatives and senators. This provision is even more federative than that which apportions representation in the House of Representatives; because it adds two to the electors of each State, and, so far, places them on an equality, whatever be their comparative population. The people of each State vote within the State, and not elsewhere; and for their own electors, and for no others. Each State proscribes the qualifications of its own electors, and can alone compel them to vote. The electors, when chosen, give their votes within their respective States, and at such times and places as the States may respectively prescribe.

There is not the least trace of national agency, in any part of this proceeding. The Federal Government can exercise no rightful power in the choice of its own Executive. "The people of the United States" are equally unseen in that important measure. Neither a majority, nor the whole of them together, can choose a President, except in their character as citizens of the several States. Nay, a President may be constitutionally elected, with a decided majority of the people against him.[Error! Bookmark not defined.] For example. New York has forty-two votes, Pennsylvania thirty, Virginia twenty-three, Ohio twenty-one, North Carolina fifteen, Kentucky fourteen, and South Carolina fifteen. These seven States can give a majority of all the votes, and each may elect its own electors by a majority of only one vote. If we add their minorities to the votes of the other States, (supposing those States to be unanimous against the candidate), we may have a President constitutionally elected, with less than half — perhaps with little more than a fourth of the people in his favor. It is true that he may also be constitutionally elected with a majority of the States, as such, against him, as the above example shows; because the States may, as before remarked, properly agree, by the provisions of their compact, that they shall possess influence, in this respect, proportioned to their population. But there is no mode, consistent with the true principles of free representative government, by which a minority of those to whom, en masse, the elective franchise is confided, can countervail the concurrent and opposing action of the majority. If the President could be chosen by the people of the "United States" in the aggregate, instead of by the States, it is difficult to imagine a case in which a majority of those people, concurring in the same vote, could be overbalanced by a minority.

All doubt upon this point, however, is removed by another provision of the Constitution touching this subject. If no candidate should receive a majority of votes in the Electoral College, the House of Representatives elects the President, from the three candidates which have received the largest electoral vote. In doing this, two-thirds of the States must be present by their representatives, or one of them, and then they vote by States, all the members of each State giving one vote, and a majority of all the States being necessary to a choice. This is precisely the rule which prevailed in the ordinary legislation of that body, under the Articles Confederation and which proved its federative character as strongly as any other provision of those articles. Why, then, should this federative principle be preserved, in the election of the President by the House of Representatives, if it was designed to abandon it, in the election of some officer by the Electoral Colleges? No good reason for it has yet been assigned, so far as I am informed. On the contrary, there is every just reason to suppose, that those who considered the principle safe and necessary in one form of election, would adhere to it as equally safe and necessary in every other, with respect to the same public trust. And this is still farther proved by the provision of the Constitution relating to the election of the Vice-President. In case of the death or constitutional disability of the President, every executive trust devolves on him; and, of course, the same general principle should, be applied, in the election of both of them. This is done in express terms, so far as the action of the Electoral Colleges is contemplated. But if those Colleges should fail to elect a Vice-President, that trust devolves on the Senate, who are to choose from the two highest candidates. Here the federative principle is distinctly seen, for the Senate is the representative of the States.

This view of the subject is still farther confirmed by the clause of the Constitution relating to impeachments. The power to try the President is vested in the Senate alone, that is, in the representatives of the States. There is a strict fitness and propriety in this; for those only, whose officer the President is, should be entrusted with the power to remove him.

It is believed to be neither a forced nor an unreasonable conclusion from all this, that the Executive Department is, in its structure, strictly federative.

The Judiciary. — The Judges are nominated by the President, and approved by the Senate. Thus the nominations are made by a federate officer, and the approval and confirmation of them depend on those who are the exclusive representatives of the States. This agency is manifestly federative, and "the people of the United States" cannot mingle in it, in any form whatever.

As the Constitution is federative in the structure of all three of its great departments, it is equally so in the power of amendment.

Congress may propose amendments, "whenever two-thirds of both houses shall deem it necessary." This secures the States against any action upon the subject by the people at large. In like manner, Congress may call a convention for proposing amendments, "on the application of the legislatures of two-thirds of the several States." It is remarkable that, whether Congress or the States act upon the subject, the same proportion is required; not less than two-thirds of either being authorized to act. From this, it is not unreasonable to conclude, that the convention considered that the same power would act in both cases; to wit: the power of the States, who might effect their object either by their separate action as States, or by the action of Congress, their common federative agent; but, whether they adopted the one mode or the other, not less than two-thirds of them should be authorized to act efficiently.

The amendments thus proposed "shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress." It is the act of adoption or ratification alone which makes a constitution. In the case before us, the States alone can perform that act. The language of the Constitution admits of no doubt, and gives no pretext for double construction. It is not the people of the United States in the aggregate, merely acting in their several States, who can ratify amendments. Three-fourths of the several States can alone do this. The idea of separate and independent political corporations could not be more distinctly conveyed, by any form of words. If the people of the United States, as one people, but acting in their several States, could ratify amendments, then the very language of the Constitution requires that three-fourths of them shall concur therein. Is it not, then, truly wonderful that no mode has yet been prescribed to ascertain, whether three-fourths of them do concur or not? By what power can the necessary arrangement upon this point be effected? In point of fact, amendments have already been made, in strict conformity with this provision of the Constitution. We ask our author, whether three-fourths of the people of the United States concurred in those amendments or not; and if they did, whence does he derive the proof of it?

If Judge Story, and the politicians of his school, be correct in the idea, that the Constitution was formed by "the people of the United States," and not by the States, as such, this clause relating to amendments presents a singular anomaly in politics. Their idea is that the State sovereignties were merged, to a certain extent, in that act, and that the government established was emphatically the government of the people of the United States. And yet, those same people can neither alter nor amend that government. In order to perform this essential function, it is necessary to call again into life and action those very State sovereignties which were supposed to be merged and dead, by the very act of creating the instrument which they are required to amend. To alter or amend a government requires the same extent of power which is required to form one; for every alteration or amendment is, as to so much, a new government. And, of all political acts, the formation of a constitution of government is that which admits and implies, the most distinctly and to the fullest extent, the existence of absolute, unqualified, unconditional, and unlimited sovereignty. So long, therefore, as the power of amending the Constitution rests exclusively with the States, it is idle to contend that they are less sovereign now than they were before the adoption of that instrument.

The idea which I am endeavoring to enforce, of the federative character of the Constitution, is still farther confirmed by that clause of the article under consideration, which provides that no amendment shall be made to deprive any State of its equal suffrage in the Senate, without its own consent. So strongly were the States attached to that perfect equality which their perfect sovereignty implied, and so jealous were they of every attack upon it, that they guarded it, by an express provision of the Constitution, against the possibility of overthrow. All other rights they confided to that power of amendment which they reposed in three-fourths of all the States; but this they refused to entrust, except to the separate, independent and sovereign will of each State; giving to each, in its own case, an absolute negative upon all the rest.[Error! Bookmark not defined.]

The object of the preceding pages has been to show that the Constitution is federative, in the power which framed it; federative in the power which adopted and ratified it; federative in the power which sustains and keeps it alive; federative in the power by which alone it can be altered or amended; and federative in the structure of all its departments. In what respect, then, can it justly be called a consolidated or national government? Certainly, the mere fact that, in particular cases, it is authorized to act directly on the people, does not disprove its federative character, since that very sovereignty in the States, which a confederation implies, includes within it the right of the State to subject its own citizens to the action of the common authority of the confederated States, in any form which may seem proper to itself. Neither is our Constitution to be deemed the less federative, because it was the object of those who formed it to establish "a government," and one effective for all the legitimate purposes of government.

Much emphasis has been laid upon this word, and it even has been thought, by one distinguished statesman of Judge Story's school, that ours is "a government proper," which I presume implies that it is a government in a peculiarly emphatic sense. I confess that I do not very clearly discern the difference between a government and a government proper. Nothing is a government which is not properly so; and whatever is properly a government is a government proper. But whether ours is a "government proper," or only a simple government, does not prove that it is not a confederation, unless it be true that a confederation cannot be a government.

For myself, I am unable to discover why States, absolutely sovereign, may not create for themselves, by compact, a common government, with powers as extensive and supreme as any sovereign people can confer on a government established by themselves. In what other particular ours is a consolidated or national government, I leave it to the advocates of that doctrine to show.

CHAPTER IX.

EXTENT AND LIMITS OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

We come now to a more particular and detailed examination of the question, "Who is the final judge, or interpreter in constitutional controversies?" The fourth chapter of this division of Judge Story's work is devoted to this inquiry; and the elaborate examination which he has given to the subject, shows that he attached a just importance to it. The conclusion, however, to which he has arrived, leaves still unsettled the most difficult and contested propositions which belong to this part of the Constitution. His conclusion is, that, "in all questions of a judicial nature," the Supreme Court of the United States is the final umpire; and that the States, as well as individuals, are absolutely bound by its decisions. His reasoning upon this part of the subject is not new, and does not strike me as being particularly forcible. Without deeming it necessary to follow him in the precise order of his argument, I shall endeavor to meet it in all its parts, in the progress of this examination. Its general outline is this: It is within the proper function of the judiciary to interpret the laws; the Constitution is the supreme law, and therefore it is within the proper function of the judiciary to interpret the Constitution; of course, it is the province of the federal judiciary to interpret the Federal Constitution. And as that Constitution, and all laws made in pursuance thereof, are the supreme law of the land, anything in the laws or constitution of any State to the contrary notwithstanding, therefore, the interpretations of that Constitution, as given by the Supreme Court, are obligatory, final and conclusive, upon the people and the States.

Before we enter upon this investigation, it is proper to place the proposition to be discussed in terms somewhat more definite and precise than those which the author has employed. What, then, is meant by "final judge and interpreter?" In the ordinary acceptation of these terms, we should understand by them a tribunal having lawful cognizance of a subject, and from whose decisions there is no appeal. In this view of the question, there can be no difficulty in admitting that the decisions of the Supreme Court are final and conclusive. Whatever comes within the legitimate cognizance of that tribunal, it has a right to decide, whether it be a question of the law or of the Constitution, and no other tribunal can reverse its decision. The Constitution, which creates the Supreme Court, creates no other court of superior or appellate jurisdiction to it, and, consequently, its decisions are strictly "final." There is no power in the same government to which that court belongs to reverse or control it, nor are there any means therein of resisting its authority. So far, therefore, as the Federal Constitution has provided for the subject at all, the Supreme Court is, beyond question, the final judge or arbiter; and this, too, whether the jurisdiction which it exercises be legitimate or usurped.

The terms "constitutional controversies" are still more indefinite. Every controversy which is submitted to the decision of a judicial tribunal, whether State or federal, necessarily involves the constitutionality of the law under which it arises. If the law be not constitutional, the court cannot enforce it, and, of course, the question whether it be constitutional or not, necessarily arises in every case to which the court is asked to apply it. The very act of enforcing a law presupposes that its constitutionality has been determined. In this sense, every court, whether State or federal, is the "judge or arbiter of constitutional controversies," arising in causes before it and if there be no appeal from its decision, it is the "final" judge or arbiter, in the sense already expressed.

Let us now inquire what "constitutional controversies" the federal courts have authority to decide, and how far its decisions are final and conclusive against all the world.

The third article of the Constitution provides that "the judicial powers shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls to all cases of admiralty and maritime jurisdiction to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State and the citizens thereof, and foreign States, citizens or subjects."

The eleventh amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State."

It will be conceded on all hands that the federal courts have no jurisdiction except what is here conferred. The judiciary, as a part of the Federal Government, derives its powers only from the Constitution which creates that government. The term "cases" implies that the subject matter shall be proper for judicial decision; and the parties

between whom alone jurisdiction can be entertained, are specifically enumerated. Beyond these "cases" and these parties they have no jurisdiction.

There is no part of the Constitution in which the framers of it have displayed a more jealous care of the rights of the States, than in the limitations of the judicial power. It is remarkable that no power is conferred except what is absolutely necessary to carry into effect the general design, and accomplish the general object of the States, as independent, confederated States. The federal tribunals cannot take cognizance of any case whatever in which all the States have not an equal and common interest that a just and impartial decision shall be had. A brief analysis of the provisions of the Constitution will make this sufficiently clear.

Cases "arising under the Constitution" are those in which some right or privilege is denied, which the Constitution confers, or something is done which the Constitution prohibits, as expressed in the Constitution itself. Those which arise "under the laws of the United States" are such as involve rights or duties, which result from the legislation of Congress. Cases of these kinds are simply the carrying out of the compact or agreement made between the States, by the Constitution itself, and, of course, all the States are alike interested in them. For this reason alone, if there were no other, they ought to be entrusted to the common tribunals of all the States. There is another reason, however, equally conclusive. The judicial should always be at least co-extensive with the legislative power; for it would be a strange anomaly, and could produce nothing but disorder and confusion, to confer on a government the power to make a law, without conferring at the same time the right to interpret and the power to enforce it.

Cases arising under treaties, made under the authority of the United States, and those "affecting ambassadors and other public ministers end consuls," could not properly be entrusted to any other than the federal tribunals. Treaties are made under the common authority of the States, and all, alike, are bound for the faithful observance of them. Ambassadors and other public ministers and consuls are received under the common authority of all the States, and their duties relate only to matters involving alike the interests of all. The peace of the country, and the harmony of its relations with foreign powers, depend, in a peculiar degree, on the good faith with which its duties in reference to these subjects are discharged. Hence it would be unsafe to entrust them to any other than their own control; and even if this were not so, it would be altogether incongruous to appeal to a State tribunal, to enforce the rights, the obligations or the duties of the United States. For like reasons, cases of admiralty and maritime jurisdiction are properly entrusted to the federal tribunals.

Controversies to which the United States shall be a party should, upon general principles, belong only to her own courts. There would be neither propriety nor justice in permitting any one State to decide a case in which all the States are parties. In like manner, those between two or more States — between a State and citizens of another State, where the State is plaintiff — (it cannot be sued) — and between citizens of different States, could not be entrusted to the tribunals of any particular State interested, or whose citizens are interested therein, without danger of injustice and partiality. Jurisdiction is given to the federal courts, in these cases, simply because they are equally interested for all the parties, are the common courts of all the parties, and therefore are presumed to form the only fair and impartial tribunal between them. The same reasoning applies to cases between citizens of the same State, claiming lands under grants of different States. Cases of this sort involve questions of the sovereign power of the States, and could not, with any show of propriety, be entrusted to the decision of either of them, interested as it would be to sustain its own acts, against those of the sister State. The jurisdiction in this case is given upon the same principles which give it in cases between two or more States.

Controversies between a State or the citizens thereof, and foreign States, citizens or subjects, depend on a different principle, but one equally affecting the common rights and interests of all the States. A foreign State cannot, of course, be sued; she can appear in our courts only as plaintiff. Yet, in whatever form such controversies, or those affecting the citizens of a foreign State, may arise, all the States have a deep interest that an impartial tribunal, satisfactory to the foreign party, should be provided. The denial of justice is a legitimate, and not an unfruitful cause of war. As no State can be involved in war without involving all the rest, they all have a common interest to withdraw from the State tribunals a jurisdiction which may bring them within the danger of that result. All the States are alike bound to render justice to foreign States and their people; and this common responsibility gives them a right to demand that every question involving it shall be decided by their common judicatory.

This brief review of the judicial power of the United States, as given in the Constitution, is not offered as a full analysis of the subject; for the question before us does not render any such analysis necessary. By design has been only to show with what extreme reserve judicial power has been conferred, and with what caution it has been restricted to those cases, only, which the new relation between the States established by the Constitution rendered absolutely necessary. In all the cases above supposed, the jurisdiction of the federal courts is clear and undoubted; and as the States have, in the frame of the Constitution, agreed to submit to the exercise of this jurisdiction, they are bound to do so, and to compel their people to like submission. But it is to be remarked, that they are bound only by

their agreement, and not beyond it. They are under no obligation to submit to the decisions of the Supreme Court, on subject matter not properly cognizable before it, nor to those between parties not responsible to its jurisdiction.[Error! Bookmark not defined.] Who, then, is to decide this point? Shall the Supreme Court decide for itself, and against all the world? It is admitted that every court must necessarily determine every question of jurisdiction which arises before it, and, so far, it must of course be the judge of its own powers. If it be a court of the last resort, its decision is necessarily final, so far as those authorities are concerned, which belong to the same system of government with itself. There is, in fact, no absolute and certain limitation, in any constitutional government, to the powers of its own judiciary; for, as those powers are derived from the Constitution and as the judges are the interpreters of the Constitution, there is nothing to prevent them from interpreting in favor of any power which they may claim. The Supreme Court, therefore, may assume jurisdiction over subjects and between parties, not allowed by the Constitution, and there is no power in the Federal Government to gainsay it. Even the impeachment and removal of the judges, for ignorance or corruption, would not invalidate their decisions already pronounced. Is there, then, no redress? The Constitution itself will answer this question in the most satisfactory manner.

The tenth article of the Amendments of the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The powers thus reserved, are not only reserved against the Federal Government in whole, but against each and every department thereof. The judiciary is no more excepted out of the reservation than is the legislature or the Executive. Of what nature, then, are those reserved powers? Not the powers, if any such there be, which are possessed by all the States together, for the reservation is to "the States respectively"; that is, to each State separately and distinctly. Now we can form no idea of any power possessed by a State as such, and independent of every other State, which is not, in its nature, a sovereign power. Every power so reserved, therefore, must be of such a character that each State may exercise it, without the least reference to responsibility to any other State whatever. We have already seen that the Constitution of the United States was formed by the States as such, and the reservation above quoted is an admission that in performing that work, they acted as independent and sovereign States. It is incident to every sovereignty to be alone the judge of its own compacts and agreements. No other State or assemblage of States has the least right to interfere with it, in this respect, and cannot do so without impairing its sovereignty. The Constitution of the United States is but the agreement which each State has made, with each and all the other States, and so distinguishable, in the principle we are examining, from any other agreement between sovereign States. Each State, therefore, has a right to interpret that agreement for itself, unless it has clearly waived that right in favor of another power. That the right is not waived in the case under consideration, is apparent from the fact already stated, that if the judiciary be the sole judges of the extent of their own powers, their powers are universal, and the enumeration in the Constitution is idle and useless. But it is still farther apparent from the following view:

The Federal Government is the creature of the States. It is not a party to the Constitution, but the result of it — the creation of that agreement which was made by the States as parties. It is a mere agent, entrusted with limited powers for certain specific objects; which powers and objects are enumerated in the Constitution. Shall the agent be permitted to judge of the extent of his own powers, without reference to his constituent? To a certain extent, he is compelled to do this, in the very act of exercising them, but this is always in subordination to the authority by whom his powers were conferred. If this were not so, the result would be, that the agent would possess every power which the constituent could confer, notwithstanding the plainest and most express terms of the grant. This would be against all principle and all reason. If such a rule would prevail in regard to government, a written constitution would be the idlest thing imaginable. It would afford no barrier against the usurpations of the government, and no security for the rights and liberties of the people. If then the Federal Government has no authority to judge, in the last resort, of the extent of its own powers, with what propriety can it be said that a single department of that government may do so? Nay, it is said that this department may not only judge for itself, but for the other departments also. This is an absurdity as pernicious as it is gross and palpable. If the judiciary may determine the powers of the Federal Government, it may pronounce them either less or more than they really are. That government at least would have no right to complain of the decisions of an umpire which it had chosen for itself and endeavored to force upon the States and the people. Thus a single department might deny to both the others salutary powers which they really possessed, and which the public interest or the public safety might require them to exercise; or it might confer on them powers never conceded, inconsistent with private right, and dangerous to public liberty.

In construing the powers of a free and equal government, it is enough to disprove the existence of any rule, to show that such consequences as these will result from it. Nothing short of the plainest and most unequivocal language should reconcile us to the adoption of such a rule. No such language can be found in our Constitution. The only clause, from which the rule can be supposed to be derived, is that which confers jurisdiction in "all cases arising

under the Constitution, and the laws made in pursuance thereof"; but this clause is clearly not susceptible of any such construction. Every right may be said to be a constitutional right, because no right exists which the Constitution disallows; and, consequently, every remedy to enforce those rights presents "a case arising under the Constitution." But a construction so latitudinous will scarcely be contended for by any one. The clause under consideration gives jurisdiction only as to those matters, and between those parties, enumerated in the Constitution itself. Whenever such a case arises, the Federal courts have cognizance of it; but the right to decide a case arising under the Constitution, does not necessarily imply the right to determine in the last resort what that Constitution is. If the Federal courts should, in the very teeth of the eleventh amendment, take jurisdiction of cases "commenced or prosecuted against one of the States by citizens of another State," the decisions of those courts, that they had jurisdiction, would certainly not settle the Constitution in that particular. The State would be under no obligation to submit to such a decision, and it would resist it by virtue of its sovereign right to decide for itself, whether it had agreed to the exercise of such a jurisdiction or not.

Considering the nature of our system of government, the States ought to be, and I presume always will be, extremely careful not to interpose their sovereign power against the decisions of the Supreme Court in any case where that court clearly has jurisdiction. Of this character are the cases already cited at the commencement of this inquiry; such, for example, as those between two States, those affecting foreign ministers, those of admiralty and maritime jurisdiction, &c. As to all these subjects the jurisdiction is clear, and no State can have any interest to dispute it. The decisions of the Supreme Court, therefore, ought to be considered as final and conclusive, and it would be a breach of the contract on the part of any State to refuse submission to them. There are, however, many cases involving questions of the powers of government, State and federal, which cannot assume a proper form for judicial investigation. Most questions of mere political power are of this sort; and such are all questions between a State and the United States. As to these, the Constitution confers no jurisdiction on the federal courts, and, of course, it provides no common umpire to whose decision they can be referred. In such cases, therefore, the State must of necessity decide for itself. But there are also cases between citizen and citizen, arising under the laws of the United States, and between the United States and the citizen, arising in the same way. So far as the federal tribunals have cognizance of such cases, their decisions are final. If the constitutionality of the law under which the case arises, should come into question, the court has authority to decide it, and there is no relief for the parties, in any other judicial proceeding. If the decision, in a controversy between the United States and a citizen, should be against the United States, it is, of course, final and conclusive. If the decision should be against the citizen, his only relief is by an appeal to his own State. He is under no obligation to submit to federal decisions at all, except so far only as his own State has commanded him to do so; and he has, therefore, a perfect right to ask his State whether her commands extend to the particular case or not. He does not ask whether the federal court has interpreted the law correctly or not, but whether or not she ever consented that Congress should pass the law. If Congress had such power, he has no relief, for the decision of the highest federal court is final; if Congress had not such power, then he is oppressed by the action of a usurped authority, and has a right to look to his own State for redress. His State may interpose in his favor or not, as she may think proper. If she does not, then there is an end of the matter; if she does, than it is no longer a judicial question. The question is then between new parties, who are not bound by the former decision; between a State and the United States. As between these parties the federal tribunals have no jurisdiction, there is no longer a common umpire to whom the controversy can be referred. The State must of necessity judge for itself, by virtue of that inherent, sovereign power and authority, which, as to this matter, it has never surrendered to any other tribunal. Its decision, whatever it may be, is binding upon itself and upon its own people, and no farther.

A great variety of cases are possible, some of which are not unlikely to arise, involving the true construction of the Federal Constitution, but which could not possibly be presented to the courts, in a form proper for their decision. The following are examples:

By the 4th section of the 4th article it is provided that "Congress shall guaranty to every State in the Union a republican form of government." What is a republican form of government, and how shall the question be decided? In its very nature, it is a political, and not a judicial question, and it is not easy to imagine by what contrivance it could be brought before a court. Suppose a State should adopt a constitution not republican, in the opinion of Congress, what course would be pursued? Congress might, by resolution, determine that the constitution was not republican, and direct the State to form a new one. And suppose that the State should refuse to do so, on the ground that it had already complied with the requisitions of the Federal Constitution in that respect? Could Congress direct an issue to try the question at the bar of the Supreme Court? This would, indeed, be an odd way of settling the rights of nations, and determining the extent of their powers! Besides, who would be parties to the issue? at whose suit should the State be summoned to appear and answer? Not at that of the United States, because a State cannot be sued by the United States, in a federal court; not at that of any other State, nor of any individual citizen, because

they are not concerned in the question. It is obvious that the case does not present proper subject matter for judicial investigation; and even if it did, that no parties could be found authorized to present the issue.

Again, Congress has authority "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress." Suppose that Congress should usurp the right to appoint the militia officers, or the State should insist on training the militia in their own way, and not "according to the discipline prescribed by Congress." How could this matter be brought before the Supreme Court? And even if properly brought there, how could its sentence be executed?

Again, suppose that Congress should enact that all the slaves of the country should immediately be free. This is certainly not impossible, and I fear not even improbable, although it would be the grossest and most palpable violation of the rights of the slaveholder. This would certainly produce the most direct conflict between the State and Federal Governments. It would involve a mere question of political power — the question whether the act of Congress forbidding slavery, or the laws and Constitution of the State allowing it, should prevail. And yet it is manifest that it presents no subject matter proper for judicial decision, and that the parties to it could not be convened before the Supreme Court.

These examples are sufficient to show that there is a large class of "constitutional controversies," which could not possibly be brought under the cognizance of any judicial tribunal, and still less under that of the federal courts. As to these cases, therefore, each State must, of necessity, for the reasons already stated, be its own "final judge or interpreter." They involve the mere question of political power, as between the State and Federal Governments; and the fact that they are clearly withheld from the jurisdiction of the Supreme Court, goes far to prove that the States in framing the Constitution did not design to submit to that court any question of the like kind, in whatever form or between whatever parties it might arise, except so far only as the parties themselves were concerned.

Judge Story himself does not contend that the Supreme Court is the "final judge or interpreter" in all cases whatsoever; he, of course, admits that no court can decide any question which is not susceptible of a proper form for judicial enquiry. But he contends that, in all cases of which the Supreme Court can take cognizance, its decisions are final, and absolutely binding and conclusive in all respects, to all purposes, and against the States and their people. It is this sweeping conclusion which it has been my object to disprove. I can see in the federal courts nothing more than the ordinary functions of the judiciary in every country. It is their proper province to interpret the laws; but their decisions are not binding, except between the parties litigant and their privies. So far as they may claim the force of authority, they are not conclusive, even upon those who pronounce them, and certainly are not so beyond the sphere of their own government. Although the Judiciary may, and frequently do, enlarge or contract the powers of their own governments, as generally understood, yet they can never enlarge or contract those of other governments, for the simple reason that other governments are not bound by their decisions. And so in our own systems. There is no case in which a judicial question can arise, before a federal court, between a State and the Federal Government. Upon what principle, then, are the States bound by the decisions of the federal judiciary? Upon no principle, certainly, except that, as to certain subjects, they have agreed to be so bound. But this agreement they made in their character of Sovereign States, not with the Federal Government, but with one another. As sovereign States, they alone are to determine the nature and extent of that agreement, and, of course, they are to determine whether or not they have given the federal courts authority to bind them in any given case. This principle has frequently been asserted by the States, and always successfully.Error! Bookmark not defined.

But these mere technical rules, upon which we have hitherto considered the subject, are altogether unworthy of its importance, and far beneath its dignity. Sovereign nations do not ask their judges what are their rights, nor do they limit their powers by judicial precedents. Still less do they entrust these important subjects to judicial tribunals not their own, and least of all, to the tribunals of that power against which their own power is asserted. It would have been a gross inconsistency in the States of our Union to do this, since they have shown in every part of their compact with one another, the most jealous care of their separate sovereignty and independence. It is true they have agreed to be bound by the decisions of federal tribunals in certain specified cases, and it is not to be doubted that, so long as they desire the continuance of their present union, they will feel themselves bound, in every case which comes plainly within their agreement. There is no necessity to call in the aid of the Supreme Court to ascertain to what subjects, and how far that agreement extends. So far as it is plain, it will be strictly observed, as national faith and honor require; there is no other guarantee. So far as it is not plain, or so far as it may be the will and pleasure of any State to deny or to resist it, the utter impotency of courts of justice to settle the difficulty will be manifested beyond all doubt. They will be admonished of their responsibility to the power which created them. The States

created them. They are but an emanation of the sovereign power of the States, and can neither limit nor control that power.

Ordinarily, the judiciary are the proper interpreters of the powers of government, but they interpret in subordination to the power which created them. In governments established by an aggregate people, such as are those of the States, a proper corrective is always found in the people themselves. If the judicial interpretation confer too much or too little power on the government, a ready remedy is found in an amendment of the Constitution. But in our federal system the evil is without remedy, if the federal courts be allowed to fix the limits of federal power with reference to those of the States. It would place every thing in the State governments, except their mere existence, at the mercy of a single department of the Federal Government. The maxim, stare decisis, is not always adhered to by our courts; their own decisions are not held to be absolutely binding upon themselves. They may establish a right today and unsettle it tomorrow. A decision of the Supreme Court might arrest a State in the full exercise of an important and necessary power, which a previous decision of the same court had ascertained that she possessed. Thus the powers of the State governments, as to many important objects, might be kept indeterminate and constantly liable to change, so that they would lose their efficiency, and forfeit all title to confidence and respect. It is true, that in this case, too, there is a possible corrective in the power to amend the Constitution. But that power is not with the aggrieved State alone; it could be exerted only in connection with other States, whose aid she might not be able to command. And even if she could command it, the process would be too slow to afford effectual relief. It is impossible to imagine that any free and sovereign State ever designed to surrender her power of self protection in a case like this, or ever meant to authorize any other power to reduce her to a situation so helpless and contemptible.[Error! Bookmark not defined.]

Yielding, therefore, to the Supreme Court all the jurisdiction and authority which properly belongs to it, we cannot safely or wisely repose in it the vast trust of ascertaining, defining or limiting the sovereign powers of the States.

Let us now follow the author in the enquiry, by what rules shall the Constitution be interpreted? Many of those which he has given are merely such as we apply to every instrument, and they do not, therefore, require any particular examination. The principal one, and that from which he deduces many others as consequences, is this: "It is to be construed as a frame or fundamental law of government, established by the people of the United States, according to their own free pleasure and sovereign will. In this respect, it is in no wise distinguishable from the constitutions of the State governments." That our Constitution is "a frame of government" will scarcely be denied by any one, and this, whether it be in its nature federal or consolidated. It is, also, as in every other constitution of government, "a fundamental law." It is the acknowledged basis of all federal power and authority, the sole chart by which federal officers are to direct their course. But all this leaves the enquiry still open, what is this fundamental law, what is the course indicated by the chart of federal power, and how is it to be ascertained? Judge Story seems to suppose that a full answer to this question may be found in the fact, that this frame or fundamental law of government was established by "the people of the United States, according to their free pleasure and sovereign will." If the fact were really so, it would undoubtedly exert an important influence, and would go far to justify his construction of the Constitution. We here discern the usefulness and necessity of that historical enquiry, which has just been finished. From that enquiry, we learn, distinctly and without doubt, that the Constitution was not established by "the people of the United States," and, consequently, that it does not resemble, in that respect, the constitutions of the States. There is no such analogy between them, as will presently be shown, as to require that they should be construed by the same rules. The Constitution of the United States is to be considered as a compact or confederation between free, independent and sovereign States, and is to be construed as such, in all cases where its language is doubtful. This is the leading and fundamental rule, from which the following may be deduced as consequences.

It is to be construed strictly. Judge Story supposes that the Constitution of the United States ought to receive as favorable a construction as those of the States; that it is to be liberally construed; that doubtful words are to be taken most strongly in favor of the powers of the Federal Government; and that there is "no solid objection to implied powers." All these are but inferences from the great rule which he first laid down, to wit, that the Constitution is to be considered as a frame of government, established by the people of the United States. As that rule cannot apply, because the fact on which it was founded is not true, it would seem to follow, as a necessary consequence, that the inferences deduced from it cannot be allowed. Nevertheless, they shall receive a more particular consideration under the present enquiry.

According to the principles of all our institutions, sovereignty does not reside in any government whatever, neither State nor federal. Government is regarded merely as the agent of those who create it, and subject in all respects to their will. In the States the sovereign power is in the people of the States respectively; and the sovereign power of the United States would, for the same reason, be in "the people of the United States," if there were any such people, known as a single nation, and the framers of the Federal Government. We have already seen, however, that there are

no such people, in a strict political sense, and that no such people had any agency in the formation of our Constitution, but that it was formed by the States, emphatically as such. It would be absurd, according to all principles received and acknowledged among us, to say that the sovereign power is in one party, and the power which is in the government is in another. The true sovereignty of the United States, therefore, is in the States, and not in the people of the United States, nor in the Federal Government. That government is but the agent through whom a portion of this sovereign power is exerted; possessing no sovereignty itself, and exerting no power, except such only as its constituents have conferred on it. In ascertaining what these powers are, it is obviously proper that we should look only to the grant from which they are derived. The agent can claim nothing for itself, and on its own account The Constitution is a compact, and the parties to it are each State, with each and every other State. The Federal Government is not a party, but is the mere creature of the agreement between the States as parties. Each State is both grantor and grantee, receiving from each and all the other States precisely what, in its turn, it concedes to each and all of them. The rule, therefore, that the words are to be taken most strongly in favor of the grantee, cannot apply, because, as each State is both grantor and grantee, it would give exactly as much as it would take away. The only mode, therefore, by which we may be certain to do no injustice to the intentions of the parties, is by taking their words as the true exponents of their meaning.

Judge Story thinks, however, that a more liberal rule ought to be adopted, in construing the Constitution of the United States, because "the grant inures solely and exclusively for the benefit of the grantor himself"; and therefore he supposes that "no one would deny the propriety of giving to the words of the grant a benign and liberal interpretation." Admit that it is so, and it would seem to follow that "the benefit of the grantor" requires that we should take from him as little as possible, and that an "interpretation of the words of the grant" would not be "benign and liberal" as to him, if it deprived him of any more of his rights and powers, than his own words prove that he intended to relinquish. It is evident that this remark of the author proceeds upon the leading idea, that the people of the United States are the only party to the contract; an idea which, we have already seen, can by no means be justified or allowed. The States are parties; each agreeing with each, and all the rest, that it will exercise, through a common agent, precisely so much of its sovereign rights and powers, as will, in its own opinion, be beneficial to itself when so exercised. The grant "inures to the sole and exclusive benefit of the grantor"; and who but the grantor himself shall determine what benefit he had in view, and how far the grant shall extend, in order to secure it? This he has done, in the case before us, by the very terms of the grant. If you hold him bound by anything beyond those terms, you enable others to decide this matter for him, and may thus virtually abrogate his contract, and substitute another in its place.

I certainly do not mean to say, that in construing the Constitution, we should at all times confine ourselves to its strict letter. This would, indeed, be sticking in the bark, to the worst possible purpose. Many powers are granted by that instrument, which are not included within its express terms, literally taken, but which are, nevertheless, within their obvious meaning. The strict construction for which I contend, applies to the intention of the framers of the Constitution; and this may or may not require a strict construction of their words. There is no fair analogy as to this matter between the Federal Constitution and those of the States, although the author broadly asserts that they are not "distinguishable in this respect"; and this will sufficiently appear from the following considerations:

1. The entire sovereignty of each State is in the people thereof. When they form for themselves a constitution of government, they part with no portion of their sovereignty, but merely determine what portion thereof shall lie dormant, what portion they will exercise, and in what modes and by what agencies they will exercise it. There is but one party to such a government, to wit, the people of the State. Whatever power their government may possess, it is still the power of the people; and their sovereignty remains the same. So far, therefore, there is "no solid objection to implied powers" in a State constitution; because, by employing power in the government, you take no power from those who made the government.

2. As government is the agent and representative of the sovereign power of the people, the presumption is, that they intend to make it the agent and representative of all their power. In every frame of limited government, the people deny to themselves the exercise of some portion of their rights and powers, but the larger portion never lies thus dormant. In this case, therefore, (viz.: of a government established by an aggregate people), the question naturally is, not what powers are granted, but what are denied; and the rule of strict construction, if applied at all, should be applied only to the powers denied. This would have the effect of enlarging the powers of government, by limiting the restraints imposed on it.

3. As it is fair to presume that a people absolutely sovereign, and having an unlimited right to govern themselves as they please, would not deny to themselves the exercise of any power necessary to their prosperity and happiness, we should admit all fair and reasonable implications in favor of the government, because, otherwise, some power necessary to the public weal, might be dormant and useless.

In these respects, there is no just analogy between the State constitutions and that of the United States.
In the first place, the Constitution of the United States is not a frame of government to which there is but one party. The States are parties, each stipulating and agreeing with each and all the rest. Their agreement is, that a certain portion of that power which each is authorized to exercise within its own limits shall be exercised by their common agent, within the limits of all of them. This is not the separate power of each, but the joint power of all. In proportion, therefore, as you increase the powers of the Federal Government, you necessarily detract from the separate powers of the States. We are not to presume that a sovereign people mean to surrender any of their powers; still less should we presume that they mean to surrender them, to be exerted over themselves by a different sovereignty. In this respect, then, every reasonable implication is against the Federal Government.
In the second place, the Constitution of the United States is not the primary social relation of those who formed it. The State governments were already organized, and were adequate to all the purposes of their municipal concerns. The Federal Government was established only for such purposes as the State government could not answer, to wit: the common purposes of all the States. Whether, therefore, the powers of that government be greater or less, the whole power of the States, (or so much thereof as they design to exercise at all), is represented, either in the Federal Government or in their own. In this respect, therefore, there is no necessity to imply power in the Federal Government.
In the third place, whatever power the States have not delegated to the Federal Government, they have reserved to themselves. Every useful faculty of government is found either in the one or the other. Whatever the Federal Government cannot do for all the States, each State can do for itself, subject only to the restraints of its own constitution. No power, therefore, is dormant and useless, except so far only as the States voluntarily decline to exert it. In this respect, also, there is no necessity to imply power in the Federal Government.
In all these particulars, the Federal Constitution is clearly "distinguishable from the constitutions of the State governments." The views just presented support this obvious distinction, that in the State constitutions every power is granted which is not denied; in the Federal Constitution, every power is denied which is not granted. There are yet other views of the subject, which lead us to the same conclusion.
The objects for which the Federal Government was, established, are by no means equal in importance to those of the State constitutions. It is difficult to imagine any necessity for a Federal Government at all, except what springs from the relation of the States to foreign nations. A union among them is undoubtedly valuable for many purposes. It renders them stronger and more able to resist their enemies; it attracts to them the respect of other countries, and gives them advantages in the formation of foreign connections; it facilitates all the operations of war, of commerce and of foreign diplomacy. But these objects, although highly important, are not so important as those great rights which are secured to us by the State constitutions. The States might singly protect themselves; singly form their foreign connections, and singly regulate their commerce, not so effectually, it is true, but effectually enough to afford reasonable security to their independence and general prosperity. In addition to all this, we rely exclusively on the State governments for the security of the great rights of life, liberty and property. All the valuable and interesting relations of the social state spring from them. They give validity to the marriage tie; they prescribe the limits of parental authority; they enforce filial duty and obedience; they limit the power of the master, and exact the proper duties of the servant. Their power pervades all ranks of society, restraining the strong, protecting the weak, succoring the poor, and lifting up the fallen and helpless. They secure to all persons an impartial administration of public justice. In all the daily business of life, we set under the protection and guidance of the State governments. They regulate and secure our rights of property; they enforce our contracts and preside over the peace and safety of our firesides. There is nothing dear to our feelings or valuable in our social condition, for which we are not indebted to their protecting and benignant action. Take away the Federal Government altogether, and still we are free, our rights are still protected, our business is still regulated, and we still enjoy all the other advantages and blessings of established and well-organized government. But if you take away the State governments, what have you left? A Federal Government, which can neither regulate your industry, secure your property, nor protect your person! Surely there can be no just reason for stealing, by liberal constructions and implications, from these beneficent State governments, any portion of their power, in order to confer it on another government, which, from its very organization, cannot possibly exert it for equally useful purposes. A strict construction of the Constitution will give to the Federal Government all the power which it can beneficially exert, all that is necessary for her to possess, and all that its framers ever designed to confer on it.
To these views of the subject we may add, that there is a natural and necessary tendency in the Federal Government to encroach on the rights and powers of the States. As the representative of all the States, it affords, in its organization, an opportunity for these combinations, by which a majority of the States may oppress the minority, against the spirit or even the letter of the Constitution. There is no danger that the Federal Government will ever be

too weak. Its means of aggrandizing itself are so numerous, and its temptations to do so are so strong, that there is not the least necessity to imply any new power in its favor. The States, on the contrary, have no motive to encroach on the Federal Government, and no power to do so, even if they desired it. In order, therefore, to preserve the just balance between them, we should incline, in every doubtful case, in favor of the States; confident that the Federal Government has always the inclination, and always the means, to maintain itself in all its just powers.

The Constitution itself suggests that it should be strictly and not liberally construed. The tenth amendment provides, that "the powers not delegated to the United States, nor prohibited, to the States, by the Constitution, are reserved to the States and the people." There was a corresponding provision in the Articles of Confederation, which doubtless suggested this amendment. It was considered necessary, in order to prevent that latitude of construction which was contended for by one of the great political parties of the country, and much dreaded and strenuously opposed by the other. In the Articles of Confederation all "rights, jurisdiction and powers" are reserved, except only such as are expressly delegated: but in the Constitution the word "expressly" is omitted. Judge Story believes, from this fact, that it was the intention of the framers of the tenth amendment to leave "the question, whether the particular power which is the subject of contest, has been delegated to one government or prohibited to the other, to depend upon a fair construction of the whole instrument"; doubtless intending by the word "fair," a construction as liberal as would be, applied to any other frame of government. This argument is much relied on, and is certainly not without plausibility, but it loses all its force, if the omission can be otherwise satisfactorily accounted for. The Constitution provides that Congress shall have power to pass all laws which shall be necessary and proper for carrying into effect the various powers which it grants. If this clause confers no additional faculty of any sort, it is wholly useless and out of place; the fact that it is found in the Constitution is sufficient proof that some effect was intended to be given to it. It was contemplated that, in executing the powers expressly granted, it might be necessary to exert some power not enumerated, and as to which some doubt might, for that reason, be entertained. For example, the power to provide a navy is not, in itself, the power to build a dry dock; but, as dry docks are necessary and proper means for providing a navy, Congress shall have power to authorize the construction of them. But if the word "expressly" had been used in the tenth amendment, it would have created a very rational and strong doubt of this. There would have been, at least, an apparent repugnance between the two provisions of the Constitution; not a real one, I admit, but still sufficiently probable to give rise to embarrassing doubts and disputes. Hence the necessity of omitting the word "expressly," in the tenth amendment. It left free from doubt and unaffected the power of Congress to provide the necessary and proper means of executing the granted powers, while it denied to the Federal Government every power which was not granted. The same result was doubtless expected from this amendment of the Constitution, which was expected from the corresponding provision in the Articles of Confederation; and the difference in the terms employed is but the necessary consequence of the difference in other provisions of the two systems.

Strictly speaking, then, the Constitution allows no implication in favor of the Federal Government, in any case whatever. Every power which it can properly exert is a granted power. All these are enumerated in the Constitution, and nothing can be constitutionally done, beyond that enumeration, unless it be done as a means of executing some one of the enumerated powers. These means are granted, not implied; they are given as the necessary incidents of the power itself, or, more properly speaking, as component parts of it, because the power would be imperfect, nugatory and useless, without them. It is true, that in regard to these incidental powers, some discretion must, of necessity, be left with the government. But there is at the same time, a peculiar necessity that a strict construction should be applied to them; because that is the precise point at which the government is most apt to encroach. Without some strict, definite and fixed rules upon the subject, it would be left under no restraint, except what is imposed by its own wisdom, integrity and good faith. In proportion as a power is liable to be abused, should we increase and strengthen the checks upon it. And this brings us to the enquiry, what are these incidental powers, and by what rules are they to be ascertained and defined?

The only source from which these incidental powers, are derived is that clause of the Constitution which confers on Congress the power "to make all laws which are necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." The true character of this clause cannot be better given than in the words of Judge Story himself: "It neither enlarges any power specially granted, nor is it a grant of any new power to Congress. But it is merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, those otherwise granted, are included in the grant." His general reasoning upon the subject is very lucid, and, to a certain extent, correct and convincing. He contends that the word "necessary"' is not to be taken in its restricted sense, as importing absolute and indispensable necessity, but is to be understood in the sense of "convenience," "useful," "requisite"; as being such that, without them, "the grant would be nugatory." The dangerous latitude implied by this construction, he thinks sufficiently restrained by the additional word "proper," which implies, that the means shall

be "constitutional and bona fide appropriate, to the end." In all this he is undoubtedly correct; but the conclusion which he draws from it cannot be so readily admitted. "If," says he, "there be any general principle which is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, it is that every power vested in the government is, in its nature, sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the end of such power, unless they are excepted in the Constitution, or are immoral, or are contrary to the essential objects of political society." This is by no means a legitimate conclusion from his own fair and forcible reasoning. The doctrine here is, in effect, that the Federal Government is absolutely unrestricted in the selection and use of the means of executing its own powers, except only so far as those means are excepted in the Constitution. Whether or not they are "requisite," "fairly applicable to the attainment of the end of such power," "immoral or contrary to the essential objects of political society," all these are questions which the government alone can decide, and, of course, as their own judgment and discretion are their only rule, they are under no sort of limitation or control in these respects. The standards of political morality, of public convenience and necessity, and of conformity to the essential objects of society, are quite too fluctuating and indeterminate to be relied on, by a free people, as checks upon the powers of their rulers. The only real restriction, then, which the author proposes in the above passage, is that which may be found in the fact, that the proposed means are "excepted" in the Constitution; and this is directly contrary to the letter and spirit of that instrument. The Federal Government possesses no power which is not "delegated"; "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved by the States respectively, or to the people." Judge Story's idea is, that every thing is granted which is not excepted; whereas, the language of the tenth amendment is express, that every thing is excepted which is not granted. If the word "excepted" is to be understood in this sense, the author's idea is correct; but this does not accord with the general scope of his opinions, and reasoning. He approaches much nearer to the true rule in the following passage. Let the end be legitimate; let it be within scope of the Constitution; and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but*are consistent with the letter and spirit of the instrument*, are constitutional." The words in italics are all important, in the matter, and give to the passage a meaning wholly different from that of the passage first quoted.

Judge Story's error is equally great, and far more dangerous, in supposing that the means of executing its powers are conferred on the government. The general proposition is true, as he has stated it; but it is not true in the application which he has made of it to our government. He regards the tenth amendment as altogether unnecessary, and tells us, in express terms, that the powers of the government would be exactly the same with or without it. This is a great and obvious mistake. The tenth amendment was wisely incorporated into the Constitution for the express purpose of denying to the government that unbounded discretion in the selection and use of its means, for which it contends. The power to make all laws necessary and proper for carrying into effect the granted powers is conferred on Congress alone; it is exclusively a legislative power. So far, therefore, as the government is concerned, it derives no power from this clause; and the same is true of its several departments. They have no discretion in the selection of any incidental means of executing their several trusts. If they need the use of such means, they must apply to Congress to furnish them; and it is discretionary with that body whether to furnish them or not. All this is perfectly clear from the very language of the Constitution, and the propriety of such a provision must be apparent to every one. If power could be implied in favor of such a government as ours, it would, if nothing were add to the contrary, be implied in favor of every department and officer thereof, to the execution of whose duties it might seem to be necessary. This would be a wide extent of discretion, indeed; so wide, that it would render all the limitations of the Constitution nugatory and useless. It is precisely this result which was intended to be prevented by the clause in question. The States were unwilling to entrust such a discretion either to the government, or to the several departments or officers thereof. They were willing to confer it on Congress alone; on the legislative department, the more immediate representatives of the States and their people, who would be most apt to discharge the trust properly, because they had the least temptation to abuse it. It is not true, then, as our author supposes, or, at least, it is not true of our system, that "every power in the government is, in its nature, sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power, unless they are excepted in the Constitution, or forbidden by some consideration of public morals, or by their unsuitableness to the proper objects of government." In our government, the means are at the disposal of one department only, which may either grant or withhold them at its pleasure.

What, than, are the proper limitations of the power of Congress in this respect? This has always been a subject of great difficulty, and of marked difference of opinion, among politicians. I cannot hope that I shall be able perfectly to disembarrass it; but I think, nevertheless, that there are a few plain rules, the propriety of which all will admit, and which may materially aid us in the formation of a sound opinion upon the subject.

In the first place, then, it is to be observed that Congress has no power under this clause of the Constitution, except to provide the means of executing the granted powers. It is not enough that the means adopted are sufficient to that and they must be adopted bona fide, with a view to accomplish it. Congress has no right to use for the accomplishment of one purpose, means ostensibly provided for another to do so would be a positive fraud, and a manifest usurpation; for, if the purpose be lawful, it may be accomplished by its own appropriate means, and if it be unlawful, it should not be accomplished at all. It is quite obvious that, without this check, Congress may, by indirection, accomplish almost any forbidden object; for among the great variety of means adapted to carry out the granted powers, some may be found equally calculated to effect, either by their direct or indirect action, purposes of a wholly different character and tendency. It is, therefore, of the utmost importance to the preservation of the true principles of the Constitution, that strict faith should be kept upon this point.

In the second place, the means provided must not only be "necessary," but they must also be "proper." If the word "necessary" stood alone, it would be susceptible of a very extended meaning, and would probably be considered as embracing powers which it never was in the contemplation of the framers of the Constitution to grant. It was necessary, then, to limit and restrain it by some other word, and the word "proper" was very happily selected. This word requires that the means selected shall be strictly constitutional. In ascertaining this, we must have regard not only to the express provisions of the Constitution, but also to the general nature and character of our institutions. Ours is a free government, which implies that it is also an equal government; it therefore authorizes the employment of no means for the execution of its powers, except such as are consistent with the spirit of liberty and equality. Ours is a confederated government; it therefore authorizes no means which are inconsistent with the distinct sovereignty of the States, the confederating powers. Ours is a government of "delegated" powers, limited and specifically enumerated; it therefore authorizes no means which involve, in the use of them, any distinct substantive power, not granted. This single rule, if fairly and honestly observed, will go far to remove many serious difficulties upon this point, and will deprive the Federal Government of many important powers which it has hitherto exercised, and which are still claimed for it, by Judge Story, and the whole political world to which he belongs. The propriety and, indeed, the absolute necessity of the rule, appear to me to be obvious. If powers not granted might be used as means of executing the granted powers, it is manifest that no power whatever could be considered as denied. It is not enough that there is no apparent unconstitutionality in the use of such means, in the particular case. If they involve a principle which will authorize the use of ungranted powers in any other case, they are forbidden by the Constitution. To illustrate this idea by an example: Congress has power to regulate commerce among the several States. This is supposed by some to give them power to open channels of commerce, by making roads, cutting canals etc., through the territories of the States. But this is a substantive power in itself, not granted to the United States, but reserved to the States respectively, and therefore is not allowed as a means of regulating commerce among the States. Let us suppose, however, that the opening of roads and cutting of canals are the very best means of facilitating and regulating commerce among the States, and that there is nothing in the language of the Constitution to forbid it; we are still to inquire what farther powers would be necessarily implied, as incidents of this. We find that the power to open a road through a State, implies the power to keep it in repair: to impose fines and penalties on those who injure it, and, consequently, to enforce those fines and penalties by the exercise of a jurisdiction over it. We find, also, that the power to make such a road, implies the power to locate it; and, as there is nothing to control the discretion of Congress in this respect, there is nothing to forbid them to locate their road, upon the bed of a State canal, or along the whole course of a State turnpike. The effect of this would be to transfer to the United States, against the consent of the State, and without compensation, improvements made by the State within her own territory and at her own expense. Nay, the supremacy claimed for the powers of Congress in this respect would, upon the same principle, authorize them to run a road through the centre of a State capital, or to cover half her territory with roads and canals, over which the State could exert neither jurisdiction nor control. The improvements of individuals, too, and of corporate bodies made under the authority of State laws, would thus be held at the mercy of the United States. When we see, then, that the means of regulating commerce among the States would necessarily imply these vast and forbidden powers, we should unhesitatingly reject them as unconstitutional. This single instance, given by way of example and illustration, presents a rule which, if strictly adhered to in all analogous cases, would go far to remove the difficulties, and to prevent the contests, which so often arise on this part of the Constitution.

These few simple rules are, in their nature, technical, and may at all times be easily applied, if Congress will observe good faith in the exercise of its powers. There is another of a more enlarged and liberal character, which the word "proper" suggests, and which, if applied with sound judgment, perfect integrity and impartial justice, will render all others comparatively unnecessary. It exacts of Congress an extended and fair view of the relations of all the States, and a strictly impartial regard to their respective rights and interests. Although the direct action of a

granted power, by the means also granted in the Constitution, may be both unequal and unjust, those means would, nevertheless, be perfectly constitutional. Such injustice and inequality would be but the necessary consequence of that imperfection, which characterizes every human institution, and to which those who undertake to proscribe specific rules to themselves are bound to submit, But when, Congress are called on to prescribe new means of executing a granted power, none are "proper," and therefore none are constitutional which operate unequally and unjustly among the States or the people. It in true that perfect and exact equality in this respect is not to be expected; but a near approach to it will always be made by a wise and fair legislation. Great and obvious injustice and inequality may at all times be avoided. No "means" which involve these consequences can possibly be considered "proper"; either in a moral or in a constitutional sense. It requires no high intellectual faculty to apply this rule; simple integrity is all that is required.

I have not thought it necessary to follow the author through his extended examination of what he terms the incidental powers of Congress, arising under the clause of the Constitution we are examining. It would be indeed an endless task to do so; for I am unable to perceive that he proposes any limit to them at all. Indeed, he tells us in so many words, that "upon the whole, the result of the most careful examination of this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or impair the right of the legislature to use its best judgment in the selection of measures to carry into execution the constitutional powers of the national government." This is, indeed, a sweep of authority, boundless and unrestricted. The "best judgment" of Congress is the only limit proposed to its powers, whilst there is nothing to control that judgment, nor to correct its errors. Government is abandoned emphatically to its own discretion; for even if a corrective be supposed to exist with the people, that corrective can never be applied in behalf of an oppressed minority. Are the rules which I have proposed indeed nothing? Is no effect whatever to be given to this word "proper," in this clause of the Constitution? Can Judge Story possibly be right in supposing that the Constitution would be the same without it as with it; and that the only object of inserting it was "the desire to remove all possible doubt respecting the right to legislate on the vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid pageant, or a delusive phantom of sovereignty?" It was, indeed, the object of the framers of the Constitution "to remove all possible doubt" from this subject. They desired neither a splendid pageant nor a splendid government. They knew that without this restriction ours would be both; and as powerful as splendid. They did not design that any power with which they thought proper to clothe it should be inoperative for want of means to carry it into execution; but they never designed to give it the boundless field of its own mere will, for the selection of those means. Having specifically enumerated its powers, as far as was practicable, they never designed to involve themselves in the absurdity of removing, by a single clause, every restriction which they had previously imposed. They meant to assure their agent that, while none of the powers with which they had thought proper to clothe it should be nugatory, none of them should be executed by any means which were not both "necessary" and "proper."

The lovers of a strong consolidated government have labored strenuously, and I fear with too much success, to remove every available restriction upon the powers of Congress. The tendency of their principles is to establish that legislative omnipotence which is the fundamental principle of the British Constitution, and which renders every form of written constitution idle and useless. They suffer themselves to be too much attracted by the splendors of a great central power. Dazzled by these splendors, they lose sight of the more useful, yet less ostentatious purposes of the State governments, and seem to be unconscious that, in building up this huge temple of federal power, they necessarily destroy those less pretending structures from which alone they derive shelter, protection and safety. This is the *ignis fatuus* which has so often deceived nations, and betrayed them into the slough of despotism. On all such, the impressive warning of Patrick Henry, drawn from the lessons of all experience, would be utterly lost: "Those nations who have gone in search of grandeur, power and splendor, have always fallen a sacrifice and been the victims of their own folly. While they acquired those visionary blessings, they lost their freedom." The consolidationists forget these wholesome truths, in their eagerness to invest the federal government with every power which is necessary to realize their visions in a great and splendid nation. Hence they do not discriminate between the several classes of federal powers, but contend for all of them, with the same blind and devoted zeal. It is remarkable that, in the exercise of all those functions of the Federal Government which concern our foreign relations, scarcely a case can be supposed, requiring the aid of any implied or incidental power, as to which any serious doubt can arise. The powers of that government, as to all such matters, are so distinctly and plainly pointed out in the very letter of the Constitution, and they are so ample for all the purposes contemplated, that it is only necessary to understand them according to their plain meaning and to exercise them according to their acknowledged extent. No auxiliaries are required; the government has only to go on in the execution of its trusts, with powers at once ample and unquestioned. It is only in matters which concern our domestic policy, that any serious struggle for federal power has ever arisen, or is likely to arise. Here, that love of splendor and display, which

deludes so large a portion of mankind, unites with that self-interest by which all mankind are swayed, in aggrandizing the Federal Government, and adding to its powers. He who thinks it better to belong to a splendid and showy government, than to a free and happy one, naturally seeks to surround all our institutions with a gaudy pageantry, which belongs only to aristocratic or monarchical systems. But the great struggle is for those various and extended powers, from the exercise of which avarice may expect its gratifications. Hence the desire for a profuse expenditure of the public money, and hence the thousand schemes under the name of internal improvements, by means of which hungry contractors may plunder the public treasury, and wily speculators prey upon the less skillful and cunning. And hence, too, another sort of legislation, the most vicious of the whole, which, professing a fair and legitimate object of public good, looks, really, only to the promotion of private interests. It is thus that classes are united in supporting the powers of government, and an interest is created strong enough to carry all measures and sustain all abuses.

Let it be borne in mind that, as to all these subjects of domestic concern, there is no absolute necessity that the Federal Government should possess any power at all. They are all such as the State governments are perfectly competent to manage; and the most competent, because each State is the best judge of what is useful or necessary to itself. There is, then, no room to complain of any want of power to do whatever the interests of the people require to be done. This is the topic upon which Judge Story has lavishly expended his strength. Looking upon government as a machine contrived only for the public good, he thinks it strange that it should not be supposed to possess all the faculties calculated to answer the purposes of its creation. And surely it would be strange if it were, indeed, so defectively constructed. But the author seems to forget that in our system the Federal Government stands not alone. That is but a part of the machine; complete in itself, certainly, and perfectly competent, without borrowing aid from any other source, to work out its own part of the general result. But it is not competent to work out the whole result. The State governments have also their part to perform, and the two together make the perfect work, then, are all the powers which it is necessary that government should possess; not lodged in one place, but distributed; not the power of the State governments, nor of the Federal Government, but the aggregate of their several and respective powers. In the exercise of those functions which the State governments are forbidden to exercise, the Federal Government need not look beyond the letter of its charter for any needful power; and in the exercise of any other function, there is still less necessity that it should do so; because, whatever power that government does not plainly possess, is plainly possessed by, the State governments. I speak, of course, of such powers only as may be exercised either by the one or the other, and not of such as are denied to both. I mean only to say, that so far as the States and the people have entrusted power to government at all, they have done so in language plain and fall enough to render all implication unnecessary. Let the Federal Government exercise only such power as plainly belongs to it, rejecting all such as is even doubtful, and it will be found that our system will work out all the useful ends of government, harmoniously and without contest, and without dispute, and without usurpation. Error! Bookmark not defined.

CHAPTER X.

STRUCTURE AND FUNCTIONS OF THE HOUSE OF REPRESENTATIVES.

I have thus finished the examination of the political part of these commentaries, and this is the only object with which this review was commenced. There are, however, a few topics yet remaining, of great public concern, and which ought not to be omitted. Some of these, it seems to me, have been presented by the author in false and deceptive lights, and others of them, from their intrinsic importance, cannot be too often pressed upon public attention. I do not propose to examine them minutely, but simply to present them in a few of their strongest lights. In his examination of the structure and functions of the House of Representatives, Judge Story has given his views of that clause of the Constitution which allows representation to three-fifths of the slaves. He considers the compromise upon this subject as unjust in principle, and decidedly injurious to the people of the non-slaveholding States. He admits that an equivalent for this supposed concession to the South was intended to be secured by another provision, which directs that "Representatives and direct taxes shall be apportioned among the several States, according to their respective numbers"; but he considers this provision "more specious than solid; for while in the levy of taxes it apportions them on three-fifths of persons not free, it on the other hand, really exempts the other two-fifths from being taxed at all as property. Whereas, if direct taxes had been apportioned, as upon principle they ought to be, according to the real value of property within the State, the whole of the slaves would have been taxed as property. But a far more striking inequality has been disclosed by the practical operations of the government. The principle of representation is constant and uniform; the levy of direct taxes is occasional and rare. In the course of forty years, no more than three direct taxes have been levied, and those only under very extraordinary and pressing circumstances. The ordinary expenditures of the government are, and always have been,

derived from other sources. Imposts upon foreign importations, have supplied, and will generally supply, all the common wants; and if these should not furnish an adequate revenue, excises are next resorted to, as the surest and most convenient mode of taxation. Direct taxes constitute the last resort; and, as might have been foreseen, would never be laid until other resources had failed."

This is a very imperfect, and, as it seems to me, not a very candid view of a grave and important subject. It would have been well to avoid it altogether, if it had been permitted; for the public mind needs no encouragement to dwell, with unpleasant reflections, upon the topics it suggests. In an examination of the Constitution of the United States, however, some notice of this peculiar feature of it was unavoidable; but we should not have expected the author to dismiss it with such criticism only as tends to show that it is unjust to his own peculiar part of the country. It is manifest to everyone that the arrangement rests upon no particular principle, but as a mere compromise between conflicting interests and opinions. It is much to be regretted that it is not on all hands acquiesced in and approved, upon that ground; for no public necessity requires that it should be discussed; and it cannot now be changed without serious danger to the whole fabric. The people of the slaveholding States themselves have never shown a disposition to agitate the question at all, but, on the contrary, have generally sought to avoid it. It has, however, always "been complained of as a grievance," by the non-slaveholding States, and that too in language which leaves little doubt that a wish is very generally entertained to change it. A grave author, like Judge Story, who tells the people, as it were *ex cathedra*, that the thing is unjust in itself, will scarcely repress the dissatisfaction which such an announcement, falling in with preconceived opinions, will create, by a simple recommendation to acquiesce in it as a compromise, tending upon the whole to good results. His remarks may render the public mind more unquiet than it now is they can scarcely tranquilize or reconcile it. For myself, I am very far from wishing to bring the subject into serious discussion, with any view to change; but I cannot agree that an arrangement, obviously injurious to the South, should be held up as giving her advantages of which the North has reason to complain.

I will not pause to inquire whether the rule apportioning representatives according to numbers, which, after much, contest, was finally adopted by the convention, be the correct one or not. Supposing that it is so, the rule which apportions taxation in the same way, follows as a matter of course. The difficulties under which the convention seem to have labored, in regard to this subject, may well excite our surprise, at the present day. If the North really supposed that they conceded anything to the South, by allowing representation to three-fifths of their slaves, they were certainly but poorly compensated for the concession, by that provision of the Constitution which apportions taxation according to representation. This principle was universally acknowledged throughout the United States, and is, in fact, only, a modification of the great principle upon which the revolution itself was based. That taxation should be apportioned to representation, results from the federative character of the government; and the fact that this rule was adopted, sustains the views which have been presented upon this point. It would have been indeed strange if some one State, having only half the representatives of its neighbor State, might yet have been subjected to twice the amount of taxation; Delaware, for instance, with her one representative, to twice the taxes of Pennsylvania, with her twenty-eight. A different rule from that which prevails might subject the weaker States to intolerable oppression. A combination among a few of the strongest States might, by a little management, throw the whole burthen of taxation upon the others, by selecting only such subjects of taxation as they themselves did not possess, or which they possessed only to a comparatively small extent. It never would have answered to entrust the power of taxation to Congress, without some check against these and similar abuses, and no check could have been devised more effective or more appropriate than the provision now under consideration. All the States were interested in it, and the South much more deeply than the North. The slaves of the South afford the readiest of all possible subjects for this sort of practice, and it would be going too far to say that they would not, at some day or other, be selected for it, if this provision of the Constitution did not stand in the way. The southern States would certainly never have adopted the Constitution without some such guarantee as this against those oppressions to which their peculiar institutions exposed them; and the weaker States, whether north or south, would never have adopted it, because it might lead to their utter annihilation in the confederacy. This provision of the Constitution, therefore, can scarcely be considered as an equivalent for anything conceded by some of the States to others. It resulted necessarily from the very nature of their union; it is an appropriate and necessary feature in every confederacy between sovereign States. We ought, then, to regard that provision of the Constitution which allows representation to only three-fifths of the slaves, as a concession made by the South; and one for which they received no equivalent, except in the harmony it served to produce.

Reverting to the rule that representation shall be apportioned to population, and supposing that all parties acquiesce in the propriety of it, upon what principle is the rule itself founded? We have already seen that the whole country had adopted the principle that taxation, should be apportioned to representation, and, of course, in fixing the principle of representation, the question of taxation was necessarily involved. There is no perfectly just rule of

taxation but property; every man should contribute to the support of the government, according to his ability, that is, according to the value of that property to which government extends its protection. But this rule never can be applied in practice; because it is impossible to discover what is the amount of the property, either of individuals or nations. In regard to States, population is the best measure of this value which can be found, and is, in most cases, a sufficiently accurate one. Although the wealth of a State cannot be ascertained, its people can be easily counted, and hence the number of its people gives the best rule for its representation, and consequently for its taxation.

The population of a State is received as the best measure of the value of its property, because it is in general true, that the greater the number of people, the greater is the amount of productive industry. But of what consequence is it, by what sort of people this amount of production is afforded? It was required that each State of our Union should contribute its due proportion to the common treasury; a proposition ascertained by the number of its people. Of what consequence is it whether this contribution be made by the labor of slaves, or by that of freemen? All that the States had a right to require of one another was, that each should contribute its allotted proportion; but no State had a right to enquire from what particular sources that contribution arose. Each State having a perfect right to frame its own municipal regulations for itself, the other States had no right to subject her to any disabilities or disadvantages on account of them. If Massachusetts had a right to object to the representation of the slaves of Virginia, Virginia had the same right to object to the representation of the apprentices, the domestic servants, or even the mechanics of Massachusetts. The peculiar private condition and relations of the people of a State to one another could not properly be enquired into by any other State. That is a subject which each State regulates for itself; and it cannot enter into the question of the influence which such State ought to possess, in the common government of all the States. It is enough that the State brings into the common stock a certain amount of wealth, resulting from the industry of her people. Whether those people be men or women, bond or free, or bound to service for a limited time only, is the exclusive concern of the State itself, and is a matter with which the other States cannot intermeddle, without impertinence, injustice and oppression. So far, then, from limiting representation to three-fifths of the slaves, they ought all to be represented, for all contribute to the aggregate of the productive industry of the country. And, even then, the rule would operate injuriously upon the slave-holding States; for, if the labor of a slave be as productive as that of a free man, (and in agriculture it is so), the cost of supporting him is much less. Therefore, of the same amount of food and clothing, raised by the two classes, a greater surplus will remain of that of the slave, and of course a greater amount subject to the demands of the public necessities.

The remarks of John Adams, delivered in convention,[Error! Bookmark not defined.] are very forcible upon this point. According to Mr. Jefferson's report of them, he observed, "that the numbers of people are taken as an index of the wealth of the State, and not as subjects of taxation; that, as to this matter it was of no consequence by what name you called your people, whether by that of freemen or of slaves; that in some countries the laboring poor are called freemen, in others they are called slaves; but that the difference, as to the state, was imaginary only. What matters it whether a landlord, employing ten laborers on his farm, gives them annually as much money as will buy them the necessaries of life, or gives them those necessaries at short hand? The ten laborers add as much wealth to the State, increase its exports as much, in the one case as in the other. Certainly five hundred freemen produce no more profits, no greater surplus for the payment of taxes, than five hundred slaves. Therefore the State in which are the laborers called freemen should be taxed no more than that in which are the laborers called slaves. Suppose by an extraordinary operation of nature or of law, one-half the laborers of a State could, in the course of one night, be transformed into slaves, would the State be made poorer, or less able to pay taxes? That the condition of the laboring poor in most countries, that of the fishermen particularly of the northern States, is as abject as that of slaves. It is the number of laborers which produces the surplus for taxation, and numbers therefore, indiscriminately, are the fair index to wealth."

It is obvious that these remarks were made for very different purpose from that which I have in view. The subject then before the convention was the proper rule of taxation, and it was Mr. Adams's purpose to show that, as to that matter, slaves should be considered only as people, and, consequently, as an index of the amount of taxable wealth. The convention had not then determined that representatives and direct taxes should be regulated by the same ratio. When they did determine this, the remarks of Mr. Adams seem to me conclusive, to show that representation of all the slaves ought to have been allowed; nor do I see how those who held his opinions could possibly have voted otherwise. If slaves are people, as forming the measure of national wealth, and consequently of taxation, and if taxation and representation be placed upon the same principle, and regulated by the same ratio, then that slaves are people, in fixing the ratio of representation, is a logical sequitur which no one can possibly deny.

But it is objected that slaves are property, and for that reason, are not more entitled to representation than any other species of property. But they are also people, and, upon analogous principles, are entitled to representation as people. It is in this character alone that the non-slaveholding States have a right to consider them, as has already

been shown, and in this character alone is it just to consider them. We ought to presume that every slave occupies a place which, but for his presence, would be occupied by a free white man; and, if this were so, every one, and not three-fifths only, would be represented. But the States who hold no slaves have no right to complain that this is not the case in other States, so long as the labor of the slave contributes as much to the common stock of productive industry, as the labor of the white man. It is enough that a State possesses a certain number of people, of living, rational beings. We are not to enquire whether they be black or white, nor tawny, nor what are their peculiar relations among one another. If the slave of the South be property, of what nature is that property, and what kind of interest has the owner in it? He has a right to the profits of the slave's labor. And so, the master of an indented apprentice has a right to the profits of his labor. It is true, one holds the right for the life of the slave, and the other only for a time limited in the apprentice's indentures; but this is a difference only in the extent, and not in the nature of the interest. It is also true, that the owner of a slave has, in most States, a right to sell him; but this is only because the laws of the State authorize him to do so. And, in like manner, the indentures of an apprentice may be transferred if the laws of the State will allow it. In all these respects, therefore, the slave and the indentured apprentice stand upon precisely the same principle. To a certain extent, they are both property, and neither of them can be regarded as a free man; and if the one be not entitled to representation, the other also should be denied that right. Whatever be the difference of their relations to the separate members of the community, in the eye of that community they are both people. Here, again, Mr. Adams shall speak for me; and our country has produced few men who could speak more wisely: "A slave may, indeed, from the custom of speech, be more properly called the wealth of his master, than the free laborer might be called the wealth of his employer; but as to the State, both are equally its wealth, and should therefore equally add to the quota of its tax." Yea; and, consequently, they should equally add to the quota of its representation.

Judge Story supposes that it is a great advantage to the slave-holding States that, while three-fifths of the slaves are entitled to representation, two-fifths are exempted from taxation. Why confine it to three-fifths? Suppose that none of them were entitled to representation, the only consequence would be, that the State would have fewer representatives, and for that reason, would have a less amount of taxes to pay. In this case, all the slaves would be exempted from taxation; and, according to our author, the slaveholding States would have great reason to be content with so distinguishing an advantage. And, for the same reason, every other State would have cause to rejoice at the diminution of the number of people, for although its representation would thereby be decreased, its taxes would be decreased in the same proportion. This is the true mode of testing the author's position. It will be found that every State values the right of representation at a price infinitely beyond the amount of direct taxes to which that right may subject it; and, of course, the southern States have little reason to be thankful that two-fifths of their slaves are exempted from taxation, since they lose, in consequence of it, the right of representation to the same extent. The author, however, seems to have forgotten this connection between representation and taxation; he looks only at the sources whence the Union may draw wealth from the South, without enquiring into the principles upon which her representation may be enlarged. He thinks that direct taxes ought to be apportioned, "according to the real value of property within the State; in which case "the whole of the slaves would have been taxable as property." I have already remarked that this is, indeed, the true rule but it is wholly impracticable. It would be alike impossible to fix a satisfactory standard of valuation, and to discover the taxable subjects. No approximation to the truth could be hoped for, without a host of officers, whose compensation would consume a large proportion of the tax, while, from the very nature of their duties, they would be forced into minute examinations, inconsistent with the freedom of our institutions, harassing and vexatious in their details, and leading inevitably to popular resistance and tumult. And this process must be gone through at every new tax; for the relative wealth of the States would be continually changing. Hence, population has been selected as the proper measure of the wealth of the States. But, upon our author's principle, the South would be, indeed, little better off than the lamb in the embrace of the wolf. The slaves are easily found; they can neither be buried under ground, nor hid in the secret drawers of a bureau. They are peculiar, too, to a particular region; and other regions, having none of them, would yet have a voice in fixing their value us subjects of taxation. That they would bear something more than their due share of this burthen, is just as certain as that man, under all circumstances, will act according to his nature. In the mean time, not being considered as people, they would have no right to be heard in their own defense, through their representatives in the federal councils. On the other hand, the non-slave-holding States would be represented in proportion to the whole numbers of their people, and would be taxed only according to that part of their wealth which they might choose to disclose, or which they could not conceal. And in the estimate of this wealth, their people would not be counted as taxable subjects, although they hold to their respective States precisely the same relation, as laborers and contributors to the common treasury, as is held by the slaves of the South to their respective States. The rule, which considers slaves only as property to be taxed, and not as people to be represented, is little else than a rule imposing on the southern.

States almost the entire burthens of the government, and allowing to them only the shadow of influence in the measures of that government.

The truth is, the slave-holding States have always contributed more than their just proportion to the wealth and strength of the country, and not less than their just proportion to its intelligence and public virtue. This is the only perfectly just measure of political influence; but it is a measure which cannot be applied in practice. We receive population as the best practicable substitute for it; and as all people, whatever be their private and peculiar conditions and relations, are presumed to contribute their share to the stock of general wealth, intelligence and virtue, they are all entitled to their respective shares of influence in the measures of government. The slave-holding States, therefore, had a right to demand that all their slaves should be represented; they yielded too much in agreeing that only three-fifths of them should possess that right. I cannot doubt that this would have been conceded by the convention, had the principle, that representatives and direct taxes should be apportioned according to the same ratio, been then adopted into the Constitution. It would have been perceived that, while the representation of the southern States would thus have been increased, their share of the public taxes would have been increased in the same proportion; and thus they would have stood, in all respects, upon the same footing with the other States. The northern States would have said to them, "Count your people; it is of no consequence to us what is their condition at home; they are laborers, and therefore they contribute the mine, amount of taxable subjects, whether black or white, bond or free. We therefore recognize them as people, and give them representation as such. All that we require is, that when we come to lay direct taxes, they shall be regarded as people still, and you shall contribute for them precisely as we contribute for our people." This is the plain justice of the case; and this alone would be consistent with the great principles which ought to regulate the subject. It is a result which is no longer attainable, and the South will, as they ought to do, acquiesce in the arrangement as it now stands. But they have reason to complain that great authors, in elaborate works designed to form the opinions of rising generations, should so treat the subject as to create an impression that the southern States are enjoying advantages under our Constitution to which they are not fairly entitled, and which they owe only to the liberality of the other States; for the South feels that these supposed advantages are, in fact, sacrifices, which she has made only to a spirit of conciliation and harmony, and which neither justice nor sound principle would have exacted of her.

Regarding this work of Judge Story, as a whole, it is impossible not to be struck with the laborious industry which he has displayed in the collection and preparation of his materials. He does not often indulge himself in speculations upon the general principles of government, but confines himself, with great strictness, to the particular form before him. Considering him as a mere lawyer, his work does honor to his learning and research, and will form a very useful addition to our law libraries. But it is not in this light only that we are to view it. The author is a politician, as well as a lawyer, and has taken unusual pains to justify and recommend him own peculiar opinions. This he has done, often at the expense of candor and fairness, and, almost invariably, at the expense of historical truth. We may well doubt, therefore, whether his book will produce more evil than good, to the country; since the false views which it presents, of the nature and character of our government, are calculated to exert an influence over the public mind, too seriously mischievous to be compensated by any new lights which it sheds upon other parts of our Constitution. Indeed, it is little less than a labored panegyric upon that instrument. Having made it, by forced constructions, and strange misapprehensions of history, to conform to his own beau ideal of a perfect government, he can discern, in it nothing that is deficient, nothing that is superfluous. And it is his particular pleasure to arm it with strong powers, and surround it with imposing splendors. In his examination of the legislative department, he has displayed an extraordinary liberality of concession in this respect. There is not a single important power ever exercised or claimed for Congress which he does not vindicate and maintain. The long-contested powers to protect manufactures, to construct roads, with an endless list of similar objects to which the public money may be applied, present no serious difficulty to his mind. An examination of these several subjects, in detail, would swell this review beyond its proper limits, and is rendered unnecessary by the great principles which it has been my object to establish. I allude to them here, only as illustrating the general character of this book, and as showing the dangerous tendency of its political principles. It is, indeed, a strong argument in favor of federal power; and when we have said this, we have given it the character which the author will most proudly recognize. And it is not for the legislature alone, that these unbounded powers are claimed; the other departments come in for a full share of his favor. Even when he is forced to condemn, he does it with a censure so faint, and so softened and palliated, as to amount to positive praise.

The principle that ours is a consolidated government of all the people of the United States, and not a confederation of sovereign States, must necessarily render it little less than omnipotent. That principle, carried out to its legitimate results, will assuredly render the federal government the strongest in the world. The powers of such a government are supposed to reside in a majority of the people; and, as its responsibility is only to the people, that majority may

make it whatever they please. To whom is that majority itself responsible? Upon the theory that it possesses all the powers of the government, there is nothing to check, nothing to control it. In a population strictly homogeneous in interests, character and pursuits, there is no danger in this principle. We adopt it in all our State governments, and in them it is the true principle; because the majority can pass no law which will not affect themselves, in mode and degree, precisely as it affects others. But in a country so extensive as the United States, with great differences of character, interests and pursuits, and with these differences, too, marked by geographical lines, a fair opportunity is afforded for the exercise of an oppressive tyranny, by the majority over the minority. Large masses of mankind are not apt to be swayed, except by interest alone; and wherever that interest is distinct and clear, it presents a motive of action too strong to be controlled. Let it be supposed that a certain number of States, containing a majority of the people of all the States, should find it to their interest to pass laws oppressive to the minority, and violating their rights as secured by the Constitution. What redress is there, upon the principles of Judge Story? Is it to be found in the federal tribunals? They are themselves a part of the oppressing government, and are, therefore, not impartial judges of the powers of that government. Is it to be found in the virtue and intelligence of the people? This is the author's great reliance. He acknowledges that the system, as he understands it, is liable to great abuses; but he supposes that the virtue and intelligence of the people will, under all circumstances, prove a sufficient corrective. Of what people? Of that very majority who have committed the injustice complained of, and who, according to the author's theory, are the sole judges whether they have power to do it or not, and whether it be injustice or not. Under such a system as this, it is a cruel mockery to talk about the rights of the minority. If they possess rights, they have no means to vindicate them. The majority alone possess the government; they alone measure its powers, and wield them without control or responsibility. This is despotism of the worst sort, in a system like ours. More tolerable, by far, is the despotism of one man, than that of a party, ruling without control, consulting its own interests, and justifying its excesses under the name of republican liberty. Free government, so far as its protecting power is concerned, is made for minorities alone.

But the system of our author, while it invites the majority to tyrannize over the minority, and gives the minority no redress, is not safe even, for that majority itself. It is a system unbalanced, unchecked, without any definite rules to prevent it from running into abuse, and becoming a victim to its own excesses. The separation and complete independence of the several departments of the government is usually supposed to afford a sufficient security against an undue enlargement of the powers of any one of them. This is said to be the only real discovery in politics, which can be claimed in modem times; and it is generally considered a very great discovery, and, perhaps, the only contrivance by which public liberty can be preserved. The idea is wholly illusory. It is true, that public liberty could scarcely exist without such separation, and, for that reason, it was wisely adopted in our systems. But we should not rely on it with too implicit a confidence, as affording in itself any adequate barrier against the encroachment of power, or any adequate security for the rights and liberties of the people. I have little faith in these balances of government; because there is neither knowledge nor wisdom enough in man to render them accurate and permanent. In spite of every precaution against it, some one department will acquire an undue preponderance over the rest. The first excesses are apt to be committed by the legislature; and, in a consolidated government, such as the author supposes ours to be, there is a peculiar proneness to this. In all free governments, the democratic principle is continually extending itself. The people being possessed of all power, and feeling that they are subject to no authority except their own, learn, in the end, to consider the very restraints which they have voluntarily imposed upon themselves, in their constitution of government, as the mere creatures of their own will, which their own will may at any time destroy. Hence the legislature, the immediate representatives of the popular will, naturally assume upon themselves every power which is necessary to carry that will into effect. This is not liberty. True political liberty demands many and severe restraints; it requires protection against itself, and is no longer safe, when it refuses to submit to its own self-imposed discipline.

And let us not sleep in the delusion that we shall derive all needful security from our own "intelligence and virtue." The people may, indeed, preserve their liberties forever, if they will take care to be always virtuous, always wise, and always vigilant. And they will be equally secure, if they can assure themselves that the rulers they may select will never abuse their trust, but will always understand and always pursue the true interests of the people. But, unhappily, there are no such people and no such rulers. A government must be imperfect, indeed, if it require such a degree of virtue in the people as renders all government unnecessary. Government is founded, not in the virtues, but in the vices of mankind; not in their knowledge and wisdom, but in their ignorance and folly. Its object is to protect the weak, to restrain the violent, to punish the vicious, and to compel all to the performance of the duty which man owes to man in a social state. It is not a self-acting machine, which will go on and perform its work without human agency; it cannot be separated from the human beings who fill its places, set in motion, and regulate and direct its operations. So long as these are liable to err in judgment, or to fail in virtue, so long will government be liable to run

into abuses. Until all men shall become so perfect as not to require to be ruled, all governments professing to be free will require to be watched, guarded, checked and controlled. To do this effectually requires more than we generally find of public virtue and public intelligence. A great majority of mankind are much more sensible to their interests than to their rights. Whenever the people can be persuaded that it is their greatest interest to maintain their rights, then, and then only, will free government be safe from abuses.

Looking at our own Federal Government, apart from the States, and regarding it, as Judge Story would have us, as a consolidated government of all the people of the United States, we shall not find in it this salutary countervailing interest. In an enlarged sense, it is, indeed, the greatest interest of all to support that government in its purity; for, although it is undoubtedly defective in many important respects, it is much the best that has yet been devised. Unhappily, however, the greatest interest of the whole is not felt to be, although in truth it is, the greatest interest of all the parts. This results from the fact, that our character is not homogeneous, and our pursuits are wholly different. Rightly understood, these facts should tend to bind us the more closely together, by showing us our dependence upon each other; and it should teach us the necessity of watching, with the greater jealousy, every departure from the strict principles of our union. It is a truth, however, no less melancholy than incontestable, that if this ever was the view of the people, it has ceased to be so. And it could not be otherwise. Whatever be the theory of our Constitution, its practice, of late years, has made it a consolidated government; the government of an irresponsible majority. If that majority can find, either in the pursuits of their own peculiar industry, or in the offices and emoluments which flow from the patronage of the government, an interest distinct from that of the minority, they will pursue that interest, and nothing will be left to the minority but the poor privilege of complaining. Thus the government becomes tyrannous and oppressive, precisely in proportion as its democratic principle is extended; and instead of the enlarged and general interest which should check and restrain it, a peculiar interest is enlisted, to extend its powers and sustain its abuses. Public virtue and intelligence avail little, in such a condition of things as this. That virtue falls before the temptation's of interest which you present to it, and that intelligence, thus deprived of its encouraging hopes, serves only to point out new objects of unlawful pursuit, and suggest new and baser methods of attaining them.

This result could scarcely be brought about, if the Federal Government were allowed to rest on the principles upon which I have endeavored to place it. The checking and controlling influences which afford safety to public liberty, are not to be found in the government itself. The people cannot always protect themselves against their rulers; if they could, no free government, in past times, would have been overthrown. Power and patronage cannot easily be so limited and defined, as to rob them of their corrupting influences over the public mind. It is truly and wisely remarked by the Federalist, that "a power over a man's subsistence is a power over his will." As little as possible of this power should be entrusted to the Federal Government, and even that little should be watched by a power authorized and competent to arrest its abuses. That power can be found only in the States. In this consists the great superiority of the federative system over every other. In that system, the Federal Government is responsible, not directly to the people en masse, but to the people in their character of distinct political corporations. However easy it may be to steal power from the people, governments do not so readily yield to one another. The confederated States confer on their common government only such power as they themselves cannot separately exercise, or such as can be better exercised by that government. They have, therefore, an equal interest, to give it power enough, and to prevent it from assuming too much. In their hands, the power of interposition is attended with no danger; it may be safely lodged where there is no interest to abuse it.

Under a federative system, the people are not liable to be acted on (at least, not to the same extent), by those influences which are so apt to betray and enslave them, under a consolidated government Popular masses, acting under the excitements of the moment, are easily led into fatal errors. History is full of examples of the good and great sacrificed to the hasty judgments of infuriated multitudes, and of the most fatal public measures adopted under the excitements of the moment. How easy it is for the adroit and cunning to avail themselves of such occasions, and how impossible it is, for a people so acted on, to watch their rulers wisely, and guard themselves against the encroachments of power? In a federative system, this danger is avoided, so far as their common government is concerned. The right of interposition belongs, not to the people in the aggregate, but to the people in separate and comparatively small subdivisions. And even in these subdivisions, they can act only through the forms of their own separate governments. These are necessarily slow and deliberate, affording time for excitement to subside, and for passion to cool. Having to pass through their own governments, before they reach that of the United States, they are forbidden to act until they have had time for reflection, and for the exercise of a cool and temperate judgment. Besides, they are taught to look, not to one government only, for the protection and security of their rights, and not to feel that they owe obedience only to that. Conscious that they can find, in their own State governments, protection against the wrongs of the Federal Government, their feeling of dependence is less oppressive, and their

judgments more free. And while their efforts to throw off oppression are not repressed by a feeling that there is no power to which they can appeal, these efforts are kept under clue restraints, by a consciousness that they cannot be unwisely exerted, except to the injury of the people themselves. It is difficult to perceive how a Federal Government, established on correct principles, can ever be overthrown, except by external violence, so long as the federative principle is duly respected and maintained. All the requisite checks and balances will be found, in the right of the States to keep their common government within their common sphere; and a sufficient security for the due exercise of that right is afforded by the fact, that it is the interest of the States to exercise it discreetly. So far as our own government is concerned, I venture to predict that it will become absolute and irresponsible, precisely in proportion as the rights of the States shall cease to be respected, and their authority to interpose for the correction of federal abuses shall be denied and overthrown.

It should be the object of every patriot in the United States to encourage a high respect for the State governments. The people should be taught to regard them as their greatest interest, and as the first objects of their duty and affection. Maintained in their just rights and powers, they form the true balance-wheel, the only effectual check on federal encroachments. And it possesses as a check these distinguishing advantages over every other, that it can never be applied without great deliberation and caution, that it is certain in its effects, and that it is but little liable to abuse. It is true that a State may use its power for improper purposes, or on improper occasions; but the Federal Government is, to say the least of it, equally liable to dangerous errors and violations of trust. Shall we then leave that government free from all restraint, merely because the proper countervailing power is liable to abuse? Upon the same principle we should abandon all the guards and securities which we have so carefully provided in the Federal Constitution itself. The truth is, all checks upon government are more or less imperfect; for if it were not so, government itself would be perfect. But this is no reason why we should abandon it to its own will. We have only to apply to this subject our best discretion and caution, to confer no more power than is absolutely necessary, and to guard that power as carefully as we can. Perfection is not to be hoped for; but an approximation to it, sufficiently near to afford a reasonable security to our rights and liberties, is not unattainable. In the formation of the Federal Government we have been careful to limit its powers and define its duties. Our object was to render it such that the people should feel an interest in sustaining it in its purity, for otherwise it could not long subsist. Upon the same principle, we should enlist the same interest in the wise and proper application of those checks, which its unavoidable imperfections render necessary. That interest is found in the States. Having created the Federal Government at their own free will, and for their own uses, why should they seek to destroy it? Having clothed it with a certain portion of their own powers, for their own benefit alone, why should they desire to render those powers inoperative and nugatory? The danger is, not that the States will interpose too often, but that they will rather submit to federal usurpations, than incur the risk of embarrassing that government, by any attempts to check and control it. Flagrant abuses alone, and such as public liberty cannot endure, will ever call into action this salutary and conservative power of the States.

But whether this check be the best or the worst in its nature, it is at least one which our system allows. It is not found within the Constitution, but exists independent of it. As that Constitution was formed by sovereign States, they alone are authorized, whenever the question arises between them and their common government, to determine, in the last resort, what powers they intended to confer on it.[Error! Bookmark not defined.] This is an inseparable incident of sovereignty; a right which belongs to the States, simply because they have never surrendered it to any other power. But to render this right available for any good purpose, it is indispensably necessary to maintain the States in their proper position. If their people suffer them to sink into the insignificance of mere municipal corporations, it will be in vain to invoke their protection against the gigantic power of the Federal Government. This is the point to which the vigilance of the people should be chiefly directed. Their highest interest is at home; their palladium is their own State governments. They ought to know that they can look nowhere else with perfect assurance of safety and protection. Let them then maintain those governments, not only in their rights, but in their dignity and influence. Make it the interest of their people to serve them; an interest strong enough to resist all the temptations of federal office and patronage. Then alone will their voice be heard with respect at Washington; then alone will their interposition avail to protect their own people against the usurpations of the great central power. It is vain to hope that the federative principle of our government can be preserved, or that anything can prevent it from running into the absolutism of consolidation, if we suffer the rights of the States to be filched away, and their dignity and influence to be lost, through our carelessness or neglect.

Endnotes

1. General Hamilton one of the principal writers of the Federalist, was undoubtedly at heart a monarchist. On more than one occasion he plainly avowed himself such. In the convention which framed the Constitution, he exerted his commanding influence to impart centralized, consolidated, or monarchical powers to the Federal Union. But, signally failing in this, in his subsequent interpretations of the Constitution he did what he could to bend the instrument to suit his views. Judge Story and Chief Justice Kent, and, earlier, Chief Justice Jay, belonged to the same political party as General Hamilton. They were Federalists, and so odious did this party become to the American people, that it was driven out of power at the expiration of old John Adams's single presidential term in 1800. — [C. C. B.]

2. The resolutions of Virginia, in 1765, show that she considered herself merely as an appendage of the British Crown; that her legislature was alone authorized to tax her; and that she had a right to call on her King, who was the King of England, to protect her against the usurpations of the British Parliament.

3. At this time all the colonies were in the habit of calling England "home," and the "mother country," but no such language as "our sister colonies" was in vogue. There was little or no intercourse between the colonies. Their first intimate acquaintance with each other grew out of incidents connected with the older, French war in 1756. When Mr. Quincy of Boston, visited Charleston, S. C., 1773, he spoke of that colony as, "this distant shore." When the first Congress assembled in 1774, the members all met as "strangers." And they came together with no design to amalgamation or to blend their separate and, as to each other, independent sovereignties, but simply to combine against a common foe. They no more proposed to blend their separate sovereignties than a community of gentlemen propose to make common stock of all their property when they to take means to detect and punish burglars and horse-thieves. — [C.C.B.]

4. The historical fact here stated, is perfectly authenticated and has never been disputed; nevertheless, the following extracts from the Journals of Congress may not be out of place:

> "Wednesday, September 14, 1774. Henry Wisner, a delegate from the county of Orange, in the colony of New York, appeared at Congress, and produced a certificate of his election by the said county, which being read and approved, he took his seat in Congress as a deputy from the colony of New York."
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> "Monday, September 20, 1774, John Hening, Esq., a deputy from Orange county, in the colony of New York, appeared this morning, and took his seat as a deputy from that colony."
>
> "Saturday, October 1, 1774 Simon Bocrum, Esq., appeared in Congress as a deputy from King's county, in the colony of New York, and produced the credentials of his election, which being read and approved, he took his seat as a delegate from that colony."

It is evident, from these extracts, that although the delegates from certain portions of the people of New York were admitted to seats in Congress as delegates from the colony, yet, in point of fact, they were not elected as such, neither were they ever recognized as such, by New York herself. The truth is, as will presently appear, the majority of her people were not ripe for the measures pursued by Congress, and would not have agreed to appoint delegates for the whole colony.

5. A reference to the credentials of the Congress of 1774 will show, beyond all doubt, the true character of that assembly. The following are extracts from them:

> New Hampshire, "To devise, consult and adopt such measures as may have the most likely tendency to extricate the colonies from their present difficulties; to secure and perpetuate their rights, liberties, and privileges, and to restore that peace, harmony, and mutual confidence, which once happily subsisted between the parent country and her colonies."
>
> Massachusetts. "To consult on the present state of the colonies, and the miseries to which they are, and must be reduced, by the operation of certain acts of Parliament respecting America; and to deliberate and determine upon wise and proper measures to be by then recommended to all the colonies, for the recovery and establishment of their just rights and liberties, civil and religious, and the restoration of union and harmony between Great Britain and the colonies, most ardently desired by all good men."
>
> Rhode Island. "To consult on proper measures to obtain a repeal of the several acts of the British Parliament for levying tax on his Majesty's subjects in America without their consent, and upon proper

measures to establish the rights and liberties of the colonies upon a just and solid foundation, agreeably to instructions given by the general assembly."

Connecticut "To consult and advise on proper measures for advancing the beat good of the colonies, and such conference to report from time to time to the Colonial House of Representatives."

New York. Only a few of her counties were represented, some by deputies authorized to "represent," and some by deputies authorized to "attend Congress."

New Jersey. "To represent the colony in the General Congress."

Pennsylvania. "To form and adopt a plan for the purposes of obtaining redress of American grievances, ascertaining American rights upon the moat solid and constitutional principles, and for establishing that union and harmony between Great Britain and the colonies which is indispensably necessary to the welfare and happiness of both."

Delaware. To consult and advise with the deputies from the other colonies, to determine upon all such prudent and lawful measures as may be judged most expedient for the colonies immediately and unitedly to adopt, in order to obtain relief for an oppressed people, (a) and the redress of our general grievances."

Maryland. "To attend a general congress, to effect one general plan of conduct operating on the commercial connection of the colonies with the mother country, for the relief of Boston, and the preservation of American liberty."

Virginia. "To consider of the most proper and effectual manner of so operating on the commercial connection of the colonies with the mother country as to procure redress for the much injured province of Massachusetts Bay, to secure British America from the ravage and ruin of arbitrary taxes, and speedily to procure the return of that harmony and union, so beneficial to the whole empire, and so ardently desired by all British America."

North Carolina. "To take such measures as they may deem prudent to effect the purpose of describing with certainty the rights of Americans, repairing the breach made in those rights, and for guarding them for the future against any such violations done under the sanction of public authority." For these purposes the delegates are "invested with such powers as may make any acts done by them obligatory in honor, on every inhabitant hereof, who is not an alien to his country's good, and an apostate to the liberties of America."

South Carolina. "To consider the acts lately passed, and bills depending in Parliament with regard to the port of Boston, and the colony of Massachusetts Bay; which acts and bills, in the precedent and consequences, affect the whole Continent of America. Also the grievances under which America labors, by reason of the several acts of Parliament that impose taxes or duties for raising a revenue, and lay unnecessary restraints and burdens on trade; and of the statutes, parliamentary acts, and royal instructions, which make an invidious distinction between his Majesty's subjects in Great Britain and America, with full power and authority to conceit, agree to and prosecute such legal measures as in the opinion of the said deputies, so to be assembled, shall be most likely to obtain a repeal of the said acts, and a redress of those grievances.

[The above extracts are made from the credentials of the deputies of the several colonies, as spread upon the Journal of Congress, according to a copy of that bound (as appears by a gilt label on the back hereof) for the President of Congress — now in possession of B. Tucker, Esq.)

It is perfectly clear from these extracts, 1. That the colonies did not consider themselves as "one people," and that, they were therefore bound to consider the quarrel of Boston as their own; but that they made common cause with Massachusetts, only because the principles asserted in regard to her, equally affected the other colonies; 2. That each colony appointed its own delegates, giving them precisely such power and authority as suited its own views; 3. That no colony gave any power or authority, except for advisement only; 4. That so far from designing to establish "a general or national government," and to form, themselves into "a nation de facto," their great purpose was to bring about a reconciliation and harmony with the mother country. This is still farther apparent from the tone of the public addresses of Congress. 5. That this Congress was not "organized under the auspices and with the consent of

the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries to whom the ordinary powers of government were delegated in the colonies," but, on the contrary, that it was organized by the colonies as such, and generally through their ordinary legislatures; and always with careful regard to their separate and independent rights and powers.

If the Congress of 1774 was "a general or national government," neither New York nor Georgia was party to it; for neither of them was represented in that Congress. It is also worthy of remark that the Congress of 1774 had no agents of its own in foreign countries, but employed those of the several colonies. See the resolutions for delivering the address to the King passed October 25, 1774, and the letter to the agents, approved on the following day.

(a) Massachusetts, the particular wrongs of which are just before recited at large.

6. The Journals of Congress afford the most abundant and conclusive proofs of this. In order to show the general character of their proceedings, it is enough for me to refer to the following:

On the 11th October, 1774, it was "Resolved unanimously, That a memorial be prepared to the people of British America, stating to them the necessity of a firm, united and invariable observation of the measures recommended by the Congress, as they tender the invaluable rights and liberties derived to them from the laws and Constitution of their country." The memorial was accordingly prepared, in conformity with the resolution.

Congress having previously had under consideration the plan of an association for establishing non-importation, &c., finally adopted it, October 20, 1774. After reciting their grievances, they say: "And, therefore, for ourselves and the inhabitants of the several colonies whom we represent, firmly agree, and associate, under the sacred ties of virtue, honor and love of our country, as follows." They then proceed to recommend a certain course of proceeding, such as non-importation and non-consumption of certain British productions; they recommended the appointment of a committee in every county, city and town, to watch their fellow-citizens, in order to ascertain whether or not "any person within the limits of their appointment has violated this association"; and if they should find any such, it is their duty to report them, "to the end, that all such foes to The rights of British America may lie publicly known, and universally contemned as the enemies of American liberty; and, thenceforth, we respectively will break off all dealings with him or her." They also resolve, that they will "have no trade, commerce, dealings or intercourse whatsoever, with any colony or province in North America, which shall all not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country."

This looks very little like the legislation of the "general or national government" of a "nation de facto." The most important measures of general concern are rested upon no stronger foundation than "the sacred ties of virtue, honor, and the love of our country," and have no higher sanction than public contempt and exclusion from the ordinary intercourse of society.

7. That the powers granted to the delegates to the second Congress were substantially the same with those granted to the delegates to the first, will appear from the following extracts from their credentials:

> New Hampshire. "To consent and agree to all measures, which said Congress shall deem necessary to obtain redress of American grievances." Delegates appointed by a Convention.
>
> Massachusetts. "To concert, agree upon, direct and order (in concert with the delegates of the other colonies) " such further measures as to them shall appear to be the best calculated for the recovery and establishment of American rights and liberties, and for restoring harmony between Great Britain and the colonies" Delegates appointed by Provincial Congress.
>
> Connecticut. "To join, consult and advise with the other colonies in British America, on proper measures for advancing the best good of the colonies." Delegates appointed by the Colonial House of Representatives.
>
> The colony of New York was not represented in this Congress, but delegates were appointed by a convention of deputies from the city and county of New York, the city and county of Albany, and the counties of Dutchess Ulster, Orange, Westchester, Kings and Suffolk. They gave their delegates power to "concert and determine upon such measures as shall be judged most effectual for the preservation and re-establishment of American rights and privileges, and for the restoration of harmony between Great Britain and the colonies." Queen's County approved of the proceeding.
>
> Pennsylvania. Simply to "attend the general Congress." Delegates appointed by Provincial Assembly.

New Jersey. "To attend the continental Congress, and to report their proceedings at the next session of the General Assembly." Delegates appointed by the Colonial Assembly.

Delaware. "To concert and am upon such further measures, as shall appear to them best calculated for the accommodation of the unhappy differences between Great Britain and the colonies on a constitutional foundation, which the House most ardently wish for, and that they report their proceedings to the next session of General Assembly." Delegates appointed by the Assembly.

Maryland "To consent and agree to all measures, Which said Congress shall deem necessary and effectual to obtain a redress of American grievances; and this province bind themselves to execute to the utmost of their power, all resolutions which the said Congress may adopt." Delegates appointed by Convention, and subsequently approved by the General assembly.

Virginia. "To represent the colony in general Congress, to be held, &c." Delegates appointed by Convention.

North Carolina. "Such powers an may make any acts done by them, or any of them, or consent given in behalf of this province, obligatory in honor upon every inhabitant thereof," Delegates appointed by Convention and approved in General Assembly.

South Carolina. "To concert, agree to, and effectually prosecute such measures, as in the opinion of the said deputies, and the deputies to be assembled shall be most likely to obtain a redress of American grievances." Delegates appointed by Provincial Congress.

In the copy of the Journals of Congress now before me, I do not find the credentials of the delegates from Rhode Island. They did not attend at the first meeting of Congress, although they did at the subsequent period. Georgia was not represented in this Congress until September, 1775. On the 13th May, 1775, Lyman Hall appeared as a delegate from the parish of St. Johns and he was admitted to his seat, "subject to such regulations as the Congress shall determine, relative to his voting." He was never regarded as the representative of Georgia, nor was that colony then considered as a party to the proceedings of Congress. This is evident from the fact that, in the address to the inhabitants of Great Britain, they use the style, "The twelve United Colonies, by their delegates in Congress, to the inhabitants of Great Britain," adopted on the 8th July, 1775. On the 20th of that month Congress were notified that a convention of Georgia had appointed delegates to attend them, but none of them took their seats till the 13th September following. They were authorized "to do, transact, join and concur with the several delegates from the other colonies and provinces upon the Continent, on all such matters and things as shall appear eligible and fit, at this alarming time, for the preservation and defence of our rights and liberties, and for the restoration of harmony, upon constitutional principles, between Great Britain and America."
Some of the colonies appointed their delegates only for limited times, at the expiration of which they were replaced by others, but without any material change in their powers. The delegates were, in all things, subject to the orders of their respective colonies.
8. This was done by Pennsylvania. — [Sec 9 2 Dallas, Col. L. of Penn. 3.]
9. This statement of Judge Story is in opposition to the following language of Judge Henry Baldwin, who was confessedly one of the ablest jurists who has graced the bench of the Supreme Court of the United States: "Their SEPARATE INDEPENDENCE WAS PROCLAIMED, and they remained towards each other as they were before, as colonies, and then as States; they did not alter their relations; the same delegates from the colonies acted as the representatives of The States; so declared themselves, and continued their session without new credentials. The appointing power being the same, the separate legislature of each State, as a State, nation, or empire; THE PEOPLE the supreme head, as the King, the Emperor, the Sovereign. These colonies were not declared to be free and independent States by substituting Congress in the place of King and Parliament; nor by the people of the States, transferring to the UNITED STATES that allegiance they had owed to the Crown." Bald. 29. — [C. C. B.]
10. A document which I have so met with elsewhere but which may be found in the Appendix to Professor Tucker's elaborate and instructive Life of Jefferson, affords important evidence upon this point. As early as May, 1775, the plan of a "confederation and perpetual union" among the colonies, was prepared and proposed for adoption. It was not in fact adopted, but its provisions show, in the strongest manner, in what light the colonies regarded their relation to one another. The proposed union was called "a firm league of friendship"; each colony reserved to itself "as much as it might think proper of its own present laws, customs, rights, privileges, and peculiar jurisdictions,

within its own limits; and may amend its own Constitution as may seem best to its own Assembly or Convention"; the external relations of the colonies were to be managed by their general government alone, and all amendments of their "Constitution," as they termed it, were to be proposed by Congress and "approved by a majority of the colony assembles." It can scarcely be contended that this "league of friendship," this "confederation and perpetual union," would, if it had been adopted, have rendered the people of the several colonies less identical than they were before. If, in their opinion, they were "one people" already, no league or confederation was necessary, and no one would have thought of proposing it. The very fact, therefore, that it was proposed, as a necessary measure "susceptible for their common defence" against their enemies, for the security of their liberties and their properties, the safety of their persons and families, and their mutual and general welfare," proves that they did not consider themselves as already "one people," in any sense or to any extent which would enable them to effect those important objects. This proposition was depending and undetermined at the time of the Declaration of independence.

11. In point of fact, Virginia declared her independence on the 15th of May, 1776. The following beautiful allusion to that scene is extracted from an address delivered by Judge Beverly Tucker, of William and Mary College, before the Petersburgh Lyceum, on the 15th of May, 1848:

That spectacle, on this day sixty-three yearn, Virginia exhibited to the world; and the memory of that majestic scene it is now my task to rescue from oblivion. It was on that day that she renounced her colonial dependence on Great Britain, and separated herself forever from that kingdom.

Then it was that, bursting the manacles of a foreign tyranny, she, in the same moment imposed on herself the salutary restraints of law and order. In that moment she commenced the work of forming a government, complete within itself; and having perfected that work, she, on the 29th of June in the same year, performed the highest function of independent sovereignty, by adopting, ordaining, and establishing the Constitution under which all of us were born. Then it was that, sufficient to herself for all the purposes of government, she prescribed the oath of fealty and allegiance to her solo and separate sovereignty, which all of us, who have held any office under her authority, have solemnly called upon the Searcher of Hearts to witness and record. In that hour, gentlemen, it could not be certainly known, that the other colonies would take the same decisive step. It was indeed, expected. In the same breath in which she had declared her own independence, Virginia had advised it. She had instructed her delegates in the General Congress to urge it; and it was by the voice of one of her sons, whose name will ever proudly live in her history, that the word of power was spoken, at which the chain that bound the colonies to the parent kingdom fell asunder, as flax that severs at the touch of fire. But even then, and while the terms of the general Declaration of Independence were yet unsettled, hers had already gone forth. The voice of her defiance was already ringing in the tyrant's ears; hers was the cry that summoned him to the strife; hers was the shout that invited his vengeance: 'Me! me! Adsum qui feci; in me, converlite ferrum.'"

This beautiful address, abounding in patriotic sentiments, and sound political doctrines, clothed in the richest language, ought to be in the hands of every citizen, particularly of those of Virginia. The following extract from the Journals of the Convention, containing the history of this interesting event; cannot fail to be acceptable to every American reader:

> "Wednesday, May 11th, 1770.
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> "The convention, then, According to the order of the day, resolved itself into a committee on the state of the colony; and, after some time spent therein, Mr. President resumed the chair, and Mr. Cary reported that the committee had, according to order, had under consideration the state of the colony; and had come to the following resolutions thereupon; which he had read in his place, and afterwards delivered at the clerk's table, where the same were again twice read, and unanimously agreed to, one hundred and twelve members being present.
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> "For as much as all the endeavors of the united colonies, by the most decent representations and petitions to the King and Parliament of Great Britain, to restore peace and security to America under the British Government, and a reunion with that people, upon just and liberal terms, instead of a redress of grievances, have produced from an imperious and vindictive administration, increased insult, oppression, and a vigorous attempt to effect our total destruction. By a late act, all the colonies are declared to be in rebellion, and out of the protection of the British Crown, our properties subjected to confiscation, our people, when captivated, compelled to join in the plunder and murder of their relations and countrymen, and all former rapine and oppression of Americans declared legal and just. Fleets and armies are raised, and, the aid of foreign troops engaged to assist these destructive purposes. The King's representative in this colony hath not only withheld all powers of government from operating for our safety, but having retired on board an

armed ship, is carrying on a piratical and savage war against us, tempting our slaves by every artifice to resort to him, and training and employing them against their masters.

"In this state of extreme danger, we have no alternative left, but an abject submission to the will of those overbearing tyrants, or a total separation from the crown and Government of Great Britain, uniting and exerting the strength of all America for defence, and forming alliances with foreign powers for commerce and aid in war. Wherefore, appealing to the Searcher of all Hearts for sincerity of former declarations, expressing our desire to preserve our connection with that nation, and that we are driven from that inclination by their wicked councils, and the eternal laws of self-preservation; resolved unanimously, that the delegates appointed to represent this colony in general Congress, be instructed to propose to that respectable body, to declare the united colonies free and independent States, absolved from all allegiance to, or dependence upon the Crown or Parliament of Great Britain; and that they give the assent of this colony to that declaration, and to whatever measures may be thought proper and necessary by the Congress, for forming foreign alliances, and a confederation of the colonies, at such time and in such manner as to them may seem best. Provided, that the power of forming government for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures.

"Resolved, Unanimously, that a committee be appointed to prepare a declaration of rights, and such a plan, of government, as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people.

And a committee was appointed of the following gentleman:

Mr. Archibald Cary, Mr. Meriweather Smith, Mr. Mercer, Mr. Henry Us, Mr. Treasurer, Mr. Beaty, Mr. Dandridge, Mr. Edmund Randolph, Mr. Gilmer, Mr. Bland, Mr. Digges, Mr. Carrington, Mr. Thomas Ludwel Lee, Mr. Cabell, Mr. Jones, Mr. Blair, Mr. Flaming, Mr. Tazewell, Mr. Richard Cary, Mr. Bullit, Mr. Watts, Mr. Banister, Mr. Page, Mr. Starke, Mr. David Mason, Mr. Adams, Mr. Read, and Mr. Thomas Lewis."

It is impossible to contemplate this proceeding on the part of Virginia, without being convinced that she acted from her own free and sovereign will; and that she, at least, did "presume" to establish a government for herself, without the least regard to the recommendation or the pleasure of Congress.

12. The language of the Supreme Court is very full in declaring that the colonies did not lose their sovereign independence of each other and become one people by virtue of the Declaration of Independence of Great Britain. "No sovereignty did or could exist over them, unless that of Great Britain should be restored by a reconciliation; which not happening, their Declaration of Independence, in their separate conventions, became absolute, and these States were independent, according to the universal opinion of the country, which is most clearly expressed in the language of this Court." (4 Cranch, 212, *McIlvaine v. Coxe*.), "The authority of this Court is respected, the Declaration of Independence is to the judicial mind what it is to the common eye, a proclamation to the world, by the separate States, assembled in Congress by their respective deputies, voting for and signing the instrument by States, a publication of their existing political condition, each as an independent State." "They declared these united colonies to be independent States, not one State, " (or country') 16 as the State of Great Britain." "Each declared itself sovereign and independent, according to the limits of their territory." (Baldwin, 74, 15; 12 Wheaton, 522, 7.) In October, 1776, Congress directed that every officer should swear, that "I acknowledge the thirteen United States of America, namely: New Hampshire, &c., to be free, independent and sovereign States" The name of each of the thirteen States was named as a distinct sovereignty. (2 Journal of Congress, 400.) In November of the same year, Congress addressed a circular letter to the respective legislatures of the States, speaking of them as "so many sovereign and, independent communities," and to each respective legislature it is recommended,' &c. (1 Laws U. S., 12, 13.) How can such language be reconciled with the idea of Judge Story, that "the colonies did not severally act for themselves?" — [C. C. B.]

13. Commenting upon the separate independence of the States, Judge Baldwin says: "Such was the situation of the States and people, from 1770 till 1781, when the several State legislatures made an act of Federation, as ALLIED SOVEREIGNS, Which was only a league or alliance." This confederation of 1781 may be regarded as the actual date of the Union. Some of Its details were afterwards modeled, curtailed or extended, but the principle of allied sovereign States was never changed. — [C. C. B.]

14. That the Union in 1781 was simply a league of separate sovereign communities, is sufficiently attested In Article III. of the Confederation: "The said States hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, trade, or any other pretense whatever." — [C. C. B.]
15. Taking the relation of the States to each other, as it exists under the Constitution, and as declared by this Court, in one uniform and consistent series of adjudication, from 6 Cr. 136, to 2 Pet. 590, 1: that "the several States are still foreign to each other, for all but Federal purposes"; their position an "a single unconnected sovereign power" before and without any confederation between them, is an inevitable consequence." (Baldwin, 83.) "As the States are still foreign to each other, for all but Federal purposes, the United States could have neither a right of soil nor jurisdiction, propriety or dominion, within any particular State, but by a cession from the State by its legislature, or a convention of the people. * * The Constitution is a cession of jurisdiction only, made by the people of a State," (Baldwin, 94.) But the United States must have the "consent of a State," and "purchase from the owners of the soil it before it can build a post-office, custom-house, fort, dock-yard, or any other public structure. Thus the sovereignty of a State over its own territory has not been ceded by the adoption of the Constitution. "By the treaty of peace with Great Britain, the powers of government, and the right of soil, which had previously been in Great Britain, passed definitely to these States." (8 Wheaton, 584.)" Then there could be no mode by which the United States could acquire either 'the powers of government,' or the 'right of soil' in any territory, but by a cession from the States. * * And it was held by this Court, that the only territory which in fact belonged to the United Stated in 1787 was acquired by the cession from Virginia." "What then is the extent of jurisdiction which a State possesses? We answer without hesitation the Jurisdiction of a State Is co-extensive with its legislative power." (5 Wheat., 375; Baldwin, 87, 88.) The right of soil and general jurisdiction over the whole territory, within the boundaries of the several States, was invested In the people of each State, as absolute sovereigns of both; neither right can be exercised but by a grant from them, and what is not given away by cession, still remains with them." (Baldwin, 99; 2 Peters, 468.) In 1795, Georgia, which had ceded none of its territory, made sale of a large tract, on the Yazoo River. The United States denied the right of Georgia to make such sale. The question was brought before the Supreme Court in the case of Fletcher P. Peck, and the Court decided that the title of the land was in Georgia. (6 Cranch 142.) Referring to the formation of the Union, the Court held that: "A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems. (10 Wheaton, 46) " The power having existed prior to the Constitution, and not having been prohibited by that instrument, remains with the States." (5 Wheaton, 16, 17; 2 Peters, 466.) — [C. C. B.]
16. The phrase "to form a more perfect union" has been sometimes quoted to prove that the new Constitution was designed to alter fundamentally the confederate nature of the Union. But it is surprising that any gentleman capable of comprehending the force of language should make such a mistake as to imagine that the phrase "more perfect union" is implied a consolidation of the States. UNION and CONSOLIDATION are words of a very different signification. The object was not to sink the Union in consolidation, but to "form a MORE PERFECT Union." The name of our federation is not CONSOLIDATED STATES but UNITED STATES. A number of States held together by coercion, or the point of the bayonet, would not be a UNION. Union is necessarily voluntary — the act of choice, free association. Nor can this VOLUNTARY system be changed to one of force without the destruction of "THE UNION." The Austrian Empire is composed of several States, as the Hungarians, the Poles, the Italians, etc., but it cannot be called a UNION — it is a despotism. Is the relation between Russia, and bayonet-held Poland aUNION? Is It not an insult and a mockery to call the compulsory relation between England and Ireland a UNION? In all these cases there is only such a union as exists between the talons of the hawk and the dove, or between the jaws of the wolf and the lamb. A UNION OF STATES necessarily implies separate sovereignties, voluntarily acting together. And to bruise these distinct sovereignties into one mass of power is, simply, to destroy the Union — to overthrow our system of government. The Supreme Court has always been clear enough on this point: "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people Into one common mass. Of consequence, when they act, they ad in their States," (4 Wheaton, 403 McCullough v. Maryland) — [C. C. B.]
17. The phrase, "WE THE PEOPLE OF THE UNITED STATES," in the preamble to the Constitution, railed upon by the friends of the monarchist principles of government, to prove the consolidated nature of Federal Union, has been twisted into most absurd shapes. The phrase is, WE, THE PEOPLE OF THE STATES, not the people of AMERICA. The very phrase shows the Federal Union to be a government of States, and not of the people of all America, as a consolidated body. "UNITED STATES" has a very different legal signification to that of consolidated States. "The people of the United States," in the preamble of the Constitution, has the same meaning as "the people

of the several STATES," In the second section of Article First of the same instrument The idea of severalty or separateness, and not that of consolidation, is clearly implied. Indeed, this is the grammatical meaning of the phrase. The qualifying adjective "united" is annexed to the word states, and not to the word "people." It is precisely the same meaning as the phrase "Les Etas Unis" in the French language, i. e., the "states united." When Patrick Henry Indignantly asked, "What right had the framers of the Constitution to say, ' We, the people,' instead of "we, the States?"' Mr. Madison replied: "Who are the parties to the government? The people; but then not the people as composing ONE GREAT BODY; but the people as composing THIRTEEN SOVEREIGNTIES." The Constitution of the United States is a grant by grantors to a grantee. The grantors are the "several States," not as a consolidated people, but as separate and independent sovereignties — "the people" as organized into "several" distinct sovereign communities. Thus the Supreme Court of the United States declares that "the States form a confederated government; yet the several States retain their individual sovereignties, and with respect to their municipal regulations, are to each other sovereign." (2 Peters, 690; 12 Wheaton, 334.) Again: "The powers retained by the States proceed not from the PEOPLE OF AMERICA, but from the people of the SEVERAL STATES, and remain after the adoption of the Constitution what they were before." (4 Wheaton, 193, 17, 54; 203, 9.) Thus all authority proven that the Government of the Union Is one of the STATES united, and not of the People consolidated. — [C. C. B.]

18. This assertion of Judge Story is contradicted, not only by the organization of the government, but by the uniform language of those who framed and adopted it. Both Hamilton and Madison constantly spoke of the Union as a "compact." In the Eighty-fifth Article of the Federalist, Hamilton calls the Constitution a "compact," and says that thirteen Independent States are "the parties to the compact." Madison: "It Is a compact between thirteen sovereignties." In the Resolutions of 1798 he says: "The powers of the Federal Government result from a compact to which the States are parties." Again says Madison: "In case of a deliberate, palpable, and dangerous exercise of other powers not granted in the compact, the States who are parties thereto have the right, and are In duty bound to interpose." In the Convention of Massachusetts which adopted the Constitution, Judge Parsons said: "The government and powers which the Congress can administer are the more result of a compact." Washington perpetually spoke of the ratification of the Constitution asACCEDING to a COMPACT (See letter to Bushrod Washington, Nov. 10, 1797; to General Knox, June 17, 1788; to John Jay, July 20, 1788; to Gouverneur Morris, December 14 1789.) Jefferson, in the Kentucky Resolutions, says: "The States are not united on the principle of unlimited submission to the General Government, but by that of COMPACT," &c. Mr. Webster, In his great speech to the young men of Albany, 1851, called the Constitution a "COMPACT." Thus it is certain that the framers of the Constitution thought they were making a "compact between sovereign States." And the INTENTION of the framers and parties to an instrument is the LAW in the case. — [C. C. B.]

19. In the Constitutional convention, Governor Patterson, of New Jersey, said: "Let us consider with what powers we are sent here. The basis of our present authority is founded on a revision of the Articles of the present Confederation, and to alter and amend them in parts where they may appear defective The object was not to form a new government, but to "alter and amend" that which already existed. — [C. C. B.]

20. There was a party In the Convention, which, though in the minority, was respectable for its intellect, which wanted to form a national or consolidated government. From the opening of the Convention in May, until the 25th of June, there had been a resolution that "A national government ought to be established." But on the last mentioned date it was moved to strike out this word "National," and Insert in its place "United States." This passed overwhelmingly in the affirmative, and thus ended the business of a national government. On this occasion Governor Patterson said: "Can we, on this ground, (of amending the Articles of Confederation), form a national government? I fancy not. Our commissions give no complexion to the business, and we cannot suppose that when we exceed the bounds of our duty, the people will approve our proceedings.

We are met here as the deputies of thirteen Independent sovereign States, for federal purposes. Can we consolidate their sovereignty, and form one nation, and annihilate the sovereignties of our States, who have sent us here for other purposes? I declare that I never will consent to such a system. Myself or my State never will submit to tyranny or despotism." Luther Martain said: "The General Government is only Intended to protect and guard the rights of the States, AS STATES. The basis of all ancient and modern confederacies is the freedom and the independency of the States composing them." Such were the ideas which prevailed In the framing and adoption of the Constitution. (See Elliot's Debates, Madison's and Martain's Reports.) — [C. C. B.]

21. This fact proves beyond dispute that the Union is a government of States as independent communities, and not of the people as one body. When the Constitution was adopted and the present Union went into operation in 1799, there were eleven States having fifty-nine representatives, of which four States had thirty-two, while the other seven had but twenty-seven, and yet the minority of the people could elect the President and dispense all the powers of the

Union. In 1790, when the first census was taken, four States had a population of one million seven hundred and ten thousand, while the other nine had only one million three hundred and ninety thousand. Thus four States, having a majority of the population, had but eight senators, while the nine States, with a minority of the people, had eighteen senators. That, surely, was not a government of the whole people, as one body, but of the States as sovereign communities. When the second census was taken, in 1800, the total population was four million two hundred and forty-seven thousand, of which four States had two million two hundred and twenty-six thousand, and the other twelve had two million twenty-one thousand. Then four States had a majority of the whole people of two hundred and fire thousand, but they had only eight votes in the Senate, and eighty-two for President; while the twelve States, with a minority of population, had twenty-four votes in the Senate and ninety-one for President. When the third census was taken, In 1810, there were seventeen States, with a total population of five million seven hundred and sixty-five thousand, of which four States had a majority of two hundred and thirty-one thousand, but they had only eight votes In the Senate and one hundred and one for President, while the rest, with a minority of the people, had twenty-six votes in the Senate and one hundred and fourteen for President. When the fourth census was taken, in 1820, six States had a population of four million one hundred and ninety-nine thousand, the other eighteen had but three million six hundred and fifty-seven thousand. Then six States had a majority of five hundred and forty-two thousand of the people, but they had only twelve votes In the Senate and one hundred and twenty-six for President, while the rest had thirty-six votes in the Senate and one hundred and thirty-five for President. At the next census, 1830, six States had a majority of two hundred and twenty-four thousand of the total Population, while they had but twelve votes in the Senate and one hundred and thirty-six for President, and the minority of the people, but the majority of States, had thirty-six senators and one hundred and fifty-three votes for President, Thus, In the Federal Government, the words majority and minority do not apply to the number of people, but to the number of States. Can anything more be required to prove that the Union is a government of States as separate bodies, and not of the people as one population? — [C. C. B.]

22. So absolutely Is the Federal Government dependent on the States for its existence at all times, that It may be absolutely dissolved, without the least violence, by the simple refusal of a part of the States to act. If, for example, a few States, having a majority of electoral votes, should refuse to appoint electors of President mad Vice-President, there would be no constitutional Executive, and the whole machinery of government would stop.

23. The decisions of the Supreme Court have declared that its jurisdiction is limited by the Constitution, laws and treaties of the United States, and that it has no power of acting, except where the subject is submitted according to the form presented by law. (9 Wheaton, 738; 5 Peters, 2; 6 Wheaton, 264.) The original jurisdiction of the Supreme Court is pointed out by the Constitution, and cannot be lessened nor enlarged by act of Congress; for Congress cannot transcend the powers entrusted to it in the Constitution. (1 Cranch, 187, 175.) The Supreme Court has no Jurisdiction in any case where a State is the defendant (See Eleventh Amendment to the constitution; 9 Wheaton, 732.) Where two parties in a State Court set up conflicting titles under the same act of Congress, the Supreme Court has no power to override the decision of the State Court. The decision of the State Court is final in such cases. (3 Wheaton, 433; 6 Wheaton, 448) The Supreme Court has no authority, on a writ of error, to declare a law of a State void on account of its collision with the Constitution of that State. (3 Peters, 288.) The Supreme Court has no authority to issue a habeas corpus in the case of persons held by the action of the State Court. (1 Wash., 239.) Many other cases might be named which show the limited jurisdiction of the Supreme Court of the United States. It has jurisdiction over no matter which the States have not delegated in the Constitution. Overall matters which the States have not delegated to the Federal Government, the State Courts are supreme. Mr. Chase, the present Chief Justice, speaking of the sovereignty of the State of Ohio in 1854, said: "We have rights which the Federal Government must not invade — rights superior to its power, on which our sovereignty depends. "Such a proposition necessarily follows from the limited nature of the Federal Government — [C. C. B.]

24. Hunter and Martin, *Cohen v. State of Virginia* and other cases.

25. This want of uniformity and fixedness, In the decisions of courts, renders the Supreme Court the most unfit umpire that could be selected between the Federal Government and the States, on questions involving their respective rights and powers. Suppose that the United States should resolve to cut a canal through the territory of Virginia, and being resisted, the Supreme Court should decide that they had a right to do so. Suppose that, when the work was completed, a similar attempt should be made In Massachusetts, and being resisted, the same court should decide that they had no right to do so. The effect would be that the United States would possess a right in one State which they did not posses in another. Suppose that Virginia should impose a tax on the arsenals, dock-yards, &c., of the united States within her territory, and that, In a suit to determine the right, the Supreme Court should decide in favor of It. Suppose that a like attempt should be made by Massachusetts, and, upon a similar appeal to that court, it should decide against it; Virginia would enjoy a right In reference to the United States, which would be denied to

Massachusetts. Other cases may be supposed, involving like consequences, and showing the absurdity of submitting to courts of justice the decision of controversies between governments, involving the extent and nature of their powers. I know that the decisions of the Supreme Court on constitutional questions, have been very consistent and uniform; but that affords no proof that they will be so through all time to come. It is enough for the purposes of the present argument, that they MAY be otherwise.

26. In this extended examination of the rates by which the Constitution of the United States is to be interpreted, Judge Upshur has, we think, completely demolished the doctrines of Judge Story on that subject; but there is an important principle to be applied in the interpretation of all compacts and legal instruments which has not been made sufficiently plain. It is the rule laid down by Blackstone, that the intention of the parties to a compact to the key to its meaning. The terms and language must be referred to the time of its enactment, and must be taken as understood by those who so employed them, and not according to any subsequent definition. (1 Blackstone, 69, 60.) Thus the Constitution of the United States must be explained as those who made and framed it intended. Their INTENTION is the LAW. We sometimes hear such phrases as "New views of the Constitution," and "Progressive ideas of the Constitution." But we are to seek for the meaning of that instrument; not in "new views," or in "progressive ideas" of its import, but in the old views of those who made it. We are to take into consideration the condition of the country at the time the Constitution was framed and adopted, and the settled judicial and professional opinion immediately following its adoption. This rule has been often affirmed by the Supreme Court. (6 Wheaton, 410; 2 Peters, 714; 5 Cranch. 83; 8 Dallas. 898.)

Any subsequent construction of a law or instrument not in agreement with the settled intent of those who framed 14 is to be disregarded. (1 Peters, 281, 1.)

The intention of the framers of the Constitution was that it should continue as they framed it; it was not designed as a temporary agreement, but as an everlasting law. (1 Wheaton, 326.) Its language is to be taken in its natural and obvious sense, and not in any novel and new construction. (4 Wheaton, 415.) "Its spirit is to be respected not less than its letter, yet the spirit is to be collected chiefly by the words." (a Wheaton, 262. "it was not intended to use language which would convey to the eye one idea, and after deep reflection impress on the mind another." (4 Wheaton, 418.) Such were the rules by which the Constitution was interpreted by the Supreme Court undeviatingly from the foundation of the government to 1863. Since this last date a change has come over the spirit of the judiciary which is in violation of all the past rules of interpretation, and indeed of judicial proceedings among all enlightened nations. The doctrine has been boldly proclaimed, by leading journals, that laws and compacts are to be construed so as to be in harmony with the "will of the people," and judges have, in too many instances, succumbed to this monstrous delusion. It amounts to the abrogation of all organic law, by substituting the passions and fancies of the people to its place. It has made the whims and the passions of a political party superior to the Constitution of our country. It, indeed, amounts to the overthrow of all fixed and regular governments, and leaves the passions and fancies of an hour the only guarantees of liberty. — [C. C. B.]

27. Mr. Adams was not a member of the convention. This speech was made in Congress in deliberating on the Articles of Confederation. — [Ed.]

28. Elsewhere we have shown that such was the understanding of those who framed the Constitution of the Imitates when they adopted it. — [C. C. B]

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